PRIVY COUNCIL

JUDGMENTS

ON

APPEALS FROM INDIA

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BY

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Vakil, High Court, Calcutta,

AND

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PREFACE.

THIS Volume contains the Indian Cases decided by the Privy ncil from 1887 to 1890, as comprised in the Law Reports on an Appeals, Vols. XIV to XVIII, and the Indian Law orts, Calcutta Series, Vols. XIV to XVIII, Madras Series, s. X to XIV, Bombay Series, Vols. XI to XV, Allahabad es, Vols. IX to XIII.

In the Appendix some additional cases have been given ch are not to be found in the authorized reports. They have selected from the Judgments printed in the Folio Form sent by the Registrar of the Judicial Committee of the Privy ncil to the Subordinate High Courts in India.

In order to facilitate reference, I have omitted, in the Table Cases, all honorific prefixes, such as Maharaja, Maharani, a, Rani, Nawab, Begum, &c., and adopted a uniform method spelling Indian names.

The late lamented Pandit Pran Nath Saraswati and myself tly edited this volume, but the Index has been prepared since leath by myself alone.

No efforts have been spared to enhance the usefulness of the k by a proper arrangement of the Appendix, Head Notes and Index; and I trust, that this and the previous 4 Vols. will ly the want that was felt both by the Bench and the Bar, ell as by the general public, especially at the Moffusil ts, in not having in one set of books a properly-arranged a complete series of all the judgments of the Privy Council, h were scattered over numerous volumes of authorized reports 1 to 1890.

BHOWANIPORE,
April 1893.

BIDHU BHUSAN BANERJEE.

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A

TABLE

OF

THE CASES REPORTED

IN THIS VOLUME.

A

	Page.
Abdul Ali, Kali Dutt Jha *v.*, ...	326
Abdul Hossein Zenail Abadi *v.*, Turner	25
Abdul Kadir *v.*, Amtal Karim Banu...	224
Abdul Ruhman Khan, Muhammad Yusuf Khan *v.*, ...	362
Administrator General of Bengal, Sham Narain *v.*, ...	734
Ajit Singh, Janki Kunwar *v.*, ...	92
Ajudhiya Singh, Madho Singh *v.*, ...	165
Amanat Bibi *v.*, Imdad Husain ...	214
Amarchand Kundu, Ashanulla Chowdhry *v.*, ...	476
Ambika Pershad, Sardhari Lal *v.*, ...	172
Amir Hossein, Rajab Ali *v.*, ...	389
Ammi Devi *v.*, Vikrama Devu ...	190
Amtal Karim Banu, Abdul Kadir *v.*,..	224
Anand Kuar *v.*, Tansukh ...	372
Anand Roy, Kali Pershad *v.*, ...	121
Anangamanjari Chowdhrani *v.*, Tripura Sundari Chowdhrani	45
Anundomoyi Debi, Girish Chunder Maiti	78
Appasami Odayar *v.*, Subramanya Odayar	255
Arunachellam *v.*, Arunachellam ...	265
Asgar Ali, Jibun Nissa *v.*, ...	574
Asgar Ali Khan, Azin-ul-Abdin Khan *v.*, ...	129
Ashanulla Chowdhry *v.*, Amarchand Kundu	476
Asutosh Mukerji *v.*, Kamini Debi ...	246
Ashutosh Dhur, Belchambers *v.*, ...	736
Azin ul-Abadin Khan *v.*, Asgar Ali Khan	129

B

	Page.
Baboo Lall *v.*, Luttoo Ram ...	694
Badan Singh, Mahammud Amanulla *v.*, ...	412
Badri Narain *v.*, Sheo Koer ...	493
Baijnath and others Graham and Peacock *v.*,...	651
Bal Krishan, Rajeswari Kuar ...	80
Bassu Koer *v.*, Dhum singh ...	260
Belchambers *v.*, Ashutosh Dhur ...	736
Bhagbut Pershad Singh *v.*, Girja Koer	186
Bhagwan Sahai *v.*, Bhagwan Din ...	557
Bhagwan Din, Bhagwan Sahai *v.*, ...	557
Bhagwan Das, Budha Mal *v.*, ...	632
Bhagwan Das *v.*, The Netherlands Fire Insurance Company ...	293
Bhagwan Dass *v.*, Hunnooman Pershad	689
Bhoop Narain Chowbey *v.*, Rughoo Nath Gobind Roy	691
Bhubaneswari Debi, Hari Saran Moitra *v.*, ...	198
Bhusan Chunder, Kali Kishore Dutt *v.*, ...	60
Bindeshri Prasad *v.*, Mahant Jairamgir	61
Bishen Chand *v.*, Nadir Hossein ...	113
Bisheswar Baksh Singh *v.*, Ran Bijai Bahadur Singh	590
Bishambar Nath *v.*, Imdad Ali Khan	619
Biseswar Roy *v.*, Shashi Sikareswar Roy	501
Brijmohun, Maina *v.*, ...	624
Brojendro Kishore Roy, Hemanta Kumari Debi *v.*, ...	542
Budha Mal *v.*, Bhagwan Das ...	632
Bungsi Buddan Saha, Mohiny Mohun Das *v.*, ...	498

C

	Page.
Candas Narrondas Navivahu *v.*, Turner	400

Page.

Cauty, Hemmuni Singh v., ... 429
Chairman of the Darbhanga Municipality, Luchmeswar Singh v., ... 564
Chand Kour v., Partab Singh ... 243
Chandi Churn Barua v., Sidheswari Debi 231
Chandrabati Koeri v., Harrington ... 681
Court of Wards v., Raja Leelanund Singh 722

D

Daulat Ram v., Mehr Chand ... 84
Daya Shanker, Shankar Baksh v., ... 107
Debendranath Sircar, Rajkishori Dasi v., ... 100
Debi Din, Ram Charan v., ... 616
Deoraj Kuari, Sartaj Kuari v., ... 139
Deputy Commissioner Bara Banki, Ram Singh v., ... 486
Dhum Singh, Bassu Kuar v., ... 260
Durga Chowdhrani v., Jewahir Singh.. 560
Durga, Mallikarjuna v., ... 547

F

Fahamidanissa Begum, Secretary of State v., ... 391
Fazl-un-Nissa, Majid Hossain v., ... 312
Futteh Bahadur, Luft Ali Khan v., ... 364

G

Gajraj Singh, Munnalal Chaodri v., ... 452
Gandharp Singh, Uman Parshad v., ... 71
Ganga Prasad, Thakro v., ... 133
Gauri Sanker Lal v., Janki Pershad ... 518
Girdhar Lall, Jugal Kishore v., ... 687
Girish Chunder Maiti v., Anundomoyi Debi 78
Girja Kanto Chowdhry v., Hurrish Chunder Chowdhry 702
Girja Koer, Bhagbut Pershad Singh v., ... 186
Gobind Lal Roy v., Hemendra Narain Roy 497
Golab Singh, Simbhunath Pande v.,... 5
Gopee Beebee, Lall Beharee Lall v., ... 706
Gouhur Ally, Habeeb Oollah v., ... 699
Gour Mohun Chakerbati v., Tara Sunderi Debi 504
Gourmonee Dassee v., Jogutindronarain 696
Graham and others v., Baijnath and others 651
Gregson v., Udoy Aditya Deb ... 416
Gridhariji, Romanlalji v., ... 350
Gridharee Lall, Ushrufoonnessa Begum v., ... 708
Guman Kunwar, Pirthi Pal Kunwar v., ... 569

Page.

Gunga Narain Gupta v., Tiluckram Chowdhry 168
Gursahai Nand, Mungniram Marwari v., ... 463

H

Habeeb Oollah v., Gouhur Ally ... 699
Haidar Ali v., Tassadduk Rasul Khan 270, 529
Haidar Ali Khan v., Nawab Ali Khan.. 458
Har Lal v., Sardar 384
Hari Sarun Moitra v., Bhubaneswari Debi 198
Hari Ram v., Sheodayal Mal ... 281
Harrington, Chandraboti Koeri v., ... 681
Harsukh Das, Kissorimohun Roy v.,... 472
Hayat-un-Nissa v., Muhammad Ali Khan 521
Hemmuni Singh v., Cauty ... 429
Hemangini Dasi v., Kedarnath Kundu 374
Hemanta Kumari Debi v., Brojendro Kishore Roy 542
Hemendra Narain Roy Chowdhry, Gobind Lal Roy v., ... 497
Hosseini Bibi, Mahomed Buksh Khan v., ... 175
Hardeo Baksh, Shankar Baksh v., ... 299
Hunnooman Pershad, Bhagwan Doss v., ... 689
Hurro Nath Rai Chowdhri v., Randhir Singh 642
Hurrish Chunder Chowdhry, Girja Kanto Chowdhry v., ... 702

I

Imdad Hossain, Amanat Bibi v., ... 214
Imdad Ali Khan, Bishambher Nath v., 619
Immadi Kanaka Ramaya Goundan, Minakshi Nayudu v., ... 271
Indar Kunwar v., Jaipal Kunwar ... 150
Indar Kunwar, Rabi Dutt Sing v., ... 505

J

Jagatpal Singh, Ran Bijai Bahadoor Singh v., ... 590
Jaidayal v., Ram Shae 484
Jaipal Kunwar, Indar Kunwar v., ... 150
Jairam Gir, Bindeshari Pershad v., ... 61
Janki Kunwar v., Ajit Singh ... 92
Janki Pershad, Gauri Sanker Lall v., ... 518
Jarao Kunwari v., Lalonmoni ... 628
Jewahir Singh, Durga Chowdhrani v., 560
Jibun Nissa v., Asgar Ali ... 574
Jogendro Bhuputi v., Nityanund Man Singh 596
Jogutindra Narain, Gourmonee Dassee v., ... 696
Jugul Kishore v., Girdhar Lal and Martin 687

K

Page.

Kali Dutt Jha v., Abdul Ali, ... 326
Kali Kishore Dutt v., Bhusan Chunder 607
Kali Krishna Tagore v., The Secretary of State 237
Kali Pershad v., Anand Roy ... 121
Kalyanraiji v., The Mofussil Company Ld. 578
Kamini Debi, Ashutosh Mookerjee v., 246
Keder Nath Kundu, Hemangini Dassi v., ... 374
Khagendro Narain Chowdry v., Matangini Debi 528
Khetter Mohun Singh, Srinath Dass v., ... 315
Khikhinda Koer, Muddon Gopal Lall v. 676
Kishori Mohun Roy v., Harsukh Dass. 472
Kishori Lall Roy, Krishna Kishori Chowdhrani v., ... 13
Kovila Kath v., Kovila Kath ... 455
Krishna Kishori Chowdhrani v., Kishori Lall Roy 13
Kristoromoni Dassi v., Norendro Krishna 285

L

Lall Beharee Lall v., Gopee Beboe ... 706
Lal Saheb Rai, Radha Pershad Singh v., 600
Lalonmoni, Jarao Kumari v. ... 628
Leelanund Singh, Court of Wards v, 722
Luchmeswar Singh v., The Chairman of Durbhanga 564
Luchmeswar Singh, Secretary of State v., ... 275
Luchmun Singh, v, Puna. ... 370
Lutf Ali Khan v. Futteh Bahadoor ... 364
Lutto Ram, Baboo Lal v., ... 694

M

Macnaghten, Mahabir Pershad Singh v, ... 345
Madho Singh v., Ajudhia Singh ... 165
Madho Pershad v., Mehrban Singh ... 586
Mahabir Pershad Singh v., Macnaghten 345
Mahabir Pershad v., Moheswar Nath Sahai 489
Mahomed Ali Khan, Hayat-Un-Nissa v., ... 521
Mahomed Buksh Khan v, Hosseini Bibi 175
Mahomed Yusuf Khan v., Abdul Rahman Khan 362
Mahomed Amanulla Khan v., Badan Singh 412
Mahomed Mumtaz Ahmad v., Zubaida Jan 433
Mahomed Tukhee, Torab Ally v., ... 711
Mahton, Tilukdhari Singh v., ... 408

Page.

Maina v., Brijmohun 624
Majid Hossein v., Fazil-un-Nissa ... 312
Malikarjuna v., Durga ... 547
Martin, Jugul Kishore v. ... 687
Mariam Begum v., Mirza ... 422
Masludin, Waghela Rajsanji v. ... 16
Matangini Debi, Khagendra Narain Chowdry v., ... 528
Mathusri Jijai Amba 584
Mehrban Singh, Madho Pershad v., ... 586
Mehr Chand, Daulut Ram v., ... 84
Mehde Hossein, Ram Lall v., ... 572
Minakshi Naidu v, Immude Kanaka Ramaya Goundan 271
Minakshi Naidu v., Subramanya Sastre 54
Mirza, Maria Begum v., ... 422
Mirza, Wazir Begum v., ... 422
Modhusudun Doss v., Prapanna ... 496
Mofussil Company Ld., Kalyanraiji v., ... 578
Mohiny Mohun Doss v., Bungsee Buddun Doss 498
Mohender Nath Purkait, Pertap Chander Ghose v, ... 444
Moheswar Nath Sahai, Mahabir Pershad v., ... 489
Mohes Chunder Neogee, Mohim Chander Mozoomder v., ... 321
Mohim Chunder Mozoomdar, v., Mohes Chunder Neogee 321
Monohur Mookerjee, Radhamadhub Holdar v., ... 211
Muddun Gopal Lall v., Khikhinda Koer 676
Mungniram Marware v., Gurshahai Nanda 463
Munnulall Chowdry v., Gajraj Singh... 452
Muthaya Chetti, Sivaraman Chetti v., ... 331
Mylapore Iyasawmy Moodliar v. Yeo Kay 50

N

Nadir Hossein, Bishen Chand Basawat v., ... 183
Nandi Singh v., Sitaram 309
Nawab Ali Khan, Haider Ali Khan v, 458
Netherland Fire Insurance Co., Bhugwan Dass v., ... 203
Nitya Nund Man Singh, Jogendro Bhupati v. 596
Norendro Krishna, Kristoromoni Dassee v., ... 285

P

Padmanand Singh, Parameswar Pertab Singh v., ... 128
Parbati, Sondar v., ... 448

Page.

Parmeswar Pertab Singh v., Padmanund Singh 128
Peacock and others v., Baijnath and others 651
Pertab Narain Singh, Triloknath Singh v., ... 219
Pertab Singh, Chand Kour v., ... 243
Pertab Chunder Ghose v., Mohender Nath Purkait 444
Pettachi Chittiar v., Sangili Vira Pandia Chenatambia 38
Pirthi Pal Kunwar v., Guman Kunwar 569
Prapanna, Modhu Soodun Doss v.,... 496
Protab Chunder Burrooah v., Ranee Surnomoyee 716
Puna, Luchmun Singh v., ... 370

Q

Quarry, In the matter of... ... 638

R

Rabi Dutt Singh v., Inder Kunwar... 505
Radha Maddhub Holdar v., Monohur Mookerjee... 211
Radha Pershad Singh v., Lal Saheb Rai 600
Radha Pershad Singh v., Torab Ali... 582
Rahimbhoy Habibhoy v., Turner... 639
Rai Kishori Dossi v., Debender Nath Sircar 100
Rajab Ali v., Amir Hossen ... 389
Rajeswari Kuar v., Rai Bal Krishan... 80
Ram Chand Dutt, Watson & Co. v. ... 535
Ram Churn v., Debi Din... ... 616
Ram Lal v., Mehdi Hossain ... 572
Ram Singh v., Deputy Commissioner of Bara Banki 486
Ram Saltai, Jaidayal v.,... ... 484
Ran Bijai Bahadoor Singh v., Jagat Pal Singh... 590
Randhir Singh, Huro Nath Roy Chowdhry v., ... 642
Romanlalji Gossami, Gridhariji v., ... 350
Rughoo Nath Gobind Roy, Bhoop-Narain Chowbey v., ... 691

S

Saheb Singh, Sheolochun Singh v., ... 1
Sangili Vira Pandia Chinatambiar, Pettachi Chettiar v., ... 38
Sardar, Har Lal v., ... 384
Sardhari Lal v., Ambika Pershad ... 172
Sartaj Koeri v., Deoraj Koeri ... 139
Satrucharla Jagunnadha Razu v., Satracharla Rama Bhadra Razu ... 645
Scott Co., Stang, Steel Co. v., ... 338
Secretary of State, Kali Krishna Tagore v., ... 237
Secretary of State, v., Luchmeswar Singh 275
Secretary of State v, Fahamedanissa Begum 391
Sham Lall Mitter, Watson & Co. v.,... 66
Shamnarain v., The Adminstrator General of Bengal 734
Shanker Buksh v, Daya Shanker ... 107
Shanker Buksh v., Hurdeo Buksh ... 299
Shashi Sikaraswar Roy, Biseswar Roy v., ... 501
Sheodayal Mal, Hari Ram v., ... 281
Sheo Koer, Budri Narain v. ... 493
Sheolochun Singh v., Saheb Singh ... 1
Shimbhunath Pande v., Golab Singh... 5
Sidheswari Debi, Chunde Churn Barua v., ... 231
Sitaram, Nandi Singh v., ... 309
Sivaraman Chetti v., Muthaya Chetti.. 331
Sondar v., Parbati 448
Southekul Krishna Rao, In the matter of 96
Srinath Doss v. Khetter Mohun Singh. 315
Stang, Steel & Co. v., Scott & Co. ... 338
Subramanya Sastri, Minakshi Naidu v., ... 54
Subramanya Odayar, Appaswami Odayar v., ... 255
Suresh Chunder Mookerjee, Tara Churn Chatterjee v. 379
Surnomoyee, Protab Chunder Burrooah v., ... 716

T

Tansukh, Anund Koer v. ... 372
Tara Churn Chatterjee v., Suresh Chunder Mookerjee 379
Tara Sunderi Debi, Gour Mohun Chuckerbutty v., ... 504
Tassaduck Rasul, Haider Ali v., ...270,529
Thakro v., Ganga Proshad ... 133
Thayamal v., Vencatarama Aiyan ... 10
Tilukdhari Singh v., Mahton ... 408
Tiluckram Chowdry, Gunga Narain Gupt v., ... 168
Torab Ali, Radha Proshad Singh v.,... 582
Torab Ali v., Mohamed Tukhee ... 711
Triloke Nath Singh v., Pertab Narain Singh 219
Tripura Sunderi, Anangamanjari Chowdrani v., ... 45
Turner, Abdool Hossein Zenail Abadi v., ... 25
Turner, Rahimbhoy Habibhoy v.,... 639
Turner, Candas Narrondas Navivahu v., ... 400
Twidale's Pettition, In the matter of... 336

U

page.

Udoy Aditya Deb, Gregson v., ... 416
Uman Pershad v., Gandharp Singh ... 71
Umes Chunder Sircar v., Zahur Fatima 507
Ushrufoonnessa v., Gridharee Lall ... 708

V

Venkatarama Aiyan, Thayammal v.,... 10
Vikrama Devu, Ammi Devi v., ... 190

W

Waghela Rajsanji v., Sheikh Masluddin 16
Watson & Co. v., Sham Lal Mitter ... 66
Watson & Co. v., Ram Chand Dutt ... 535
Wazir Begum v., Mirza 422

Y

Yeo Kay, Mylapore Iyasawmy Moodliar v., ... 50

Z

Zahur Fatima, Umes Chunder Sircar v., ... 507
Zubaida Jan, Muhammad Mumtaz Ahmad v., ... 433

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PRIVY COUNCIL

JUDGMENTS

ON

APPEALS FROM INDIA.

10th February 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Watson, the Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

On Appeal from the High Court in Bengal.

SHEOLOCHUN SINGH* ... *Defendant.*

and

SAHEB SINGH ... *Plaintiff.*

Hindu Law—Inheritance—Inheritance to property purchased by Hindu widow out of the income of her estate.

When a widow, not spending the income of her widow's estate in the property which belonged to her husband when living, has invested such savings in property held by her without making any distinction between the original estate and the after-purchases, the *primâ facie* presumption is that it has been her intention to keep the estate one and entire, and that the after purchases are an increment to the original estate.

The authority upon this matter is found in *Isridut Koer* v. *Hansbutti Koerain* (I), where a widow having made no distinction between the original estate and the after-purchases, the latter were held inalienable by her for any purpose not justifying alienation of the former

*I. L. R., 14 C., p. 387 ; 14 Cowell's I. A., p. 63.

(1) I. L. R., 10 Calc., p. 324 , L. R., 10 Ind. Ap. p. 150 ; 4 P. C. J. p. 459.

APPEAL from a decree (14th September, 1883) of the High Court, in part affirming, and in part reversing, a decree (31st December, 1881) of the Subordinate Judge of Shahabad.

The question raised by this appeal was whether a gift by a Hindu widow, although ineffectual to confer a title, after her death, in properties which had belonged to her husband, might effectually transfer property which, after his death, she and a co-widow, left by the same husband, had purchased out of the savings of the income of the joint estate held by them as widows.

The property, whence the income was derived, belonged to the estate of Sheodyal Singh, who died without issue in 1826, leaving two widows, Pranpiari Koer and Rekaba Koer. The widows remained in joint possession of his estate till the death of Pranpiari Koer in 1871, Rekaba continuing in sole possession, for her widow's estate, till the 19th October, 1875, when by deed of gift she gave to the defendant-appellant the entire movable and immovable properties which had belonged to her husband, together with those purchased by her, and her co-widow Pranpiari, out of their savings.

The purport of the deed of gift, or *atanama*, executed by Rekaba on the 19th October, 1875, was that she and Pranpiari, desiring to carry out their husband's wishes as to the establishment of "more

thakurbaries" and "*shivalas*," with other religious objects, and in accordance with the advice of members of their husband's family, had placed Sheolochun Singh as sole manager of the estates; also that Rekaba, the surviving widow, being now sixty years of age, desired to make, and by that deed did make, "for the preservation of the *riasut*, and the name of her husband, for the *shiva puja* of Sri Thakur, and for her husband's *sradh*," a gift of the entire immovable and movable properties, household furniture and other valuables left by Sheodyal Singh, together with what had been acquired by the widows, to Sheolochun Singh from generation to generation.

Saheb Singh, son of Jit Singh, claiming as *gotraja sapinda* of the late Sheodyal Singh, and one of his three nearest kinsmen, objected to mutation of names in the Collectorate records in regard to the interests in land which had belonged to Sheodyal; and on the death of Rekaba on 2nd February, 1880, Saheb Singh brought the present suit against Sheolochun Singh, claiming a declaration that the deed of gift of 19th October, 1875, was void, as having been executed by a widow without authority, also claiming a one-third share of the property, with partition against the two other near relations of the late Sheodyal Singh, both of whom he joined as defendants; and claiming mesne profits.

Among the defences limitation was alleged, also the competence of the gift, it having been virtually for the spiritual benefit of a deceased husband. But the defence material to this report was the allegation that the widows had during their lives acquired certain of the mouzahs, specified in the schedule annexed to the plaint, with their own money, and that Rekaba was competent to alienate the property so acquired.

The opinion of the Subordinate Judge on the question of limitation, and his findings of fact, were in favor of the plaintiff; but he gave no decision on the last point, as he was of opinion that, whether the mouzahs in question were purchased out of income or out of the widows' savings, Rekaba was entitled to make the transfer, which she had made, of all but the land which had been in the possession of Sheodyal; also, as to the movable property, he was under the impression that Rekaba had, in her lifetime, complete power to dispose of it. Accordingly he made a decree in favor of the plaintiff for so much of his claim as comprised the one-third of the land that had belonged to Sheodyal, dismissing the claim as to all that had been purchased by the widows and as to the movable property.

On the defendant's appeal from this decree so much of it as related to the properties purchased after the death of Sheodyal to the movables, and to mesne profits, was objected to by the plaintiff under s. 561 of the Code of Civil Procedure.

The High Court (MITTER and WILKINSON JJ.) dismissed the appeal and allowed the objections. They concurred with the lower Court that the suit was not barred by limitation, and as to certain findings of fact. But finding that all the properties purchased after Sheodyal's death had been acquired out of the income of property which had been his, they held that, if the after-purchased property had been treated as an increment to the estate of the deceased husband by his widows, the latter had no power to alienate it except on the ground of necessity. On this point they referred to *Isridut Koer* v. *Hansbutti Koerain* (1), and found that the after-purchases had been so dealt with by the widows. They allowed mesne profits to the plaintiff, and also, referring to the judgment in *Bhugwandeen Doobey* v. *Maina Baee* (2), corrected the Subordinate Judge's impression as to the power of the widow over movables. The plaintiff accordingly obtained a decree for a one-third share of the land, including the after-purchases, and of the movables, also for mesne profits.

(1) I. L R., 10 Calc., p.324; L. R., 10 Ind. Ap., p. 150; 4 P. C. J. p. 459.
(2) 11 Moore's Ind. Ap., 487; 2 P. C. J. 487.

The judgment of the High Court was as follows :—

"As regards the objections taken by the plaintiff-respondent to the decree of the lower Court, it seems to us that there is no reason why he should not get a decree for mesne profits from the date of the death of Rekaba Koer to the date of delivery of possession. We accordingly direct that in that respect the decree of the lower Court be modified, and it be declared that the plaintiff is entitled to recover the said mesne profits, and that the amount thereof will be determined in execution of the decree.

"As regards the movable property the lower Court has disallowed the claim on the ground that, according to Mitakshara law, a Hindu widow is entitled to alienate it; but in this respect he has fallen into an error.

"It was decided by the Judicial Committee in the case of *Bhugwandeen Doobey* v. *Maina Baee* (1), that a Hindu widow under the Mitakshara law has no power to alienate the estate inherited from her husband to the prejudice of his heirs, whether such estate consists of movable or immovable property. Therefore the decision of the lower Court on this point also will be set aside. The learned pleader, who appeared for the appellant, admits that there is no question as to the value of movable property claimed in the plaint. We accordingly declare that the plaintiff will be entitled to recover Rs. 1,128-5-4 pie as the value of the one-third share of the movable property of Sheodyal Singh.

"Then there remains the question whether Mussamut Rekaba Koer under the Hindu law was competent to alienate the properties purchased after the death of Sheodyal. With reference to this matter the parties joined issue upon a question of fact, *viz.*, whether or not these properties were acquired after the death of Sheodyal out of the proceeds of his property. But it was admitted by by the learned pleader for the appellant that upon the evidence there is no doubt that the properties in question were acquired out of the proceeds of Sheodyal's estate. That being so, the question between the parties is reduced to one of law, *viz.*, whether these properties, which were acquired by the widows of Sheodyal out of the proceeds of his immovable properties, could be alienated by the said widows without any such necessity as would justify the alienation by a Hindu widow under the Hindu law.

"A very recent decision of the Judicial Committee upon this point has lately come out to this country. It was passed on the appeal of *Isridut Koer* v. *Hansbutti Koerain* (2), and the judgment was delivered on the 11th July last. The effect of this decision is shortly this: If it be proved that a particular property acquired out of the income of the husband's estate has been added as an accretion to that estate, a Hindu widow has no power to alienate it unless there be any necessity which justifies the alienation; but, if the acquisition be of such a character that it may be reasonably held to be a portion of the income of the husband's estate still held in suspense in the hands of the widow, she has full disposing power over it as she has over any other income of that estate. This being the principle settled by the latest decision of the Judicial Committee of the Privy Council, we see no difficulty in determining the question raised before us. Upon the evidence before us there is not the slightest doubt that the properties in question were dealt with by the widows as accretions to their husband's estate. They were treated in the deed of gift precisely in the same way as the admitted properties of Sheodyal were treated. Acting, therefore, upon the principle laid down by the Judicial Committee of the Privy Council in the case cited above, we are of opinion that the plaintiff's claim in respect of these properties also should be allowed."

On this appeal,—

Mr. *J.H.A. Branson*, for the appellant, argued that, on the principles declared in

(1) 11 Moore's Ind. Ap., p. 487. 2 P. C. J. p. 487.

(2) I. L. R., 10 Calc., p. 324; L. R., 10 Ind. Ap., p. 150. 4 P. C. J. p. 459.

Isridut Koer v. *Hansbutti Koerain* (1), the widow's gift of the property acquired by herself, and her co-widow, out of their savings, should have been supported. The mouzahs which the widows purchased after the death of their husband were recorded separately from the rest of the property forming the estate which had been Sheodyal's. The separate ownership of these mouzahs having been at one time in the widows, they had not extinguished it by devoting the property to a purpose which was their own.

Mr. *T. H. Cowie, Q.C.*, and Mr. *R. V. Doyne*, for the respondent, were not called upon.

Their Lordships' judgment, after Mr. *Branson* had been heard was given by

THE RIGHT HON. SIR RICHARD COUCH.

The suit, which is the subject of this appeal, was brought by the respondent, who claimed as one of the heirs of Sheodyal, who died in 1827, to recover from the appellant a third share of the property which had been left by Sheodyal at his death, and to which his two widows Pranpiari and Rekaba became entitled, and also a third of the properties which had been purchased by the widows with, as he alleged, the income of the property which they inherited. Pranpiari and Rekaba, in the first place, held the properties jointly, and Pranpiari died in 1870, leaving Rekaba surviving her and in possession of the whole of the estate. It appears that on the 19th October, 1875, Rekaba executed a deed of *atanama*, by which she professed to give to the appellant, who was the defendant in the suit, the whole of the property, not only that which came to the widows from Sheodyal, but the properties which had been purchased by them; and it was also alleged that the defendant had been adopted by the widows with the permission of Sheodyal as his son.

Various issues were settled. The defence set up various matters, including the law of limitation, the adoption of the defendant, and the deed of *atanama*. All the issues were found in favor of the plaintiff, the respondent, except that with respect to the question whether the plaintiff was entitled to recover a share of the properties which had been purchased by the widows. The lower Court found that the widows were entitled to alienate that property, and consequently that he was not entitled to it. The High Court, when the case came before it upon appeal, upon this question said that upon the evidence before them there was not the slightest doubt that the properties in question, namely, the purchased properties, were dealt with by the widows as accretions to their husband's estate, and that they were treated in the deed of gift precisely in the same way as the admitted properties of Sheodyal were treated.

Their Lordships have been referred by Mr. Branson to the different parts of the evidence which he considered bore upon the question whether the properties were purchased by the widows out of the income of the descended property, and whether their intention was to keep those properties distinct. Certainly the evidence is not such as would show that the High Court in coming to the conclusion they did were not quite justified by it.

The authority upon this matter is the case of *Isridut Koer* v. *Hansbutti Koerain* (2). At the conclusion of the judgment their Lordships state the matter which has to be looked at in deciding whether the property acquired or purchased by the widows is to descend with the husband's estate or is to be treated as a separate estate. They say: "Neither with respect to this object," namely, to change the succession, "nor apparently in any other way have the widows made any distinction between the original estate and the after purchases." Where a widow comes into possession of the property of the husband, and receives the income, and does not spend it, but invests it in the purchase of other property, their Lordships think that, *primâ facie*, it is the intention of the widow to keep the estate of the husband as an

(1) I. L. R., 10 Calc., p. 324; L. R., 10 Ind. Ap., p. 150. 4 P. C. J. p. 459.

(2) I. L. R., 10 Calc., p. 324; L. R., 10 Ind. Ap., p. 150. 4 P. C. J. p. 459.

entire estate, and that the property purchased would, *primâ facie*, be intended to be accretions to that estate. There may be, no doubt, circumstances which would show that the widow had no such intention, that she intended to appropriate the savings in another way. There are circumstances here which would indicate that it was the intention of the widows to keep the estate entire, and that they did not intend that the husband's estate and the subsequently-purchased properties should go in a different line of succession, because their act, in what they did with regard to the defendant, was to make a gift to him of the whole of the property, and professing to do it so as to, what seems to be called, carry out the intentions of Sheodyal and found a *thakurbari*, with which the estate would be connected. The transaction appears to indicate that their intention was not to create separate estates, one to go in one way, and another in another, but to keep the whole as one entire property; and applying what is said in the case of *Isridut Koer* v. *Hansbutti Koerain* (1) to the present case, there do not appear to be circumstances which would show that there was any other intention than that the purchased property should be accretions to the inherited property. The High Court has found that, and their Lordships see no ground for saying that the Court has not come to a proper conclusion from the evidence.

Their Lordships will therefore humbly advise Her Majesty to affirm the decision of the High Court and to dismiss the appeal, and the appellants will pay the costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Watkins & Lattey.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

(1) I. L. R., 10 Calc. p. 324; L. R., 10 Ind. Ap., p. 150. 4 P. C. J. p. 459.

11th and 26th February 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Watson, the Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

On Appeal from the High Court in Bengal.

SIMBHUNATH PANDE AND OTHERS* ... ...*Defendants.*

and

GOLAB SINGH AND OTHERS ...*Plaintiffs.*

Sale in execution of decree—Judgment-debtor's share in joint ancestral estate—Mitakshara law—Execution of decree by sale of such share—Rights of co-sharers not being parties to the decree or execution proceedings—Sale certificate.

The question was whether the whole estate belonging to a joint family, living under the Mitakshara, including the shares of sons or the share of their father alone, passed to the purchaser at a sale in execution of a decree against the father alone upon a mortgage by him of his right.

Held that, as the mortgage and decree, as well as the sale certificate, expressed only the father's right, the *primâ facie* conclusion was that the purchaser took only the father's shares, a conclusion which other circumstances—the omission on the part of the creditor to make the sons parties and the price paid—not only did not counteract but supported.

The enquiry in recent cases regarding the liability of the estate of co-sharers in respect of transfers made by, or execution against, the head of the family has been this, *viz.*, what, if there was a conveyance, the parties contracted about, or what, if there was only a sale in execution, the purchaser had reason to think he was buying. Each case must depend on its own circumstances—*Upooroop Tewary* v. *Lalla Bandhjee Suhay* (1) distinguished.

APPEAL, by special leave, from a decree (27th June, 1883) of a Divisional Bench of the High Court reversing a decree (5th December, 1881) of the Subordinate Judge of Bhagulpore.

*I. L. R., 14 Calc., p. 572; 14 Cowell's Ind. Ap., p. 77, P. C. J. folio Ed. 26th Feb. 1887.

(1) I. L. R., 6 Calc., p. 749.

The object of this suit was to establish the plaintiffs' claim to have their share in ancestral estate excluded from the effect of a sale made in execution of a decree against their father alone for a debt due by him. And the question now raised was whether the entire estate of the family—a one anna four pie share of mouzah Kindwar, in pergunnah and district Bhagulpore—passed to the purchaser at the sale, the principal defendant in this suit, or only the share of the father. The latter share would on partition be only two pie two krants of the whole sixteen annas of the village.

Their grandfather's *biswa* was four annas, or one-fourth of mouzah Kindwar. He had three sons, one of them being Luchmun Singh, the father of the plaintiffs. Inheriting one-third the latter took, as a family, a one anna four pie share of the village, each being entitled on partition (the sons being four in number) to one-sixth, including the father and mother. The plaint claimed restoration of five-sixths with mesne profits and a declaration of the sons' right to *kamat* land held by them in proportion to their share in the village.

The defendants' answer relied upon the sale, and the possession that they had obtained under the order for delivery of possession, which gave them, as they contended, rightly, the whole one anna four pie share.

At the hearing before the Subordinate Judge of Bhagulpore it appeared that, on the 12th September, 1865, Luchmun Singh, having borrowed money of Bichuknath Pandé executed to him a money bond of that date, mortgaging also his right and intrest in mouzah Kindwar; whereupon afterwards the decree (9th August, 1869) now in execution was made by consent. Execution proceedings resulted in the now disputed sale on 7th September, 1871, at which the right, title and interest of Luchmun Singh in mouzah Kindwar were purchased by Bichuknath Pandé, one of the defendants.

The Subordinate Judge held that the entire estate of the family passed by the sale. His reason mainly was that the father bound the sons when he incurred a debt that was in no way attributable to his misconduct. There being no immorality in the nature of the debt the decree might have been against the whole family; and the family property having been sold on this account the sons had no power to interfere with the auction sale. He accordingly dismissed the suit.

On appeal a Divisional Bench of the High Court (PRINSEP and O'KINEALY, JJ.) gave judgment as follows:—

"It appears to us from the facts of this case that it does not come within any of the judgments of this Court which have been quoted in the course of argument, and that it is a case purely within the judgment delivered by the Privy Council in the *case of Dindyal* (1). From the terms of the bond (which is a simple money bond) it is clear that the obligation was simply on the part of the father.

"The obligee sued to recover money due on this bond, and the father put in a petition confessing judgment, in which, after admitting the debt, he states: 'I have mortgaged my right and interest in mouzah Kindwar,' the words in the vernacular being 'Hakiyat O milkiyat apna.' We think from the terms of this petition that it was clearly understood by the father that he was dealing with only his own property in the estate. That this was the interpretation accepted by the decree-holder appears from the terms of the decree, which states that the debtor, after confessing judgment, has mortgaged his right and interest in mouzah Kindwar, and that a decree is accordingly passed. The terms of the sale certificate granted to the decree-holder, purchaser, are to the same effect. In the 'specification of property' the words are: 'The right and interest of the judgment-debtor 4 annas' (that is to say, the estate held by him and his sons) 'out of 16 annas mouzah Kindwar.' And the terms of the body of the sale certificate declare that the right

(1) L. R., 4 Ind. Ap., p. 147; I. L. R., 3 Calc, p. 198. 3 P. C. J. p. 730.

and interest which the judgment-debtor had in that property was purchased at auction for Rs. 625 by the decree holder in the case, and that it is hereby notified that whatever right, title and interest the judgment-debtor had in that property was extinguished from that date. We cannot agree with the argument that under such circumstances the judgment-debtor, father, should be regarded as being proceeded against by the obligee as representing the family estate.

"Under such circumstances we think, as we have already laid down in another case, that, under the terms of the judgment in the *case of Dindyal*, as the creditor has chosen to proceed against the father alone and to sell only the father's whole estate, he has by his own act given up whatever rights he might have had against the entire family property.

"The order of the lower Court will accordingly be set aside and a decree given to the plaintiffs declaring that they are entitled to a partition of the family estate and to obtain their respective shares under the Mitakshara law, the defendant No. 1 being entitled to retain only the share of Luchmun Singh, the father.

"The appellants will receive their costs here and also in the lower Court."

The defendants' appeal against the above decree was specially admitted by an order of Her Majesty in Council of 30th December, 1884.

For the appellants Mr. *R. V. Doyne* argued that the Subordinate Judge had rightly held that the entire interest of the family in mouzah Kindwar, the one anna two pie share, had passed by the sale in execution. What was sold was the interest that was liable to attachment and sale in execution of a decree against the father in respect of a debt incurred by him, not for any immoral purpose. What was sold was the entire interest of the family for another reason, *viz.*, that the eldest son, being of full age, was himself a party to the taking of the loan by Luchmun Singh; and he, as well as other sons on their attaining full age, assented to the mortgage on which the decree was based, as the evidence referred to in the judgment of the Subordinate Judge showed. *Dindyal* v. *Jugdip Narain* (1), relied upon in the judgment of the High Court, was distinguishable, as in that case the creditor had done nothing to show an intention on his part to regard any one as liable, save the father alone. The principles on which this decision should be placed were those explained in *Girdhari Lal* v. *Kantoo Lal* (2) and *Suraj Bansi Koer* v. *Sheo Pershad Singh* (3).

Reference was also made to the *Collector of Monghyr* v. *Hurdainarain Shahai* (4) and *Nanomi Babuasin* v. *Muddun Mohun* (5).

The respondents did not appear.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD HOBHOUSE.

This is one of the numerous cases relating to the amount of interest acquired by the purchaser at an execution sale where the sale relates to a joint family estate subject to the Mitakshara law, and the father of the family alone has been party to the proceedings. Like several of its predecessors it has been heard *ex parte*.

Luchmun Sing is father of the joint family. He has a wife and four sons. The family property consists of a share of mouzah Kindwar, amounting to 1 anna 4 pie in extent. Other shares of the mouzah were, when the transactions now in question took place, vested in other branches of the family who had become divided from Luchmun. The share of Luchmun's father was four annas. The appellants, who were defendants in the suit, claim the whole 1 anna 4 pie. The respondents, the wife and sons, who were

(1) L. R., 4 Ind. Ap., p. 147; I. L. R., 3 Calc. p. 198. 3 P. C. J. p. 730.
(2) L. R., 1 Ind. Ap., p. 321; 14 B. L R., p. 187. 3. P. C. J p. 380.
(3) L. R., 6 Ind. Ap., p. 88; I. L. R., 5 Calc., p. 148. 4 P. C. J. p. 1.
(4) I. L. R., 5 Calc., p. 425.
(5) L. R., 13 Ind. Ap., p. 1; I. L. R., 13 Calc., p. 21; 4 P. C. J., p. 682.

plaintiffs claim five-sixths of it as the shares which would come to them on partition.

On the 17th September, 1865, Luchmun took a loan of Rs. 219 from Bhichuk, one of the appellants, and executed a bond for payment in a month's time with interest at 24 per cent., or after the month, with interest at 48 per cent. In July, 1869, the bond-holder sued Luchmun, and an agreement was made that Luchmun should pay Rs. 590-4, with interest at 24 per cent, in a given month, and by way of security should mortgage "his right and interest in mouzah Kindwar." This agreement is embodied in a decree of the Munsiff of Bhagulpore, dated the 7th August, 1869. The same decree goes on to direct that in the event of non-payment the mortgaged property shall be sold by auction for the realisation of the decretal money. In the year 1874 a sale took place in execution proceedings under this decree.

The certificate of sale bears date the 21st December, 1874, and is as follows:—

"A petition being filed for execution of the decree of the Court of the Sudder Munsiff of Bhagulpore, dated 6th August, 1869, in Case No. 494 of 1869 *v.* Luchmun Singh of mouzah Kindwar, pergunnah Bhagulpore, judgment-debtor, and for holding auction sale of the undermentioned property, an *istahar* was issued according to the order of this Court, and the said property after being advertised was sold by auction on the 7th September, 1874; and accordingly the right and interest which the judgment-debtor had in that property was purchased at auction for Rs. 625 by Bhichuknath Pandé, inhabitant and proprietor of mouzah Phoolwaria, decree-holder, who forthwith filed Court fee stamps of Rs. 12-8 poundage fee and filed a receipt for the balance Rs. 612-8 out of his decretal money. Therefore this certificte is granted to Bhichuknath Pandé, decree-holder, auction-purchaser of the said property; and it is hereby notified that whatever right, title and interest the siad judgment-debtor had in the said property, being extinguished from the 7th September, 1874, the date of the sale, is transferred to Bhichuknath Pandé, decree-holder, and that this certificate will be held a valid document with reference to the transfer of the right, title and interest of the judgment-debtor.

"*Specification of property.*

"The right and interest of the judgment-debtor in 4 annas out of 16 annas of mehal Kindwar (main and hamlet), tuppa Chandlipergunnah Bhagulpore, the towzi number of the entire mehal being 82, and the sudder jumma Rs. 380-8.

"Dated 21st December, 1874."

The purchaser was put into possession on the 12th January, 1875, and he appears to have remained in the possession and enjoyment of the whole 1 anna 4 pie until this suit was brought on the 18th April, 1881. There is no distinct evidence as to the value of the property, but in the plaint the value is stated for Court purposes at Rs. 5,500, which the defendant does not dispute in his written statement, though he objects to the insufficiency of the Court fee on the ground that the plaintiffs sue to recover some *kamat* land worth Rs. 2,292-2. Their Lordships conceive that the Rs. 625 paid must be much below the value of the entirety, if indeed it is not below that of the sixth share which Luchmun would take on partition.

The Subordinate Judge dismissed the suit. He held that the debt was not tainted with immorality and that two of the sons had consented to the mortgage. But his principal ground appears to have been that he was bound by the decision in *Upooroop Tewary* v. *Lalla Bandhjee Suhay* (1) to hold that a mortgage of the right and interest of Luchmun passed the entirety of the family property.

On appeal the High Court reversed the decision of the Subordinate Judge, and gave the plaintiffs a decree declaring that they are entitled to a partition of the family estate and to obtain their respective shares under the Mitakshara law, the defendant No. 1 being entitled to retain only the share of Luchmun Singh, the father. They referred to the vernacular expressions used by Luchmun in his petition, on which the decree of the 7th August, 1869, was founded, and which are rendered by the expression "right and interest;" and they thought that Luchmun clearly understood that he was dealing with only his own property in the estate. Further they relied on

(1) I. L. R., 6 Calc., p. 749.

the fact that the sons were not made parties to the execution proceedings, and to the treatment of that fact in *Dindyal's case* (1).

Their Lordships cannot agree with the Subordinate Judge. Whatever part any of the sons may have taken in negotiating between Luchmun and Bichuk, there is no evidence whatever of their proposing to mortgage their own interests. The sons may have assented to what was done, but the question is, what was done? That must be answered by the documents.

Moreover, if Bichuk relied on assent by the sons, he should have taken care to make them parties to the execution proceedings. In *Dindyal's case*, where the expressions used by the mortgagor were much more favorable to the conveyance of the entirety than they are here, the creditor's omission of the sons from the proceedings was made a material circumstance against him. And in *Nanomi Babuasin's case*, where the decision was in favor of the purchaser, the same circumstance was recognised as being material when the expressions by which the estate is conveyed to the purchaser are susceptible of application either to the entirety or to the father's coparcenary interest alone.

In the *case of Upooroop Tewary* (2) Mr. Justice Mitter thought that the words "my proprietary share" in a mouzah were calculated to describe the entirety of the family property in dispute; and he distinguished them from the expression "right, title and interest." In *Hurdai Narain's case* (3) there was no conveyance, but a sale on a money decree. The only description was "whatever rights and interest the said judgment-debtor had in the property" these were purchased by Hurdai Narain. The High Court held that nothing passed beyond the debtor's interest which gave him a right to partition, and which perhaps may for brevity be called his personal interest, and this Committee affirmed the decision. Each case must depend on its own circumstances. It appears to their Lordships that in all these cases, at least the recent cases, the enquiry has been what the parties contracted about, if there was a conveyance, or what the purchaser had reason to think he was buying if there was no conveyance but only a sale in execution of a money decree.

Their Lordships are sorry that they cannot follow the learned Judges of the High Court into their examination of the vernacular petition. But they find quite enough ground in the decree to express a clear agreement with them. They conceive that, when a man conveys his rights and interests and nothing more, he does not *primâ facie* intend to convey away also rights and interests presently vested in others, even though the law may give him the power to do so. Nor do they think that a purchaser who is bargaining for the entire family estate would be satisfied with a document purporting to convey only the right and interest of the father. It is true that the language of the certificate is influenced by that of the Procedure Code. But it is the instrument which confers title on the purchaser. Its language, like that of the certificate in *Hurdai Narain's case*, is calculated to express only the personal interest of Luchmun. It exactly accords with the expressions used in the decree of August, 1869, founded on Luchmun's own vernacular expressions, which the High Court construe as pointing to his personal interest alone. The other circumstances of the case aid the *primâ facie* conclusion instead of counteracting it, for the creditor took no steps to bind the other members of the family, and the Rs. 625 which he got for his purchase appears to be nearer the value of one-sixth than of the entirety.

Their Lordships will humbly advise Her Majesty that the decree of the High Court should be affirmed and this appeal dismissed.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Miller, Smith & Bell.*

(1) L. R., 4 Ind. Ap., p. 147; I. L. R., 3 Calc., p. 198; 3 P. C. J., p. 730.
(2) I. L. R., 6 Calc., p. 749.
(3) I. L. R., 5 Calc., p. 425; L. R., 2 Ind. Ap., p. 26.

12th, 15th and 26th February, 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Watson, the Right Hon Lord Fitzgerald, the Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

On Appeal from the High Court at Madras.

THAYAMMAL AND KUTTISAMI AIYAN* ... } *Defendants.*

and

VENKATARAMA AIYAN ... *Plaintiff.*

Adoption Widow adopting to her deceased husband, with consent of sapindas -Effect of estate having already vested in the widow of a son.

A son's widow having obtained her widow's estate in the property inherited by her deceased husband from his father, the widow of that father cannot adopt a son to the latter, whether she acts under authority from her husband or as widow with the assent of sapindas.

That the power of the father's widow to adopt a son to him is brought to an end upon the vesting of the estate in the son's widow was decided in *Musumat Bhoobun Moyee Debia* v. *Ram Kishore Achary Chowdhry* (1) and *Padmakumari Debi* v. *The Court of Wards* (2).

APPEAL from a decree (21st March 1884) of the High Court affirming a decree (18th January 1882) of the District Judge of Trichinopoly.

In the suit, out of which this appeal arose, a son, adopted by the widow of a son of one of two brothers deceased, claimed a declaration that an adoption by the widow of the other brother, sapindas assenting, was invalid; and he had obtained a decree to that effect on the ground that, before the adoption now disputed, the estate had already vested in the widow of a son.

Of two brothers, Dorasámi, deceased in 1858, and Subha Aiyan, also deceased, the former left a son Kuttisámi who died in 1866, and a widow, Thayammál, the first defendant in this suit. The latter brother left a son named Rangasámi, who died in 1861. Kuttisámi, son of Dorasámi, left a widow, Thangammál.

The plaintiff, claiming as adopted son of Rangasámi, allged that an adoption purporting to be made in 1877 by Thayammál, widow of Dorasámi, whereby she attempted to adopt Chitambara Aiyan, the second defendant, was invalid by law. One of the reasons alleged for the invalidity of the adoption was the existence of Thangammál, the widow of Kuttisámi, who had (it was alleged as another reason) adopted a son to her deceased husband, thereby, although this son had since died, preventing any further adoption in the life of succession to Dorasámi. Another objection was that Chitambara Aiyan was too old for the adoption to be valid; also that his *upanayana* had already been performed before 1877. On this last ground the Court of First Instance decreed the claim, deciding, also in favour of the plaintiff, a question of fact raised by the defence, viz., whether the plaintiff, had himself been adopted, as he alleged, to Rangasámi.

A Divisional Bench of the High Court (Sir C. Turner, C.J., and Muthusámi Aiyar, J.) dismissed an appeal from that decree. They affirmed the finding of the plaintiff's adoption, pointing out that it was supported by what appeared in *Ramasámi Aiyan* v. *Venkataramaiyah*, (3) a suit in which the present plaintiff was also plaintiff as heir of Rangasámi in virtue of this same adoption, suing to to set aside some dispositions of property made by the widow.

As to the other part of the case, the High Court put the decision on a different ground from the first Court. The Judges held the adoption to be invalid for the reason that an adoption cannot be made by a widow after the estate has vested in

*I L. R., 10 Mad., p. 205; 14 Cowell's Ind. Ap., p. 67. [p 111.

(1) 10 Moore's Ind. Ap., p. 279; 2 P. C. J.,

(2) 1 L. R., 8 Cal., p. 302; L. R., 8 Ind. Ap., p. 229.

(3) I. L. R., 2 Mad., p. 91.

the widow of the son. They refrred to *Padmakumari Debi* v. *The Court of Wards.* (1) The judgment is reported in *Thayammál* v. *Venkatarámá.* (2)

On this appeal, Mr. *J. D. Mayne* and Mr. *H. H. Shephard* appeared for the appellants.

The respondent did not appear.

For the appellant it was argued that the High Court had misunderstood the application of the judgment in *Padmakumari Debi* v. *The Court of Wards,* (1) the decision in that case not having been, as it had been held to be, entirely applicable to the facts now presented; nor had it been kept in view that the adoption of the second appellant, having been intended to operate for the benefit of the widow's deceased husband, accorded with principle. It was clear that if an infant son, left by the husband, had died, the widow, with the assent of the sapindas, could have adopted a son to him.—See *Vellanki Venkata Krishna Row* v. *Venkata Rama Lakshmi Narsayya.* (3)

It did not appear why this power should be taken away by reason of the son having grown up, married, and then died, leaving a widow; although it must be admitted that this widow, having inherited, would not be liable to be deprived of her widow's estate. Notwithstanding, however, that the adoption would be so far inoperative, as regards the latter purpose, it did not follow that it would be invalid altogether; and it was consistent with law that the adopted son should take on the death of the widow, and not before.

As to the prior adoption of Krishnásámi since deceased by Thangammál, in order to make that adoption a valid ground of objection to the adoption now in dispute, it must be shown to have taken place before the latter adoption which occurred in May 1877; and due authority for it must be shown, or else, that the appellants were estopped from disputing it.

[*Sir Barnes Peacock* inquired whether, in regard to the ground of the High Court's decision, the appellant's counsel would dispute that, when once the estate had vested in the son's widow, the rights of the heirs, coming in after the widow, could not be altered. He also asked whether it was not clear that an adoption must be valid at the time when it was made, if it was to be valid at all.]

It was submitted that there might be a suspension of the rights following upon the adoption. The power and duty of adopting was continued, as for three generations male offspring, or its admitted substitute was required. It was true that an adoption must be either valid or invalid at the time when it took place; but it did not follow that this adoption was invalid for that reason, as it might be that the right of the adopted son to take possession did not accrue till after the death of the widow—an argument which none of the decisions appeared altogether to negative.

Reference was made to—

Digest of the Hindú Law, by West and Buhler, Vol. II, Book II, Section III, 3rd Ed., p. 995.

Mayne's Hindú Law and Usage, paras. 163, 178.

Tagore Law Lectures, 1882.

Judgment of Jackson, J., in *Puddo Kumaree Debee* v. *Juggut Kishore Acharjee.* (4)

Mussumat Bhobun Moyee Debia v. *Ram Kishore Acharj Chowdhry.* (5)

The Collector of Madura v. *Muttu Ramalinga Sethupati (Ramnad Case).* (6)

Sri Raghunadha v. *Sri Brozo Kishore.* (7)

Vellanki Venkata Krishna Row v. *Venkata Rama Lakshmi Narsayya.* (8)

Raja Soonder Singh v. *Surbanee Dossee.* (9)

(1) I. L. R., 8 Calc., p. 302; L. R., 8 Ind. Ap., p. 229.

(2) I. L. R., 7 Mad., p. 401. [p. 1.

(3) I. L. R., 1 Mad., p. 174; L. R., 4 Ind. Ap.,

(4) I. L. R., 5 Calc., p. 615.

(5) 10 Moore's Ind. Ap., p. 279.

(6) 2 Mad. H. C. R., p. 206; 12 Moore's Ind. Ap., p. 397.

(7) L. R., 3 Ind. Ap., p 154. [p. 1.

(8) I. L. R., 1 Mad., p. 174; L. R., 4 Ind Ap.,

(9) 22 W. R., p. 121.

On a subsequent day, 26th February, their Lordships' judgment was delivered by

THE RIGHT HON. SIR BARNES PEACOCK.

This is an appeal from a judgment of the High Court at Madras in a suit instituted by the respondent to have it declared that an alleged adoption of the second defendant by the first defendant was invalid. It appears that Dorasámi, who was entitled to certain property, died many years ago, leaving Thayammál, the first defendant, his widow, and also an only son, Kuttisámi, his heir-at-law, surviving him.

Kuttisámi, the son, married Thangammál, and subsequently died without issue, leaving Thangammál, his widow, who, upon the death of her husband, succeeded as heir to the property.

It is alleged that, after the death of Kuttisámi, the son, and during the life of Thangammál, his widow, Thayammál, with permission of sapindas, adopted the second defendant as a son of her deceased husband. Several objections have been taken to that adoption, and, among others, that the son's widow having lawfully adopted a son to him, the father's widow had no power to adopt. The adoption by the son's widow was disputed, but it was objected on behalf of the respondent that it was immaterial whether she had adopted or not, for that, even in the absence of such adoption, the survival of the son's widow and the vesting of the estate in her put an end to the right of Thayammál, his mother, to adopt a son to his father.

Their Lordships are of opinion that the objection is fatal to the adoption of the second defendant. It is therefore unnecessary to express an opinion as to other objections to that adoption, or to consider whether there was or was not a valid adoption by the son's widow.

Their Lordships are of opinion that the High Court was correct in considering that the case is governed by the decision of this Committee in the case of *Padmakumâri Debi* v. *The Court of Wards* (1) which was founded upon the case of *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry*.

It was contended by the learned counsel for the appelant that all that was decided by the Judicial Committee in *Bhoobun Moyee's case* was that the son adopted by the mother could not recover the estate from the widow of the son. This appears to have been the view taken by the Lower Courts in *Padmakumari's case*. But this Committee, upon appeal, held that the case went much further. Nothing can be clearer or more explicit than the language used by the Committee in that case. They said, "The substitution of a new heir for the widow was, no doubt, the question to be decided, and such substitution might have been disallowed, the adoption being held valid for all other purposes, which is the view which the Lower Courts have taken of the judgment; but their Lordships do not think that that was intended. They consider the decision to be that, upon the vesting of the estate in the widow of Bhowani (*i.e.*, the son,) the power of adoption was at an end and incapable of execution, and if the question had come before them without any previous decision upon it, they would have been of that opinion." Their Lordships entirely concur in that view, and they are of opinion that the adoption, with the permission of sapindas in the present case, could have no greater effect as regards the right to property than the adoption under the deed of permission in the cases to which reference has been made.

For the above reasons they will humbly advise Her Majesty that the judgment of the High Court ought to be affirmed. The respondent not having appeared, there will be no costs of the appeal.

Appeal dismissed.

Solicitors for appellants: Messrs. *Burton, Yeates, Hart* and *Burton*.

(1) I. L. R., 8 Calc., p. 302; L. R., 8 Ind. Ap., p. 229.

15th and 16th February 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Watson, the Right Hon. Lord Fitzgerald, the Right Hon. Sir Barnes Peacock and the Right Hon. Sir Richard Couch.

On Appeal from the High Court in Bengal.

KRISHNA KISHORI CHOWDHRANI AND ANOTHER* } *Defendants.*

and

KISHORI LAL ROY ... *Plaintiff.*

Evidence Act (I of 1872), ss. 65 and 74—Secondary evidence of contents of document.

Secondary evidence of the contents of a document cannot be admitted without the non-production of the original being first accounted for in such manner as to bring it within one or other of the cases provided for in s. 65 of the Evidence Act, I of 1872 (1).

An *anumatipatra* is not a public document within the meaning of s. 74, nor, if it were, would its being on the record constitute a copy certified as required by s. 76.

APPEAL from a decree (16th April, 1884) of the High Court, reversing a decree (20th June, 1881) of the Subordinate Judge of Rajshahye.

The suit out of which this appeal arose related to the estate of Anand Sunder Mozumdar, deceased, on 11th February, 1876.

Chandramoni, wife of Goluck Nath Roy, who died in 1840, survived her husband 28 years. She had two daughters, one of whom, Ujalmoni, was alleged by the plaintiff to have adopted him in 1851 under power from her husband, then deceased. The other daughter was married to Sham Sunder Mozumdar, and was the mother of Anand Sunder Mozumdar, deceased, who was in his lifetime, married to Krishna Kishori, the defendant.

The plaintiff sued (5th March, 1880) as adopted son of Ujalmoni to obtain possession, with mesne profits, of one moiety of all the estates, which on Goluck Nath's death had come to his sonless widow Chandramoni, to which moiety he, the plaintiff, claimed to have become entitled on the death of Chandramoni on 4th April, 1868, at which time Anand Sunder had taken wrongful possession.

The questions now raised related to the genuineness and effect of an alleged *anumatipatra*, said to have been executed by Goluck Nath on 17th Magh 1246 (January, 1840), containing a power to Chandramoni to adopt. As to this the High Court (McDONELL and FIELD; JJ.), reversing the decision of the first Court, thus stated their opinion:—

"The conclusions, therefore, at which we arrive may briefly be summed up as follows; We think that there was undoubtedly an *anumatipatra* executed by Goluck Nath Roy; but we are of opinion that the non-production of this original document has not been sufficiently accounted for so as to render secondary evidence of its contents admissible. We are of opinion that the copy produced to prove the original has not been shown to be a true copy, and we think that grave suspicion must attach to its genuineness. It must be borne in mind that Sham Sunder is shown to have had a large share in the effectual mangement of the property during Chandramoni's lifetime, and the testamentary provisions in the copy of the *anumatipatra* now set up are calculated exclusively to benefit his son. Even if we assume the copy to have been rightly admitted and to be good evidence of the original, we think, for reasons already given, that Anand Sunder Mozumder can take no interest under this *anumatipatra* either by descent or by purchase.

"The result is that the decree of the Subordinate Judge must be reversed, and that the plaintiff must have a decree for a moiety of the property left by Goluck Nath Roy."

For the appellant Mr. *T. H. Cowie, Q.C.*, and Mr. *R. V. Doyne*, contended

* I. L. R. 14 Cal., p. 486; 14 Cowell's Ind. Ap., p. 71.

(1) See *Bhubneswari Debi* v. *Harisaran Surma Moitra* I. L. R., 6 Calc. 721.

that the Court of first instance had rightly found that the original *anumatipatra* had been accounted for so as to let in secondary evidence of its contents.

Counsel having also been heard on the whole case, Mr *J. D. Mayne* (with whom was Mr. *J. Rigby, Q.C.*) was not called upon.

The judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK.

The question upon which this case must be determined is whether there was proof of the document alleged to have been executed by Goluck Nath Roy in the year 1840.

The plaintiff claims to be entitled to half the estate which belonged to Goluck Nath. Goluck Nath died, leaving only a widow and two daughters. The plaintiff is the only son of one of those daughters, and would be, if there were no will disentitling him to the property, entitled to the half share which he seeks to recover in the action. But the defendant in the action sets up that, in a power to adopt which Goluck Nath executed in the year 1840, he devised, in the event of no adoption being made, the half share, which would otherwise go to the plaintiff, to the other daughter and her son. After giving his widow power to adopt, he says: "God forbid if, without any son being begotten of my loins, I should die, and you also should suddenly die without having made"—the literal translation is "having delayed to make"—"an adoption, then my younger daughter Roopmunjari, and her son, that is my grandson by my daughter's side, shall become entitled to, and shall exclusively possess, all my above-mentioned zemindaries," &c. The question is, has it been proved that those words are contained in a document executed by Goluck Nath.

It is said that the original document was filed in the Collector's office when the widow, after the death of Goluck Nath, applied for mutation of names. It was unnecessary for the Collector, in deciding whether the name was to be changed from that of the deceased husband to that of the widow, to enquire into any subject except whether the widow was entitled to have her name substituted for that of her deceased husband. It was no part of his duty to enquire who, on the death of the widow, would be the reversionary heirs; and it is to be remarked that when she put in her petition to the Collector for the mutation of names, although she said that her husband had given her power to adopt, she did not go on to say that in that document he had devised over the estate to the second daughter and her son in the event of her not adopting. The Collector, also, in adjudicating that the widow's name was to be substituted for that of her husband, does not allude to that portion of the document. He merely declared that it has been shown to him; that the widow represents her husband; and that her name should be entered in the Collectorate in place of that of her husband.

It is stated that Goluck Nath, after he had executed the document, notified to the Judge that he had given his widow power to adopt. Those proceedings are before the Court; but there is nothing in them to show that, when he spoke of having given his widow power to adopt, he ever mentioned the fact of his having devised over the estate to his second daughter and her son in the event of the widow's not adopting.

The original document is not produced, but the parties have endeavoured to give secondary evidence of it, and in order to let in secondary evidence they endeavoured to show that the document was burnt in a fire. The learned Judge of the first Court, in dealing with this subject, does not go so minutely into the question as the High Court have done. He says: "The *anumatipatra* will relied upon by the defendants is dated" so and so, "but the original deed was burnt up by setting fire in the cutcha cutchery bungalow of the deceased Chandramoni, and its loss was satisfactorily accounted for by the depositions of the defendant's witnesses." That is all he says upon the subject. The High Court in dealing with that question go more minutely into it. They say: "we

have considered the evidence as to the loss of this document, and it by no means satisfies us. When the copy was filed in 1868 this account was not given of the loss of the original, and we think that, if this were a true account, the fact of the loss by burning would have been stated at that time. At page 15 of the Paper Book, in Appeal No. 260, there is a judgment in a suit, No. 31 of 1870, which contains a statement as to the loss of the document, and this was relied upon to show that a different account was given on this occasion. We think we cannot accept the recital of facts in the judgment as evidence of a different account having been given on a previous occasion; but we are of opinion that we may properly make the observation that the account of the loss by burning, now given, was not given in 1860." But further there is a very important remark which may be made in addition to that of the High Court. In the record to which they refer it is said: "The plaintiff has failed to produce the original will or *anumatipatra*: he has only produced a copy of an *anumatipatra* of 17th Magh 1246, as executed by Goluck Nath Roy, in favor of Chandramoni, and the plaintiff's witnesses Nos. 2 and 3 have stated that the plaintiff searched for, but could not find, the original *anumatipatra*." Now, if he knew that it was burnt, how could he produce witnesses to say that he had searched for it? He not only does not give the same account, but he gives an entirely different account. He says now that it was burnt. He said in a proceeding subsequent to the alleged date of the burning that he searched for the document but he has not been able to find it.

The High Court then go on: "Upon the evidence we think that the account now given is not entitled to credit, and we feel bound to say the defendant has not proved the loss of the original so as to entitle him to give secondary evidence of its contents."

Their Lordships are of opinion that the High Court came to a correct conclusion upon that point, and that being so, the loss or destruction of the document not having been proved, secondary evidence was not admissible under cl. (*c*), s. 65, of the Indian Evidence Act. There are however cases under that Act in which secondary evidence is admissible even though the original is in existence. One of the cases is under s. 65, letter (*e*): "When the original is a public document within the meaning of s. 74." And another under letter (*f*): "When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence." But in either of those cases "a certified copy of the document, but no other kind of secondary evidence, is admissible." If then the *anumatipatra* was a public document within the meaning of s. 74 of the Act, which in their Lordships' opinion it was not, no secondary evidence would have been admissible except a certified copy. Where is the certified copy? The document which is set out at page 118 of the Record is not a certified copy. There is no certificate of any public officer that it is a true copy of a document contained in the office. *See* s. 76.

Then, again, it is said that the Judge, on the trial, sent for the proceedings before the Collector's Court, and that they were sent up to him; and at page 218 of his Record we find that there is what is said to be an authenticated copy of the document in the proceedings. But that document was not a certified copy, and there is no evidence whatever to show that it had ever been examined by any witness with the original document, which was said to have been at one time in the Collector's office.

Their Lordships, therefore, are of opinion that there was no sufficient evidence of the loss or destruction of the original, and no sufficient secondary evidence within the meaning of the Evidence Act.

Even if parol evidence were admissible as secondary evidence, their Lordships cannot rely upon such evidence as was given in 1881 with reference to the contents of a document which had been exe-

cuted forty years previously. The only witness who was an attesting witness says that he recollects a document being executed, but he cannot say whether it contained the words which amount to a devise over to the daughter and her son. There is no evidence on the part of the attesting witness that the document did contain a devise, and there is only the evidence of witnesses who can hardly be supposed to have known at the time, or even if they did know at the time, to have recollected the contents of a document by which it is contended that the estate of this gentleman was alienated from him by the will of his grandfather.

Then, again, it was stated that, at the time of the making of the will, the second daughter's son was born, and that the child was in the lap of the mother when her father gave the power to his widow to adopt, and also devised his estate to the daughter and her son in case the widow should not adopt. From the contents of the document it appears that the testator was not speaking of a son to be born, but of a son who was then actually in existence. From the evidence which was given it appears to be clear that at the time Goluck Nath executed this document, giving his widow power to adopt the child, Anand Sunder was not in existence. The High Court have very carefully gone into the evidence upon that subject, and they have shown conclusively that the child was not in existence at the time when the document is alleged to have been executed.

Looking, then, to all the evidence in the case, their Lordships are of opinion that the High Court, who gave a very carefully considered judgment and weighed the evidence with great care, came to a right conclusion upon the evidence, that the will was not executed by Goluck Nath, and consequently that the plaintiff is entitled to recover his half share, and that the judgment of the High Court ought to be affirmed.

Their Lordships will, therefore, humbly recommend Her Majesty to affirm the judgment of the High Court, and the appellant must pay the costs of the appeal.

Appeal dismissed with costs.

Solicitors for the appellants: Messrs. *Barrow & Rogers.*

Solicitors for the respondent: Messrs. *Sandrson & Holland.*

2nd and 3rd March 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Watson, the Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, and the Right Hon. Sir Barnes Peacock.

On Appeal from the High Court at Bombay.

WAGHELA RAJSANJI* ... *Defendant.*

and

SHEKH MASLUDIN AND OTHERS. ... *Plaintiffs.*

Guardian and ward—Inability of guardian to contract on behalf of infant ward so as to bind him personally—Effect of Act VI of 1862 (Bombay), Sec. 12, in regard to a charge upon a talukdari estate in the Ahmedabad District during the period of management.

A guardian cannot contract in the name of a ward, so as to impose on him a personal liability.

Act VI of 1862 (Bombay), "for the amelioration of the condition of tálukdárs in the Ahmedabad Collectorate and for their relief from debt," was intended to deal with all debts and liabilities which could possibly impose a charge upon the *tálukdári* estate at the end of the period of management; when the estate was to be restored to the *tálukdár* free of incumbrance, excepting the Government revenue. If debts amounted to more than the surplus of rents during the management, of which the maximum period was twenty years, they were not to be paid.

* I. L. R. 11 Bom., p. 551; 14 Cowell's p. 63.

A widow, as guardian of her infant son, the heir of a *tálukdári* estate in the above district, validly transferred villages, part thereof; and in the deed of transfer, to which her ward was by her as his guardian nominally a party, contracted to indemnify the purchaser in case the Government should claim and enforce a right to revenue upon the villages which she transferred as being rent-free. The deed purported to make both guardian and ward personally liable in this respect, and also charged the liability upon other parts of the *tálukdári* estate. The infant attained majority, and the estate was then placed under management, within Act VI of 1862. During the period of management the Government claimed and enforced payment of revenue upon the villages.

Held, that there was no personal liability on the part of the *tálukdár* created by the above; also, that if the charge on the estate had been validly made, it fell, at all events, within the terms of section 12 of Act VI of 1862, absolving estates from liability for debts incurred, not only before, but during the period of management.

APPEAL from a decree (1st March, 1883,) of the High Court, in part affirming, and in part varying, a decree (17th March, 1880,) of the Subordinate Judge of Ahmedabad.

The questions raised by this appeal related to the liability of the appellant, who was defendant in the suit, to answer, as well personally as out of the rents and profits of a *tálukdári* estate, upon a contract purporting to have been made on his behalf with the plaintiff by the *tálukdár's* mother, as his guardian, on his behalf during his minority.

By deed, in 1858, the mother and guardian conveyed villages, part of the *tálukdári* estate, in liquidation of debts chargeable thereon, to the father and grandfather of the plaintiff in this suit, as rent-free, agreeing that, in case the villages should be assessed to Government revenue, the guardian and ward should be liable to pay to the purchaser the amount with costs; this liability being also charged upon other parts of the *tálukdári* estate. The villages were afterwards declared subject to assessment for revenue. The present respondent having obtained a decree upon the contract to indemnify him, this appeal questioned its correctness, both in regard to the law of guardian and ward, and to the provisions of Act VI of 1862 (Bombay).

The defendant's father, Sewsanji Rhemábhái, was *tálukdar* of Kuvar, in the district of Ahmedabad. He died in 1846, having become indebted in Rs. 21,001 to the plaintiff's grandfather, Ghulám Rasul, who obtained a mortgage of his "*vántá*" land, and in 1856 and 1858 obtained decrees against Bái Rambá, the widow of Sewsanji. She, to satisfy them, transferred to him two villages. The parties to the deed of transfer, dated 9th May, 1858, were the widow, who, as the appellant's mother and guardain, signed for him as well as herself, and the abovenamed Ghulám Rasul, with his son, Ghulám Mohidin. The deed contained the following contract by Bái Rambá for herself and her son:—

"We have absolutely sold to you the land of the abovementioned *vántá* of Kuvar, which is rent-free *(nakra)*, including the above-mentioned two villages. The Government, &c., have no right of any kind whatever over the same. And our heirs and our *karajdárs* (creditors) and neighbours or any other persons whatever have no right, claim or interest of any kind whatever. And if any one should raise any claim or title to the same, it is all null. If any one should raise any obstruction or impediment to this *vántá* land and to the population of these two villages, we and our heirs are to be answerable. And if any claim or demand should be made by Government, &c., we and our heirs are to pay the same from our house amicably *(i. e.)* from our other property, which consits of *girás*, &c., and from our persons and from our inheritance, because we have absolutely sold this *vántá*, which is rent-free *(nákra)*, including the two villages. Therefore, if the Government, &c., should make a claim in any way whatever, and resolve to levy *hak* (dues) of any kind whatever, and make a demand on you, and if you should have to pay (the same) and such costs as you may incur and such loss as you may sustain in giving an answer in respect thereof, all those moneys and the interest on those

moneys we and our heirs are to pay to you. And on account thereof and in security for the same we have given in writing to you as security *(sáu)* for this deed our other *vántás (i. e.)* our *vántá* of the two villages of Manja Daran, Mainja Rupavati Khareti, which are our *nákra* (rent-free) *vantas*, and besides these our other *giras*, and besides that our other property and *giras*, &c., which there are *(i. e.)* all those. You are to recover your money from the said property, &c., and from our persons."

In 1862 was passed Act VI of that year. The preamble recited that *talukdari* estates in the zilla of Ahmedabad were then only held on leasehold tenure determinable by the Government, to whose notice it had been brought that many of them were indebted for money borrowed on the security of their estates; of which such as were of *talukdari* tenure could not be lawfully charged, incumbered, or alienated. The Act empowered the Governor General in Council to make a declaration having the effect of vesting the management of a *talukdari* estate in a Government officer for twenty years, during which period that officer, receiving the rents and profits of the estate, should meet the claims of the Government, the cost of maintaining the *talukdar* and his family, and apply the balance to the expenses of management and the settlement of debts. The 8th section directed the officer to notify to creditors to make their claims within three months from such notice. The 9th section was as follows:—

"Any debt or liability of the *talukdar*, other than as aforesaid, to which he is subject, either personally or in respect of the said landed estates, existing at the time of the said declaration by the Governor in Council not duly notified to the said officer or officers within the time and in the manner in the last preceding sections specified, shall and is hereby declared to be for ever barred: Provided always that upon proof being given to the satisfaction of such officer or officers of the inability of the claimant to have complied with the provisions of this and the last preceding sections, it shall be lawful for the said officer or officers, to entertain and admit such claim within the further period of nine calendar months from the expiration of the abovementioned period of three months."

The 16th section enacted that such management should in no case extend beyond twenty years from the publication of the declaration vesting the estate, and that on its cessation, at or before the expiration of that period, all debts and liabilities, except those to Government, existing at the time of such declaration, and comprised in a scheme for the "payment of the *talukdar's* debts to be under the 10th section prepared by the managing officer and approved by Government," should be deemed to be fully discharged and satisfied.

And the 20th section declared that, on the expiration of the period of management, the *talukdar* should be the absolute proprietor, subject to land revenue.

The 12th section, to which special reference is made in the judgments of the Courts below, related to debts and liabilities "incurred" by the *talukdar* during the period of management, and was as follows:—

"Any debt or liability, except as herein before excepted, which may be incurred by the tálukdár, either personally or in respect to his said landed estates or any part thereof, during the period of such management as aforesaid, shall not be enforceable in any manner whatever, either during or subsequently to such period of management, against his said landed estates or any part thereof, and it shall not be competent for the tálukdár during the said period of management to charge, incumber, sell or alienate his said landed estates or any part thereof, and such charge, incumbrance, sale or alienation shall be null and void."

This appellant attained the age of sixteen years in February, 1863; and on the 20th August of that year a declaration was published by the Governor in Council, under the Act, directing the

Talukdári Officer to take charge of the appellant's táluka of Kuvar.

This was accordingly done, and on the 13th October, 1863, that officer published the notice, directed by the 8th section of the Act, calling on all persons having claims on the *talukdari* estate of Kuvar to notify them to him within three calendar months, on pain otherwise of their being barred.

Ghulám Rasul, or Ghulám Mohidin, did not within that period give notice of any claim or liability.

In March, 1868, this appellant sued Ghulam Rasul and Ghulam Mohidin to recover possession of the villages, on the ground that his mother had no authority to sell them during his minority. The High Court, however, on the 15th July, 1870, affirmed a judgment dismissing the suit, on the ground that the sale was *bonâ fide*, having been for the benefit of the minor. While that suit was pending, and in the course of the years 1870-71, the Collector of Ahmedabad assessed the villages at Rs. 2,000 *per annum* for revenue, with Rs. 125 for local cess. To establish his right to hold them rent-free, Ghulam Mohidin, his father being then dead, sued the Collector in 1872, but failed to prove them rent-free, except as to *bighas* 755½. In that suit, neither this appellant, nor the Talukdari Officer, were made parties.

The present suit (13th July, 1876,) was brought by the sons of Ghulam Mohidin to recover, as a charge on the *talukdari* estate in possession of the appellant, and from him, as being personally liable, the sum of Rs. 28,998-15-11. That amount was made up of Rs. 12,000 paid by their father for Government revenue, Rs. 750 for local cess, and the residue for costs incurred in the two suits above mentioned, and interest on all the items of claim.

The defendant (now appellant) contended that he was not bound by the contract purporting to have been made on his behalf, and he relied on Act VI of 1862.

The Subordinate Judge (17th March, 1880,) held that the defendant was by the former decision against him (January, 1875,) barred from disputing the validity of the deed of the 9th May, 1858, and that "its terms were in every way binding on the vendor." That the plaintiffs were entiled to recover under the contract what had been paid for the Government revenue, but not the interest. The Judge held that the sum of Rs. 12,750, from the defendant personally, and from his movable property, was recoverable under the contract of 1858, but that the *talukdari* estate was not chargeable.

On appeal, the High Court held that the sum claimed in respect of the local-fund cess, imposed under Act III of 1869 (Bombay), was not recoverable. This tax was not of the same kind as the land revenue, and was not within the contemplation of the contract entered into in the deed of 1858.

Upon the question whether the claim was barred by the operation of Act VI of 1862, the judgment was as follows:—

"It is true that the main object of that Act was to relieve such of the *talukdars* of Ahmedabad, as are, under its 1st section, brought under the operation of the Act, from debt. But it is not quite exclusively devoted to that object. It also indicates an intention that their creditors should, to a certain extent at least, if not in full, be paid. This is apparent from sections 8, 9. 10 and 11. The 8th, 9th and 10th sections lead us to conclude that the debts and liabilities intended to be dealt with under the Act are such as might be the subject of a claim under section 8. Such a claim should ordinarily have been sent in within three calendar months after the notification mentioned in section 8, or, under special circumstances, within the further period of nine calendar months from the expiration of the three calendar months. The defendant Raisangii and his estates were, by a declaration under section 1, brought under the operation of the Act before the 20th August, 1863. It is admitted that the non-*vanta* land, which passed to the vendee under the deed of sale of 1858, was not assessed until *Samvat* 1927, (A. D. 1870-71), some six or seven years after the issue of the noti-

fication under section 8. Therefore the plaintiffs, or their ancestor, had not at the time of the notification, or at any time within twelve months afterwards, any claim which they could have preferred to him against Raisangji or his estates, or which could have been included by the Settlement Officer in the scheme for the settlement of the defendant Raisangji's debts and liabilities to be prepared by that officer and submitted to the Governor in Council, or which could be described, in the language of section 16, as existing at the time of the declaration made under section 1. The claim under the covenant in respect of land assessment was only then, at the utmost, a contingent claim."

The Court then postponed giving judgment, that the Talukdari Settlement Officer might be made a party to the suit; as, without this, they preferred not to make an order affecting the estate.

The Talukdari Officer having been made a party, the case came up again for argument before another Division Bench (Sargent, C. J., and Melvill, J.,) which, on the 1st March, 1883, delivered the following final judgment:—

"We concur in the opinion expressed by Westropp, C. J., and Birdwood, J., that the 'liabilities' with which the first ten sections of Bombay Act VI of 1862 were intended to deal, were liabilities which, at the time of the declaration mentioned in section 1, were not merely contingent, but could be made the subject of an immediate claim. Such was not the liability which the plaintiff now seeks to enforce. The only remaining question is, whether it is such a liability as is contemplated in section 12. We think that it is not. A careful consideration of the whole section leads us to the conclusion that the word 'incur' is used in its proper sense of 'run into,' and implies an act done by the *talukdar* during the period of the management. The section seems to be intended as a warning to money-lenders that, if during the period of management they lend money to the *talukdar*, they must be content with his personal security. The case with which we have now to deal, *viz.*, that of a debt or liability to which the *talukdar* has become subject during the period of the management, in consequence of an event which could not be foreseen with certainty at the commencement of that period, is a case which does not appear to have presented itself to the mind of the Legislature, and must be treated as a *casus omissus* in the Act. Under this view there is nothing in the Act to prevent us from giving effect to the contract between the parties, and we, therefore, enter judgment for the plaintiff for the sum of Rs. 12,000, with interest at 9 *per cent. per annum* from the date of each payment composing that sum up to date of this judgment, and 6 *per cent.* to date of execution, the amount to be recovered from the defendant Raisangji's property generally, as well as from him personally."

The defendant having preferred the present appeal against the above judgment.

Mr. *R. V. Doyne*, for the appellant, contended that the contract to indemnify the purchaser was not binding on the appellant, upon whom his guardian could not impose a personal liability. The charge, also, on the *talukdari* estate was inoperative, being barred as a claim against the estate, by the effect of Act VI of 1862, with special reference to section 12. The High Court had incorrectly construed this Act, unduly limiting its scope.

Mr. *J. D. Mayne* and Mr. *L. Wilkin*, for the respondent, argued that as the continuance of the villages to be rent-free was an essential element in a contract of purchase, a contract which under the law as declared in *Hunoomanpersud Panday* v. *Mussumat Babooe Manraj Kooweree* (1) the guardian of the minor had power to enter into on his behalf, the contract to indemnify was one binding on the infant; for whose benefit, also, it had been made. The charge upon one part of the estate was a direct benefit to another part; for, had not the assumption, incorrectly no doubt, been made

(1) 6 Moore's I. A. 393.

that the villages were rent-free, more land would have had to be transferred in satisfaction of the original debt. Liability to this claim might be regarded as the result occasioned by the proportionately less amount of land having been transferred. Again, as regards the effect of Act VI of 1862, this liability was not one to which that Act was applicable, inasmuch as it was liability which had to mature, and was not measurable in money when the management began; at which time, indeed, it might never have come into existence. By no act of the *talukdar's* was it incurred, and it was altogether outside the contemplation of the Act.

It was also argued for the respondent that the appellant was estopped by the former litigation in 1875 regarding the main contract of transfer; and the latter having been maintained, this liability, with everything that was of the essence of that contract, should have been then contested, or else must be taken to have been maintained along with it. The Court, in affirming the transfer, affirmed every part of that transaction on which it was based.

Mr. *R. V. Doyne* was not called upon to reply.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD HOBHOUSE.

In this case the appellant, who was the defendant in the Court below, is the *talukdar* of Ahmedabad; and the plaintiff, who is the respondent—there has been some change of title since, but throughout this judgment the plaintiff will be referred to as a single person—brought a suit to enforce a covenant which was entered into in the year 1858 by the defendant's mother and guardian on his behalf when he was a boy eleven years old. That covenant arose in this way. The plaintiff was a creditor of Sewsanji, the defendant's father, and the debt appears to have been one for which the *talukdari* family estate might be made liable. Under those circumstances, in 1858, an account was stated of the amount due to the plaintiff, which was found to be Rs. 35,001. In lieu of enforcing that debt by decree and execution, he took a conveyance from the mother and guardian, Bai Ramba, of a certain extent of the family land—the exact extent does not matter now. The validity and propriety of that transaction was challenged by the defendant after he came of age. It was the subject of a suit in the year 1868, and the result was to establish that the transaction was a valid one *bonâ fide* entered into by the guardian, and within the range of her powers. There is, therefore, no question in this suit as to the propriety or expediency of the sale of 1858; but the question is as follows. The family claimed to hold the conveyed land rent-free, and the guardian conveyed it as rent-free, and their Lordships must assume that it was valued on that basis. The purchaser was not content with the assertion of the family that in point of fact they paid no rent, though that seems to have been the fact, but he took a covenant from the guardian to indemnify him in case the Government should enforce their claim to receive rent out of the estate, and that covenant is framed so as to bind both the guardian and the infant, who was nominally by his guardian a party to the deed. That the covenant bound the guardian there can be doubt; but the question is, whether it could bind the infant *talukdar*. Unfortunately neither of the Courts below addressed themselves to this question, because they held that it had been already decided by the decree made in the prior suit.

Looking at the prior suit, their Lordships find that it was a suit to impeach the whole sale, on the grounds, first, that it was fraudulent, and, secondly, that it was beyond the powers of the guardian and manager. No question whatever was raised as to the validity of the guardian's covenant as against the infant. In fact, it is impossible that that covenant could have come into question, excepting as a subsidiary argument to show that the deed was an improper one, and then the curious result would be this: That the

more clearly that covenant was void in law, the less would be the force of the argument founded upon it. In point of fact, neither in the pleadings, nor in the decree in that suit can it be discovered that anybody paid any attention to the point which is now under consideration. Their Lordships, therefore, must hold that to be an open point in the present suit.

Now it was most candidly stated by Mr. Mayne, who argued the case on behalf of the respondent, that there is not in Indian law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exists in English law. In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances. Their Lordships are not aware of any law in which the guardian has such a power, nor do they see why it should be so in India. They conceive that it would be a very improper thing to allow the guardian to make covenants in the name of his ward, so as to impose a personal liability upon the ward, and they hold that in this case the guardian exceeded her powers so far as she purported to bind her ward, and that, so far as this suit is founded on the personal liability of the *talukdar*, it must fail.

That, however, is not the whole of the covenant. By way of security for its performance, the deed gives a charge upon the other *talukdari* estates, some specified *vanta* lands and *giras* lands, and the other property generally. Mr. Mayne reasoned on that in this way. He said the land was valued as rent-free; if it had been valued as subject to rent, the creditor would have insisted on having so much more of the land; therefore, family land is saved by valuing, as rent-free, the land actually taken, and it was not only reasonable, but within the compass of the guardian's powers, to deal with the remaining family land of which she was manager, so as to make it a security to the creditor against his loss by the Government exacting rent. The argument is one which is worthy of great consideration; but their Lordships do not wish to pronounce any opinion on it, or to subject it to any minute examination, because, assuming it in favour of the respondent to be a sound argument, they are clearly of opinion that, so far as regards the *talukdari* estate—and that is now the only part of the case which they have not dealt with—an answer to it is to be found in the terms of the Ahmedabad Talukdari Act, (Act VI of 1862).

In the opinion of the Subordinate Judge, the defendant in the suit was liable personally, but his estate could not be charged on account of the terms of the 12th section of the Talukdari Act. In the opinion of the High Court, he was liable both personally and as regards the *talukdari* estate, and their decree is founded upon that opinion.

The object of the Talukdari Act was to maintain the *status* and order of *talukdars*, which the Government, as a matter of policy, thought it important to maintain. They were a class of gentlemen who had been living beyond their means; they had got very much embarrassed, and they did not perform those political objects which the Government thought of great importance to have performed in various parts of the country. Many Acts of the kind have been passed relating to different parts of the country, and all with the same object. The method adopted was, where a *talukdari* estate had reached a certain pitch of embarrassment, to make a declartion placing it under the management of an officer who was to manage for a term of years, which might extend to twenty years. During that time he was to maintain the *talukdar* and his family, to pay all the expenses of the management, and then to apply the surplus to liquidate or settle the debts of the *talukdar*, in liquidation or settlement of the debts and liabilities to which at the time of the declaration the *talukdar* was subject, either personally or in respect of his landed estates. But at the end of the twenty years the estate

was to be restored to the *talukdar* absolutely, free of incumbrance, excepting the Government tax. If the debts amounted to more than the surplus rents during the term would suffice to pay, those debts were not to be paid at all. It may have been a very arbitrary way of dealing with creditors, but that was the policy of the Act, and in constructing the Act it must be remembered that it recites that the *talukdari* estates could not be lawfully charged, incumbered, or alientated. It is said that that recital was wrong. The High Court state it to be wrong, and they state, moreover, that it was put in merely as a justification to the Government for dealing in the summary manner in which they did with the creditors' rights. All that may be true. It may be true that the statement of the law is wrong, and the motive assigned may be true, for aught their Lordships know. But, supposing it is, it must be remembered that that was the idea in the mind of the Legislature, and all the provisions affecting creditors must be construed with reference to that idea, under which every benefit given to the creditor out of the *talukdari* estate would be in the nature of an indulgence, because he got something which he could not enforce by law.

Before examining what the enactments actually are, it would perhaps be convenient to state the order of events. The defendant attained his majority in August, 1863, and the order placing his estate under management was made very soon after-wards. The exact date does not appear, but it was towards the end of 1863. The Government claimed rent against the plaintiff in respect of the estate that he had bought in the year 1871, and this right to rent was finally established by decree of the High Court about the year 1875. At all events, the claim was made and fully established during the period of management of the Talukdari Officer, so that the dates lead up to this result, that, owing to the liability which was incurred in the deed of 1858, the plaintiff had a claim measurable in money against the defendant, perhaps as early as the year 1871, but at all events between then and 1875. It is not necessary to be more exact in the dates.

Now what does the Act provide? The preamble and the first nine sections deal with what they call existing debts and liabilities, and they deal with them in a very summary way. All processes by which any of them could be enforced are stopped, and, in lieu of those processes, the creditors have only the indulgence, which has just been mentioned, of receiving the surplus rents for a term of years. Section 9 enacts that "any debt or liability of the talukdar other than as aforesaid,"—(those words of exception may be dropped out, for they only refer to Government claims)—"to which he is subject, either personally or in respect of the said landed estates, existing at the time of the said declaration by the Governor in Council"—(that is, the order subjecting the estate to management)—"not duly notified to the said officer or officers," within a time specified, "shall and is here-by declared to be for ever barred." Then section 12 says that any debt or liability, with the same exception, "which may be incurred by the *talukdar*, either personally or in respect to his said landed estates or any part thereof, during the period of such management as aforesaid, shall not be enforceable in any manner whatever, either during or subsequently to such period of management, against his said landed estates or any part thereof." Here we have an Act designed to set up the order of *talukdars* in an unembarrassed state, and to restore them their land within a period of, at most, twenty years, and dealing first with debts and liabilities existing at the commencement of the period of management, and, secondly, with debts or liabilities incurred during the period of management. In such an Act their Lordships think it impossible to come to any other conclusion than that it was intended to deal with all debts and liabilities which could possibly impose a charge on the *talukdar* at the end of twenty years, and that to strain words from their literal ordinary mean-

ing for the purpose of showing that the liability now in dispute is one which does not fall within the compass of that Act, is an erroneous construction of the Act.

The High Court have given the plaintiff a decree on this ground, that the debt that he claims does not fall into the first class of debts and liabilities, because it was not existing when the period of management commenced; and that it does not fall within the second class, because it was not incurred during the period of management. The result is this, that because when the management commenced there happened to be no means of reducing the liability into a claim measurable in money, and because the *talukdar* did not, during the period of management, do some voluntary act to incur a fresh liability; therefore at the end of twenty years a great burden remains upon the estate. Their Lordships think that is not only contrary to the policy of the Act, but a departure from the obvious literal plain construction of the words. It may be true, and their Lordships think it is true, that when the management commenced, the liability was not one that was measurable in money. It may not have been the subject of a claim against the estate, though that point would seem to depend on the nature of the rules made by the Governor in Council for the liquidation of debts. But it does not follow at all that it was not a liability which section 9 was calculated to bar. All liabilities were to be notified; and even if there were any so situated that the creditor could get nothing, the intention of the Legislature to bar every liability that existed then is, as their Lordships think, a plainly expressed intention.

Then, as to section 12, the debt must have been incurred at some time; otherwise it could not be recovered. When was it incurred? According to the reasoning of the High Court, it never was incurrred. There was no debt when the period of management commenced, and no debt was incurred afterwards, because there were proceedings, to which the *talukdar* was no party, which converted the liability into a money claim. Their Lordships think that that is not the meaning of the word "incurred." It is not the common meaning of the word "incurred." Incur means to run into, no doubt, but it is constantly used in the sense of meeting with; of being exposed to; of being liable to; and in that sense the *talukdar* did incur debt. The liability was inchoate in the year 1858, and it reached its maturity some time between 1871 and 1875. If it was not a liability existing in 1863, when the period of management commenced under section 9, then it must be either a debt or liability incurred during the period of management. It is not necessary to decide under which section the case falls. Their Lordships incline to think that it falls under section 9, but they are quite clear that if it does not fall under section 9, it must fall under section 12. In either case the Act is sufficient to relieve the *talukdari* estate, which is the only point in question at this moment.

The result is, that their Lordships think that the High Court ought to have reversed the decree below, and to have dismissed the suit with costs, and they will humbly advise Her Majesty to make that decree. The respondent must pay the costs of this appeal.

Their Lordships are sorry to find that this record contains what they so often observe upon, namely, and enormous mass of matter which could not by any possibility be of use upon this appeal. They would wish to call the attention of the Courts in India again to that circumstance, in the hope that they may find some remedy against that which is a serious mischief in increasing costs.

Appeal allowed.

Solicitors for the appellant:—Messrs. *Walker and Whitfield.*

Solicitors for the respondents:—Messrs. *Thomas and Hick.*

3rd, 4th and 30th March 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Watson, the Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, and the Right Hon. Sir Barnes Peacock.

On Appeal from the High Court at Bombay.

ABDUL HOSSEIN ZENAIL ABADI AND ANOTHER* } *Defendants.*

and

CHARLES AGNEW TURNER OFFICIAL ASSIGNEE ... } *Plaintiff.*

Compromise by official trustee—Insolvent Act 11 and 12 Vic., C. 21, Secs. 28 and 29—Charges with a view to establish fraud—Practice—Pleading—Amendment of pleading—Fraud—The fraud charged in the pleading must be proved, and not fraud of a different kind—Restriction of power to amend

The account of an estate, formerly in the hands of a derivative executor who became insolvent and died in 1856, having been pending in Court for many years, some of the parties being interested in the original estate and others as the insolvent's creditors, a compromise was effected, under which a suit, brought in 1858 by the official assignees representing the deceased insolvent, was dismissed by the consent of parties in 1875. Part of a sum of money, paid to the credit of the insolvent's estate in pursuance of the compromise, was made over, upon the passing of the consent decree, with the knowledge of the assignee, but without notice to, or the sanction of, the Court, to a person who had assisted in taking the account. From the representatives of the latter, he being now deceased, the successor in office of the assignee claimed repayment.

In regard to the facts that he was neither a party to, nor had any control over the compromised suit; that he owed no duty to the Court in respect of it, nor to the creditors of the estate; and that he had taken nounfair advantage of the assignee;

Held, that there were no grounds upon which this repayment could be claimed.

The plaint, as presented, alleged the fraudulent concealment of the payment from the assignee. Afterwards, when all the evidence had been taken, and it had been established that the assignee knew of the payment, this was amended to the statement that if he did know of it he had no power to consent to it, and that his consent would not be binding, the payment being a fraud upon the Court.

Held, that the amendment at the stage when it was made was not permissible.

It is a well-known rule, that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged, another kind cannot, on failure of proof, be substituted for it.

The High Court having decreed the claim on a finding of fraud different from either of the above, *held*, that on this ground alone the judgment might have been reserved.

On the latter point, *Montesquieu* v. *Sandys*(1) referred to and followed.

APPEAL from a decree (9th May, 1885,) of the High Court, reversing a decree (21st September, 1883,) of the High Court in Original Jurisdiction.

The suit, out of which this appeal arose, was commenced on the 25th January, 1881, by the official assignee, representing the estate of Aga Mahomed Rahim Sherazi, who died in 1856, to recover from the present appellants, as heirs and representatives of Háji Zenail Abádi, who died in 1878, Rs. 1,50,000, with interest, on the ground that, having been unlawfully received by the Háji, it was repayable by his representatives.

By the Appellate Court below this claim was held good; and by the decree, against which this appeal was preferred, the appellants were ordered to repay to the official assignee the amount, with interest, amounting to Rs. 2,80,089.

The long litigation, to which the transanction at present in dispute was a sequel, was as follows:—In 1820 Mahomed Ali Khán died, leaving, as executor of his will, Agá Mahomed Shustri, who also died, having appointed as his executor the above-named Agá Mahomed Rahim Sherázi: see *Aga Mahomed Rahim's* case(2). A suit brought by the heirs of Mahomed Ali Khan in the late Supreme Court was revived in 1834, and a decree for an account was made. In 1846 under a decretal order a large amount of

* I. L. R., 11 Bom., p. 620; 14 Cowell's p. 111.

(1) 18 Ves. Jun., 302.
(2) Sir E. Perry's Or. Cal., p. 1, (Bom., 1853).

property in Bombay, including the Mazagon Dockyard, was attached, as belonging to Aga Mahomed Rahim Sherazi, who became insolvent, and died in 1856. On the 16th July, 1857, an order of Her Majesty in Council directed that the accounts, which purported to have been taken, should be taken again, and thereupon much assistance was given in this matter by Haji Zenail Abadi, a friend of the deceased executor, who had promoted the appeal, and acted after his death as guardian of his children.

The official assignee, Mr. O. W. Ketterer, filed in 1858 a supplemental suit, on which were made further orders relating to the accounts, the taking of which proceeded so slowly that in the year 1866 less than a twenty-fifth part of accounts, or only 4 items out of 103, had been investigated. The position of matters in 1870 was that the heirs of Mahomed Ali Khan had not received their inheritance, *viz.*, the Mazagon property and the accumulations of rent, then in the hands of the official assignee as receiver; and neither the creditors of Mahomed Rahim Sherazi, nor his family, entitled next after them, were receiving anything. In 1870, when Mr. H. Gamble was assignee, a settlement supported by the influence of Sir Salar Jung of Hyderabad, a relation of the Sherazi family, was proposed; whereby the assignee was to receive Rs. 65,000 in discharge of the claims of creditors, and Rs. 10,000 for his commission; also Rs. 1,50,000 was to be paid to Haji Zenail Abadi, and any surplus was to be for the benefit of the family of Mahomed Rahim Sherazi.

This agreement, however, in consequence of other claims coming up, was prevented from being carried into effect. In 1871, Ali Akbar, a creditor of the estate of the insolvent, sued for an injunction restraining the official assignee from carrying it out. A similar suit was brought by a member of the Shustri family, Abdul Latif. Ali Akbar was admitted as a creditor; the effect being that the estate, with the addition of the above-mentioned sum, would no longer have met the creditors' demands.

In 1875, negotiations were renewed, and a compromise was arranged on the basis of the terms of 1870, the claimants under Mahomed Ali Khan Shustri agreeing to pay to one Mahomed Takki Khan, who claimed to intervene in the suit of 1858, Rs. 60,000. With this addition to the Rs. 2,25,000, before agreed to be paid, terms again were settled. The result was that a consent decree was made on the 12th July, 1875, in the suit of 1858, whereby it was, in effect, ordered that out of the sum in Court to the credit of the suit of 1858, then consisting of Rs. 3,84,126, or thereabouts, there should be paid to the official assignee, the plaintiff in the suit, or his solicitor, the sum of Rs. 75,000 (of which Mr. Gamble, the official assignee, should be allowed to retain for his own use the sum of Rs. 10,000) and all his costs. The balance of the fund after these payments to be made over, as also the Mazagon property to be transferred, to the defendant Abdul Latif Khan Shustri; and the plaintiff's claim to be dismissed.

This fund was accordingly made over to the solicitors, Messrs. Keir, Prescot, and Winter, for the plaintiff, and they paid, on the 28th August, 1875, Rs. 1,50,000 to Haji Zenail Abadin.

The sanction of the Insolvent Court was not applied for, and no mention of any payment to Zenail Abadin or of any payment other than the Rs. 65,000 and Rs. 10,000 paid to the official assignee, was made to the Court when the consent decree was obtained.

Out of the sum of Rs. 65,000 received by the official assignee on behalf of the creditors he paid a dividend at the rate of 50 *per cent.* to those of the creditors then claiming in the insolvency who succeeded in making good their claims.

In 1877 Mr. Gamble died, and in August of that year the respondent was appointed official assignee, in which capacity he received and distributed

Rs. 27,000, the balance of the Rs. 65,000 remaining.

In July, 1880, the respondent became aware of the payment of Rs. 1,50,000 to Zenail Abadi, and thereupon requested his representatives to repay the sum to him. This not being done, he instituted the present suit against the appellants, and other formal defendants, on the 23rd January, 1881, claiming Rs. 1,50,000 and interest at 9 *per cent.* The defence mainly was that the payment to Zenail had been made under a legal compromise known to the official assignee in 1875. The case for the plaintiff at first alleged was that the payment of the money to Zenail Abadi was fraudulently concealed from the official assignee. Afterwards by an amendment made on the 31st July, 1883, after the evidence had been heard, the claim was based on the payment having been one to which the official assignee had not effectively consented, even if he was aware of its being made, "and that he had no power to consent to the same, and such consent could not be binding on his successor;" the ground ultimately taken up being, in brief, that Zenail Abadi had acted in relation to the suit of 1858 as agent for the assignee, holding in consequence a fiduciary position towards him and the creditors; so that he could not equitably derive any personal benefit from the estate without payment in full of the creditors.

The Judge of the Original Court, Scott, J., stated his opinion that the Insolvent Court, had it been informed of the proposed payment of Rs. 1,50,000 to Zenail Abadi, would have ordered distribution of the whole fund; giving the residue only to the Shirazi family after payment of the creditors in full. But the question in reference to the compromise could not be determined upon that consideration alone. Compromises required that persons in a fiduciary relation to their principals should make full disclosure of every material fact that might affect the interests of the latter; and that they should not derive, by making them when they were in a fiduciary relation, any personal profit—*Brooke* v. *Lord Mostyn*(1) and, in India, *Bibee Solomon* v. *Abdool Azeez*(2); but to set aside a compromise on the ground that such disclosure had not been made, or that such profit had been made, required that the fiduciary relation should be shown to exist; and here it had not been established by the evidence. And unless grounds, good in equity, were found, the parties could not be released from an agreement made to avoid the expense and delay of a long inquiry in the Courts of law. Zenail was in no fiduciary relation towards the creditors, or the assignee; he was no party to the suit; and no duty was imposed upon him to inform the Court of the agreement by which he was to benefit, nor was he precluded from deriving benefit. The duty of informing the Court was upon the official assignee, but there was nothing to show that Zenail acted in collusion with him, or took any undue advantage of him. From the time when the suit was revived down to the date of the final settlement in 1875, Zenail was acting as much in the interests of the Shirazi family as in the interests of the creditors; and neither before nor after 1870 was invested with any fiduciary character as regards the creditors. In and after 1870 the parties were separately represented, their diverse interests appearing in a clear light.

The conclusion of the judgment was as follows:—

"To sum up, I do not think it is proved (1) that Zenail held any confidential position towards the official assignee. He assisted in the suit, but that was in his own interest. Nor do I (2) think that he was guilty of any improper concealment. It was not his duty to inform the Court. He had no *locus standi* in the eyes of the Court.

"He may have got, and I think he did get, more than his share. He may also

(1) 2 De Gex, J., and S., 373; 33 Beav., 453; 34 L. J., Ch. 65.

(2) I. L. R., 6 Cal., 687 at p. 700.

have appropriated to himself what was intended for those he represented.

"In the first case a suit might have been brought within three years of the knowledge of the official assignee, but that knowledge began in 1875, and the suit is now barred, there being no fraud on the part of Zenail by the Statute of Limitation.

"In the second case it was for the Shirazi family to take steps. The parties to the present suit are not in any way interested.

"Before concluding, I should like to say one word in favour of Mr, Gamble. His answer was, when he was told of the 1½ lakh, that it did not matter, as the claims of the creditors were covered by his payment. They were tolerably covered.

"Mr. Gamble admitted a claim of Rs. 55,000 in 1875, but of the other claims in the schedule the only good ones were, one for Rs. 800, and another which was finally settled for Rs. 5,000.

"Thus the sum he agreed to receive covered the principal of the claims he had to meet.

"He held erroneously, I think, that in no case could claim be entitled to interest.

"The claim which is behind the present suit had not then been brought forward. I think Mr. Gamble was justified, in the case of an insolvency twenty-five years old, in judging of the liabilities as they were to be found in the schedule. Then, further, he knew how impossible it was to hope for any conclusion of the suit in the ordinary course of law. That being the case although he was blameworthy in not stating all the material facts to the Court, still he may have honestly thought the course adopted a fair and just one to all parties concerned.

"In conclusion, I would state my satisfaction that the facts have obliged me to decide on the *beati possidentes* principle. It would have been impossible to put the parties back in their original position. Zenail is dead. His money is dispersed. For eight years this sum has been dealt with as rightfully received. Moreover, the creditor who has put the present official assignee in motion has been most dilatory. His claim accrued in 1867. He proved it in 1878. He was aware, in 1875, of the payment he alleges to be fraudulent. He only informed the official assignee of it in 1880. No claim has been advanced by any other creditor.

"Suit dismissed, but I think the question was one of such doubt as to justify the official assignee in bringing the suit."

This was reversed by the High Court in its appellate jurisdiction (Sir C. Sargent, C. J., and Pinhey, J.). After a statement of the facts, (as they were afterwards set forth in their Lordships' judgment on this appeal,) the High Court proceeded thus :—

"The learned Judge in the Division Court held that Zenail Abadi's conduct at no time invested him with a fiduciary character (more especially not so after 1870) either towards Mr. Gamble or the creditors, being, as he held, an outsider, and not a party to the suit, and that he was entitled to make any terms he could with Abdul Latif without the consent of the Court, and accordingly dismissed the plaint.

"Now it is not in dispute that the suit, which was originally instituted in 1858 in the name of Mr. Ketterer, the then official assingee of the Insolvent Court, originated with Zenail ; that he set Mr. Ketterer in motion by giving him an indemnity for his costs ; and, according to the evidence of Pandurang, chief clerk to Messrs. Acland, Prentis, and Bishop, brought the suit to that firm. It further appears, from Zenail's own affidavit of 20th March, 1861, that his connection with the suit was as the agent of the Shirazi family, whilst admitting that he had a personal interest in it as a means of recouping himself the advances alleged by him to have been made to Messrs. Acland, Prentis, and Bishop to prosecute the appeal to the Privy Council. Lastly, the bill of costs of Messrs. Acland, Prentis,

and Bishop, who throughout the suit acted as solicitors for the several official assignees who succeeded one another as plaintiffs on the record, as well as the evidence of Mr. Prentis, who managed the suit, shows that the prosecution of the suit was left almost entirely by the official assignees to Zenail, and that he was regarded by the solicitors as the agent of the official assignees, upon whose instructions they were entitled to act, and in fact did so up to 1870, after which period nothing further was done in the suit beyond carrying out the compromise. The fact that the accounts were in Persian, and required special knowledge, necessarily threw the active conduct of the suit into Zenail's hands, so much so that we find Mr. Prentis saying that Zenail was regarded as the real plaintiff by the defendants.

"Under these circumstances it can scarcely, we think, be doubted that Zenail occupied a fiduciary position towards Mr. Gamble, even if he cannot be regarded strictly as his agent, as he would appear to have been by Mr. Gamble's solicitors, a position which demanded from him perfect good faith in the conduct of the suit, including the compromise of it, and entirely prohibited his deriving any advantage from it for the Shirazi family, as distinct from the creditors behind the back of Mr. Gamble. As, however, it was not disputed that, after Mr. Prescot gave his evidence, it must be taken as a fact in the case that whatever may have been the extent of Mr. Gamble's knowledge in 1870, in 1875 Mr. Gagmble was acquainted with the intention that Zenail should receive Rs. 1,50,000 from the Shustri family, and that he assented to it, the transactions, so far as the question turns upon the fiduciary relationship between Mr. Gamble himself and Zenail, can only be impeached on the ground that Mr. Gamble's consent was obtained under circum stances amounting to fraud.

"The question for decision, however, does not, in our opinion, rest exclusively on the fiduciary relationship between Mr. Gamble and Zenail, but also on the larger principle that an insolvent, (and such was virtually the case here, Zenail having on his own admision, acted as agent for the insolvent family, although, possibly, with the view to his own interest), who has set the official assignee in motion with a view to enforcing a claim against a debtor to the insolvent estate, and has taken an active part in the prosecution and compromise of the suit instituted for the above purpose in the name of the official assignee, cannot derive any benefit from such suit, except on the condition of acting in perfect good faith to the creditors. His deriving any benefit from the suit, except on that condition, would, in our opinion, be a fraud on the creditors and on the Act itself, and a Court of Equity would properly regard him as holding any such benefit as a trustee for the insolvent estate."

After going through the evidence the judgment concluded thus:—

"Upon the whole, we are forced to the conclusion that the transaction by which Zenail obtained Rs. 1,50,000 was not only the result of pressure fraudulently brought to bear on Mr. Gamble, but that it was a fraud on the creditors, of which the Shirazi family, whom Zenail reprsented in the transaction, cannot take advantage; and, lastly, that the case attempted to be made for the defendants, that Mr. Gamble was obliged to accept the Rs. 65,000 for the creditors or nothing, as the Shustri family would not give him any more, is not established by the evidence; such being the case, it follows that the Rs. 1,50,000 so paid to Zenail in his character of the representative of the Shirazi family, out of the Rs. 2,25,000 at which the claim of that family in the suit had been, in our opinion, unconditionally compromised, ought to be restored to the official assignee for distribution under the Insolvent Act. Mr, Turner, who, as official assignee, now represents the body of creditors, says he never heard of the payment of the Rs. 1.50.000 to Zenail until 1880; and even Nabi Khan himself, although he may have had a suspicion that Zenail had been paid

something on the occasion of the compromise, acquired no knowledge which he could act upon until he obtained a copy of the receipt given by Zenail to Prescot and Winter for the Rs. 1,50,000 from a clerk in their office in 1878, before he left Bombay for Europe.

"The suit was filed in January, 1881, and the claim is, therefore, clearly not barred. We must, therefore, order that the Rs. 1,50,000, with interest at 9 *per cent.* (the money having been obtained by fraud), be paid to the plaintiff by the defendants in their character of representatives of the deceased Zenail.

"Defendants to pay plaintiff his costs of the suit."

On this appeal,

Sir *Horace Davey, Q. C.*, and Mr. *J. Rigby, J. C.*, (with them Mr. *J. D. Davenport* and Mr. *Jardine,)* appeared for the appellants.

Mr. *J. Graham, Q. C.*, and Mr. *Phipson Beale* appeared for the respondent.

For the appellants it was argued that the finding of the first Court, that no fiduciary relation existed on the part of Zenail Abadi towards the assignee, or the creditors, was correct. In this respect there was error in the judgment of the Appellate Court. Both the Courts below had rightly found that the assignee had assented to the payment being made to Zenail; and, on examination of the position of the former, it would appear that, so far as the transaction was the result of a compromise to which he was a party, as plaintiff in the suit, and to which he was a party obtaining payment in the part of the creditors' claims, he could not have objected to it without upsetting the compromise altogether. This view of the case, if correct, rendered the position of the present plaintiff untenable. He was approving and reprobating parts of the same transaction, *viz.*, the compromise, under which the consent decree had been made.

It was further argued that the receipt of the money by Zenail was now sought to be impugned without its having been shown that any rule of equity had been infringed. Zenail had made, and it was not denied that he had made, the best bargain that he could for himself, and this was what the first Court referred to as his having, perhaps, got more than his share; meaning that this sum was perhaps large relatively to the amount divided among the creditors. But even as to this the value of Zenail's services might well be considered. And, whatever the opinion as to this part of the case might be, it could not be affirmed that his acts of omissions amounted to fraud, either actual or constructive. It was impossible to make out that Zenail had participated in the assignee's breach of duty, if any breach of duty had occurred. Nor could it be held, as the High Court appeared to have held, that because Zenail had set the assignee in motion with a view to enforcing the claims of the Shirazi family, and had taken part in the proceedings, therefore he, Zenail, could not derive any benefit for himself, nor otherwise than as a trustee for the estate. There was no evidence of "pressure fraudulently brought to bear upon Mr. Gamble," nor of any colluding with him, nor of any other such conduct as would afford ground for inferring undue influence or fraud on his part. The reasons on which the Appellate Court founded its judgment, therefore, failed.

The amendment was also made under circumstances which supported the appellant's view of the case. The plaintiff succeding in office the assignee who had assented to the payment, at first alleged that his predecessor was not cognizant of the transaction.

This would have been a different and a stronger case had it been maintainable. The charge, however, of fraud, even when amended, could not, upon the facts, be maintained.

Reference was made to *Leeming v. Lady Murray*(1), as illustrating the present case by showing the general power to compromise under the English Bankruptcy Act of 1869. Also to 11 and 12 Vic., C. 12, secs. 28 and 29.

(1) L. R., 13 Ch. Div., 123.

The argument principally urged by Mr. *J. Graham, Q. C.*, and Mr. *W. Phipson Beale*, for the respondent, was that the sum made over to Zenail, without due authority, still belonged to the estate of the insolvents; the assignee's not having obtained the sanction of the Court being a most material circumstance from their point of view. They insisted, moreover, on a review of the evidence, that Zenail was in a fiduciary relation to the assignee, who, again, represented the creditors. To Zenail was left the whole conduct of the suit by the assignee, and Zenail's position was such that he was incapable of taking for himself any part of the funds that were put to the credit of the suit of 1858, without accounting for it, so long as any of the creditors remained unpaid. It was incompetent to the assignee to give up claims without the sanction of the Court whilst creditors who were not paid in full remained; and the unpaid creditors were not bound by his agreement so to do. It was his duty to protect them. Accordingly, it was incompetent to the assignee to assent to a transaction like the present; and, besides, the fact that the real terms of the compromise, including the payment to Zenail, were not made known to the Court when the consent decree was passed, was an indication of fraud.

Reference was made to *Luddy's trustee v. Peard*(1), where a solicitor for the trustee of a bankrupt was not allowed to hold, as against the trustee, an advantage obtained in a purchase effected by him upon knowledge gained while acting as solicitor for the bankrupt.

As to the position with refernce to the Indian Insolvent Act, see section 89 of the Act 11 and 12 Vic., *C.* 21, and *Turner* v. *Trelawny*(2).

Counsel for the appellants were not called upon to reply.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR BARNES PEACOCK.

The suit in which the judgment under appeal was pronounced, was instituted in the year 1881 in the High Court of Bombay, Original Civil Jurisciction, by the present respondent, as assignee of the estate and effects of Mahomed Rahim Shirazi, an insolvent, against the heirs and legal representatives of Haji Zenail, to recover, with interest, a lakh and a half of rupees, received by him under a compromise made in 1875.

The facts of the case, prior to the negotiations in 1870, may be shortly stated almost in the words of the judgment of the Appellate Court.

The suit arose out of litigation, dating far back as 1834, between two Persian families, who, for convenience sake, may be described as the Shustri and Shirázi families. A merchant of the Shustri family, Mahomed Ali Khán, who died in Bombay about 1820, left a relation as executor of his estate, who again appointed in his stead Mahomed Rahim Shirázi. A suit which had been brought by the Shustri family against the original executor for an account was rivived in 1834 against Mahomed Rahim Shirázi, and, in 1846, the Master in Equity, by his report, found Mahomed Rahim Shirázi liable to the estate for over eleven lákhs. This report was confirmed by the Supreme Court, and a decree passed on the 17th September, 1847, directing Mahomed Rahim Shirázi to pay the said amount. On appeal, however, to the Privy Council, in 1847, the accounts were ordered to be retaken. In the meantime, the decree had been executed against Shirazi, who had, in consequence, become insolvent, and filed his schedule. On leaving Bombay, which he was allowed to do after suffering imprisonment, he appointed the before mentioned Renail, a merchant of Bombay, as his representative, with a power of attorney, which, after his death in Persia in 1856, was renewed by his children.

The power of attorney by the children was dated 23rd December, 1857, and authorized Zenail to recover, hold, take care of, and guard, all the property to

(1) L. R. 33 Ch. Div., 500.
(2) 12 Sim., 49.

which they were entitled, and to appoint any other person as attorney.

In 1858, Zenail, in his representative character, urged the then official assignee, Oswald William Ketterer, to file a suit against the representatives of the Shustri family to have the accounts retaken in accordance with the direction of the Privy Council, and by a decree made on the 24th February, 1859, the suit was referred to the Master in Equity for the purpose of taking the accounts.

It may be mentioned that in the schedule filed by Shirazi, the insolvent, Mirza Mahomed Shustri and Bibi Mariam Begum were inserted as creditors or claimants for Rs. 11,74,459 (the amount decreed against him in the suit of 1834), with the following remark:—"Disputed. Amount due under a decree of the Supreme Court in a cause in the Equity side, wherein the detaining creditors were complainants, and the insolvent was defendant, as executor of the last will and testament of Aga Mahomed Ally Khan, deceased, whereby it is ordered that the said insolvent do pay into the hands of the Accountant General the sum of Rs. 11,74,459-0-65 reas, being the balance reported by the Master, in manner and at the periods following, that is to say, the sum of Rs. 1,00,000, part of such balance, on the 1st day of January now next ensuing the date hereof, and the like sum of Rs. 1,00,000 on the first day of each and every succeeding month until the sum of Rs. 6,00,000 shall have been so paid by the said insolvent to the said Accountant General, and that the said insolvent do pay the further sum of Rs. 1,00,000 to the said Accountant General on the 1st day of October next ensuing the date hereof, and the like sum on the 1st day of each and every then succeeding month, until the sum of eleven lakhs of rupees should have been so paid into Court, and the said sum of Rs. 74,459-0-65 reas, being the residue of the said balance, on the 1st day of March, which would be in the year 1848. On the 16th day of October, 1847, a writ of attachment was issued for non-payment of one instalment, and executed upon the insolvent, and since that the other writs have issued, under which the whole of his property has been sequestered and sold, but the insolvent does not know what amount has been realized, and has, therefore, inserted the whole amount decreed to be paid."

There is no difference of opinion between the two Courts either as to the terms of the negotiations of 1870, or of the actual compromise which was finally arranged in 1875.

Speaking of the negotiations in 1870, the Appellate Court say: "The result of those negotiations was a compromise, by which the defendants in the suit (*i.e.*, the Shustris) were to pay, in settlement of all claims whatsoever of the Shirazi family, out of the fund in Court, the sum of Rs. 2,25,000. Out of this sum the official assignee was to be paid, and the balance was to go to the family of Aga Mahomed Rahim (*i.e.*, Shirazi), and all the other property in litigation handed over and conveyed to the Shustri family. Mr. Keir, the then solicitor of the Shustri family, subsequently agreed with Mr. Gamble, who was then the official assignee of Shirazi, that he should receive Rs. 65,000 in discharge of his claims, and Rs. 10,000 in lieu of his commission. This compromise, however, was not carried out."

It appears from the 9th paragraph of the plaint that, at the time of the compromise, there were in the hands of the Accountant General of the Court, standing to the credit of the suit of 1834, Government promissory notes and cash of the value of about 4 lakhs of rupees, and in the hands of Mr. Gamble, the then assignee, who was also receiver in the suit, a valuable property in Bombay, known as the Mazagon Dockyard, also valued at about 4 lakhs.

To this property there were in 1870, and also at the time of the compromise in 1875, three distinct claims depending on the result of the suit. First, there was Abdul Latif, he represented the original plaintiff in the suit of 1834, and

who had originally obtained a decree for upwards of 11 lakhs of rupees. Secondly, there was Mr. Gamble, the assignee of Shirazi, who had inserted in his schedule as a disputed item (11 lakhs odd) decreed against him; and, third, there was Zenail, who represented the family of Shirazi under the power of attorney which he held from them, and against whom he probably had a claim for money advanced by him to carry on the litigation, but which was a matter entirely between him and the family of Shirazi, in which the assignee or the creditors had no concern.

"At the close of 1874 (as found by the Court of Appeal) negotiations were revived by Mr. Prescot, a member of the firm of Keir, Prescot, and Winter, who had succeeded to the management of the case of Abdul Latif Shustri on Mr. Keir's departure for England. These negotiations led to the original compromise of 1870 being carried into effect in 1875. Rs. 75,000 (made up of the Rs. 65,000 to meet the claims of creditors and Rs. 10,000 for Mr. Gamble's commission) were paid to Mr. Gamble, the suit was dismissed, and the balance of Rs. 1,50000 was paid to Zenail Abadin as representing the Shirazi family."

In the judgment under appeal the High Court say:—

"The present suit is now brought by the official assignee of the insolvent estate of the late Aga Mahomed Rahim Shirazi to recover the above sum of Rs. 1,50,000 from the representatives of the late Zenail Abadin, charging that the same forms part of the estate of the insolvent, on the following grounds:—

"1st, that Zenail compromised the suit as the agent and confidential adviser of the official assignee; and, 2nd, that the payment to Zenail was fraudulently concealed by Zenail and his sons from this Court, and also from Mr. Gamble before and after the passing of the consent decree; but that, even if Mr. Gamble was aware of the Rs. 1,50,000 being paid to Zenail, the said payment was a fraud upon this Court and the creditors, which Mr. Gamble had no power to consent to, and such consent could not be binding on his successor."

The tenth to the fifteenth articles of the plaint as it originally stood were as follow:—

Tenth. In the year 1875 an arrangement was made for the compromise of the said suit, *i. e.*, the suit of 1858, the said Hazi Zenail Abadin and his son, the defendant Abdul Hossein, acting in the negotiations which resulted in such compromise as the agents or confidential advisers of the plaintiff in the said suit.

Eleventh. By a consent decree made in the said suit on the 12th July, 1875, copy whereof is hereto annexed and marked C, it was ordered that the said Accountant General should, out of the said Government promissory notes and moneys in his hands, pay to the plaintiff in the said suit the sum of rupees seventy five thousand and the costs of the said suit, and should make over and pay to the solicitors of the defendant in the said suit the balance of the said government promissory notes and moneys, and that the plaintiff in the said suit, who was also the receiver appointed therein, should assign the said immovable property to the defendant therein.

Twelfth. In pursuance of the said decree the said sum of rupees seventy-five thousand was paid to the plaintiff in the said suit.

Thirteenth. The plaintiff has lately been informed and believes that before the passing of the said consent decree it had been agreed between the defendant in the said suit and the said Haji Zenail that the amount for which this suit should be compromised was the sum of rupees two lakhs and twenty-five thousand, and not rupees seventy-five thousand only, and that out of the said Government promissory notes and moneys the said sum of rupees two lakhs and twenty-five thousand should be paid in full settlement of the claims of the estate of the said Shirazi in the said suit, but that rupees seventy-five thousand only out of the said sum of rupees two lakhs

and twenty-five thousand should be paid to the plaintiff in the said suit, and the rupees one lakh and fifty thousand, the balance thereof, should be paid to the said Haji Zenail.

Fourteenth. After the passing of the said consent decree, namely on or about the 28th August, 1875, Messrs. Proscot and Winter, the solicitors for the defendant in the said suit, paid to the said Haji Zenail the sum of rupees one lakh and fifty thousand, being the balance of the said sum of rupees two lakhs and twenty-five thousand after deducting the said sum of rupees seventy-five thousand paid to the plaintiff in the said suit, and the said Haji Zenail and his son, the said Abdul Hossein, retained the said sum of rupees one lakh and fifty thousand, and applied the same for their own purposes. A receipt for the said sum of rupees one lakh and fifty thousand was given by the said Haji Zenail, or by the first defendant on his behalf, to the said solicitors, but the defendants allege that the said receipt was subsequently returned to the said Haji Zenail, and that he destroyed the same. Hereto annexed, and marked D, is a document which, as the plaintiff is informed and believes, is a correct copy of the said receipt.

Fifteenth. The plaintiff says that the fact that the said sum of rupees two lakhs and twenty-five thousand was agreed to be paid for the compromise of the said suit, and that rupees one lakh and fifty thousand, part thereof, was to be paid to the said Haji Zenail, was fraudulently concealed by the said Haji Zenail and his sons, the first and second defendants, from this Honourable Court, and also from the said Henry Gamble, before the time of and after the passing of the said consent decree.

The learned Judge in the first Court found that Zenail was not the agent of the assignee, and was at no time invested with a fiduciary character, and that he did not conceal from Mr. Gamble the fact of the payment to him of the one lakh and fifty thousand rupees. He said it was clear that Mr. Gamble was fully aware of all the terms of the compromise, whether of 1870 or 1875.

The learned Judge had, however, after the case had been closed, allowed the 15th article of the plaint to be amended by adding the words, "And the plaintiff further saith that, even if the said Henry Gamble was aware of the sum of one lakh and a half being paid to the said Haji Zenail, the said payment was a fraud upon the Court, which the said Henry Gamble had no power to consent to, and such consent could not be binding on his successor." The learned Judge, therefore, went on to consider whether Zenail fraudulently concealed from the Court the fact of the payment of the 1 lakh and 50,000 rupees. He said: "To sum up, I do not think it proved that Zenail held any official position towards the official assignee. He assisted in the suit, but that was in his own interest. Nor do I think he was guilty of any improper concealment. It was not his duty to inform the Court. He had no *locus standi* in the eyes of the Court."

Their Lordships concur entirely in that opinion. Zenail did not act as the agent of, or in a fiduciary relation to, the official assignee either at the commencement of the suit of 1858 or in the conduct of it. He, no doubt, gave very valuable assistance, but he was acting, as was well known to the assignee throughout, on behalf of the heirs and representatives of Shirazi, and possibly of himself as having made advances for conducting the suit, and not on behalf of the creditors. Certainly there was no fiduciary relation between him and the assignee at the time of the negotiations for the compromise of of 1875 or at the time of the application for the consent decree. He was not *Dominus litis*, nor in any way connected with the Court; he owed no duty to the Court, and he was under no obligation to the creditors. Nor is it likely that the Court, even if all the facts had been brought to their notice, would have inquired whether the decree was likely to be beneficial to the creditors when all the parties to the suit consented to have it

dismissed. Indeed, the Court would have had no means of forming a judicial opinion upon the subject until the accounts had been retaken, which it was the object of all parties to avoid. The brief to counsel, who appeared in Court on behalf of the assignee to consent to the compromise, was prepared by the solicitor for the assignee, who was fully acquainted with all the facts of the case.

The learned Judge, however, proceeded:—"He (meaning Zenail) may have got, and I think he did get, more than his share. He may also have appropriated to himself what was intended for those he represented. In the first case, a suit might have been brought within three years of the knowledge of the official assignee, but that knowledge began in 1875, and the suit is now barred by the Statute of Limitations, there being no fraud on the part of Zenail."

Their Lordships do not understand what is meant by Zenail's share. It was a matter of controversy between the parties how much each should receive, and there is no ground for saying that Zenail took any unfair advantage of Mr. Gamble. Their Lordships, however, are clearly of opinion that, under the plaint in this suit, the question cannot be entered into whether Zenail by the terms of the compromise got more than his share or not.

The result of the findings of the First Court was that the plaintiff's suit was dismissed with costs. The decree was correct, but their Lordships are of opinion that the suit ought to have been dismissed on the merits, and not upon the ground that it was barred by the Statute of Limitations.

With reference to the amendment of the plaint, by introducing a new and distinct charge of fraud after all the evidence had been given and the case closed, their Lordships feel bound to say that the allowance of it was contrary to every principle of justice, it was wholly unprecedented, and, to say the least of it, did not exhibit a sound exercise of judicial discretion.

The Full Court, on appeal, said it was not disputed that after Mr. Prescot's evidence it must be taken as a fact that, whatever might have been extent of Mr. Gamble's knowledge in 1870, he was in 1875 acquainted with the intention that Zenail was to receive Rs. 1,50,000 from the Shustri family, and that he assented to it. This ought to have been an end of the suit. The Court, however, held that Zenail acted in a fiduciary relationship towards Mr. Gamble; but that even in that case the transaction could be impeached only upon the ground that Mr. Gamble's consent was obtained under circumstances amounting to fraud. They held that, under the circumstances of the case, Zenail could not derive any benefit from the suit, except on condition of acting in perfect good faith to the creditors. They said his deriving any benefit to himself from the suit, except upon that condition, would, in their opinion, be a fraud on the creditors and on the Court itself, and that a Court of equity would properly regard him as holding any such benefit as a trustee for the insolvent's estate. It is not easy to follow the reasoning of the Court of Appeal, by which they arrived at the conclusion that Mr. Gamble's consent to accept the 65,000 rupees in satisfaction of the claim of the creditors was obtained under circumstances amounting to fraud on the part of Zenail. They treated the Rs. 10,000 paid to Mr. Prescot as a payment made to him to bring pressure on Gamble to accept Rs. 65,000 in satisfaction of the claim of creditors.

The High Court refers to the evidence of Mr. Prescot. They say: "Mr. Prescot in answer to the question, 'When did you first know or hear that you were going to get the Rs. 10,000?' said he could not say, but added, 'While the matter was going on, it was hinted to me that a present would be made to me by Zenail if I carried the matter through.'"

At page 290, Mr. Prescot said: "Zenail gave me Rs. 10,000, I suppose out of gratitude for having got the matter through." Looking to all the circumstances, and to the fact that Mr. Prescot's

clerk, who could not have had much weight or influence with Abdul Latif Shustri, or in effecting the arrangement with Mr. Gamble, also received the sum of Rs. 1,000 at the same time, it is difficult to understand how the Appellate Court could possibly have arrived at the conclusion that the Rs. 10,000 were promised or paid by Zenail to Mr. Prescot with the fraudulent intent to induce him to bring pressure upon Gamble, which but for that payment he would not have done. There is no suggestion that a similar payment was promised to Mr. Keir in 1870 before he made the arrangement with Gamble to the very same effect as that made by Prescot, his successor, in 1875.

All the parties beneficially interested in the funds in Court must have been anxious to compromise their claims and to terminate the litigation as speedily as possible. In the words of the learned Judge of the first Court,—"In sixteen years one twenty-fifth part of the accounts had been investigated. At that rate, every person concerned, and the generation to follow, would have passed away with the suit still hung up in the Master's office. Meanwhile, the Shustris were kept out of their inheritance, the creditors of Shirazi were deprived of all chance of a dividend; and the family of Shirazi were debarred from such share as might be theirs if any sums were found due to their father more than enough to satisfy his creditors." Zenail, after the negotiations of 1870, doubtless stood out for the Rs. 1,50,000, which, according to the terms of the arrangement then made, were to be paid in satisfaction of the claims represented by him. The Rs. 2,25,000 were not paid to him, nor was it agreed between Abdul Latif and Zenail that only seventy-five thousand rupees should be paid to Gamble, as alleged in the 13th paragraph of the plaint. The Rs. 2,25,000 were to be paid in settlement of all claims whatsoever, as well of the family as of the creditors of Shirazi. The amount to be paid to Gamble, as assignee on behalf of the creditors, was settled by Prescot with Gamble himself. It was admitted by the Appellate Court that Gamble consented to accept Rs. 65,000 in satisfaction of the claims of the creditors, but they considered that undue pressure was brought to bear upon him, in addition to the Rs. 10,000 received by him on his own account. Prescot in arranging with Gamble acted as solicitor for the Shustri family, as Keir had done in 1870, and not for Zenail. If Gamble had insisted upon receiving a larger sum than Rs. 75,000, the amount fixed in 1870, there was no more reason that it should come out of Zenail's Rs. 1,50,000 than out of the surplus which was to go to the Shustri family. There was, therefore, no reason why Zenail should bribe Prescot to bring pressure on Gamble, even if Prescot was open to be bribed. It is impossible to understand how it could be held that, in the negotiation with Gamble, under which he consented to accept Rs. 65,000 in satisfaction of the claims of the creditors, Zenail was acting in a fiduciary relation to the creditors.

The Court of Appeal having dealt with the Rs. 10,000 paid to Prescot, proceeded to consider whether Mr. Gamble acted in perfect good faith towards the creditors, and upon that point they came to the conclusion that, having regard, amongst other things, to his receipt of the Rs. 10,000 in lieu of commission, and that that amount exceeded 5 *per cent.* on the assests recovered, the gravest suspicion was raised that his conduct was not actuated by perfect good faith. In short, the Court of Appeal seem to have considered that Mr. Prescot received Rs. 10,000 to bring pressure on Gamble to consent, and that Gamble received Rs. 10,000 as an inducement to betray the creditors. The Court of Appeal took no notice of the fact that the intended receipt by Mr. Gamble of the Rs. 10,000 in lieu of commission was fully explained by Mr. Gamble's solicitor, with the reasons for the payment in the brief to counsel to consent to the decree, and that in the decree itself it was expressly declared that it should be lawful for Mr.

Gamble to retain in his own hands, and for his own use and benefit, the said sum of Rs. 10,000, the same being in respect of future commission as official assignee and receiver in the suit. Further, the decree of the Appellate Court for the payment, by Zenail's representatives to the plaintiff in the suit, of the Rs. 1,50,000 with interest, was founded upon the fact that that amount ought to have been paid to Gamble in addition to the Rs. 75,000 in order that the whole Rs. 2,25,000 might be administered by him. In that case the Rs. 10,000 would have been less than 5 *per cent.* on the Rs. 2,25,000 recovered. The result of the findings of the High Court as to the payments made to Prescot and Gamble was that, notwithstanding their finding that the fraud alleged in the plaint was not substantiated, they reversed the decree of the first Court, and, upon the principle that, in equity, Zenail could derive no benefit from the transaction, ordered that the present appellants, the respondents in the Appellate Court, as the heirs and legal representatives of Zenail, should pay to the present respondent and then appellant, not merely such a sum as would be sufficient to pay the creditors the full amount of their debts with interest, but the whole sum of Rs. 1,50,000, with interest at 9 *per cent.*, amounting to a sum exceeding two lakhs and eighty thousand eight hundred and ninety-four rupees for debt, and simple interest thereon at the rate of 6 *per cent. per annum* from the date of the decree until payment. Their Lordships do not concur in the finding of the High Court as to the object and effect of the payments made to Mr. Prescot and to Mr. Gamble, the assignee, respectively. They think it right, however, to point out that the Court of Appeal, whatever might have been their opinion as regards those payments, ought to have confined themselves to the charge of fraud made in the plaint, and that they committed a serious error in deciding the case upon a charge which was not made by the plaintiff in his original plaint, nor in the plaint as erroneously amended at the close of the case, and which does not appear to have been made at the trial. The charge in the plaint was a fraud in concealing from the assignee the fact that by a compromise of the suit made by Abdul Latif and Zenail Rs. 2,25,000 were to be paid, and that out of that sum Zenail was to receive Rs. 1,50,000, and the assignee only Rs. 75,000. The fraud charged in the amended plaint was, that the payment of the Rs. 1,50,000 to Zenail was a fraud upon the Court, which Gamble had no power to consent to. The ground upon which the Appellate Court decided the case, though not expressed in very clear terms, was that the payment by Zenail to Prescot of Rs. 10,000 was made as an inducement to him to put pressure upon Gamble to induce him to consent to receive Rs. 65,000 on account of the claim of the creditors, and that Prescot used pressure in order to secure the acceptance of that amount by him. They also substantially treated the payment to, and receipt by, Gamble of the sum of Rs. 10,000 in lieu of commission, as an inducement to him to consent to receive the sum of Rs. 65,000 in satisfaction of the claims of the creditors, the Court of Appeal expressing their opinion that Gamble was not actuated by perfect good faith towards the creditors, and this, notwithstanding the evidence of Gamble's solicitor as to what actually took place, was objected to and disallowed as privileged. In short, though the fraud charged in the plaint was a fraudulent concealment from Gamble by an agent and fiduciary, the ground upon which the judgment of the Court of Appeal was founded was substantially a fraud brought about by Zenail, Prescot, and Gamble by bribery, corruption, and being corrupted respectively, and conspiracy to defraud the creditors of Shirazi. Neither of those charges appears to have been ever made in the Court of first instance so as to have the judgment of that Court called to or expressed upon them; nor do they appear to have been particularized in the grounds of appeal to the High

Court. In short, they seem to have occurred for the first time to the High Court, and not to the plaintiff in the suit, or to his advisers. It is a well-known rule that a charge of fraud must be substantially proved as led, and that when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it. See the case of *Montesquieu* v. *Sandys*(1), in which it was held that relief cannot be given upon circumstances which are not made a ground of relief upon the record.

Their Lordships might have reversed the judgment of the Court of Appeal on this ground alone, but they have thought it right to say that they do not concur in the opinion expressed by the High Court as to the payments to Prescot and Gamble respectively.

It was contended, before their Lordships, that the assignee had no power to consent to the compromise without the authority of the insolvent Court. That might possibly be a ground for setting aside altogether the arrangement by which Gamble consented to receive the Rs. 65,000 in satisfaction of the claims of the creditors, as to which their Lordships express no opinion, but it can not form a ground for altering the terms of the compromise, and allowing the assignee to recover from one who held no fiduciary relationship to him a sum which it was never intended he should receive.

For the above reasons their Lordships will humbly advise Her Majesty to allow this appeal, and to reverse the decree of the High Court of Appeal with the costs in that Court, and to affirm the decree of the first Court. The respondent must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appllants :—Messers. *Hacon and Turner.*

Solicitors for the respondents:—Messers. *Watkins and Lettey.*

(1) 18 Ves. Jun., 302, at p. 314.

8th, 9th and 10th March 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Watson, the Right Hon. Lord Fitzgerald and the Right Hon Sir Barnes Peacock.

On Appeal from the High Court at Madras.

PETTACHI CHETTIAR AND OTHERS* ... } *Plaintiffs.*

and

SANGILI VIRA PANDIA CHINNATAMBIAR ... } *Defendant.*

Civil Procedure Code, Act VIII of 1859, *s.* 264—*Execution of decree against a member of an undivided family by sale of his personal interest in the family estate, which was an impartible zamindari; such interest, by reason of his death before the sale, consisting only of the rents and profits then uncollected.*

On a sale of the right, title, and interest in an impartible zamindari in execution of decrees against the zamindar, the head of an undivided family, the question was whether (*a*) only his own personal interest, or (*b*) the whole title to the zamindari, including the interest of a son and successor, passed to the purchaser. The proclamation of sale purported to relate to (*a*) only; and between the dates of proclamation and the auction sale the zamindar died.

On the argument that, this having given rise to an ambiguity, the Court must be understood to have sold all that it could sell, and that under the circumstances it could sell, and was bound to sell, (*b*); because, the debts, the subject of the decrees under execution, not having been incurred by the late zamindar for any immoral purpose, the entire zamindari formed assets for their payment in the hands of his son:

Held, that the question of what the Court could, or should, have sold had not arisen. All that required decision was what the Court had sold. If (*a*) only was put up for sale, then that interest only could have been purchased. Two Courts having concurred in finding that (*a*) only was sold, in which also their Lordships agreed, only that interest passed to the purchaser.

APPEAL from a decree (17th January 1882) of the High Court, affirming a decree (18th March 1880) of the District Judge of Tinnevely.

* I. L. R., 10 Mad. p. 241; 14 Cowell p. 54.

The question on this appeal related to a sale of the right, title, and interest in an impartible zamindari in execution of decrees against the late zamindar, deceased at the time of the sale. The late zamindar was the head of an undivided family, and the question was whether the interest, sold as his, and acquired by the purchaser at the sale, consisted only of his personal interest, or included the interest of his son, and successor in the zamindari, as forming part of the right, title, and interest sold. If only the life-interest was sold, it was no more than the right to the rents and profits uncollected and due at the death of the late zamindar, amounting to Rs. 39,000; and this was all that the Courts below held to have passed by the sale.

The suit giving rise to this appeal was brought by twelve plaintiffs, who held decrees against the late zamindar, to obtain possession of the Sivagiri zamindari, consisting of twenty-three villages in the Tinnevelly district. The zamindari having been attached in the lifetime of the father, the sale in execution took place after his death, and after the son had obtained possession. The price paid by Subramania Moodelly, the purchaser, was Rs. 12,600. He was in the employment of one of the decree-holders, and to them he immediately transferred his purchase.

The zamindari of Sivagiri was an impartible zamindari formed out of an ancient hereditary polliem at the permanent settlement. On the death in 1819 of the zamindar, who in 1802 had received the first sanad-i-milkiyat-i-istimrar, his daughter, Viramamlal Nachiar, succeeded him. On her death in 1835 she was succeeded by the elder of her two sons, Varaguna Rama Pandia Chinnatambiar, referred to in this report as the late zamindar, whose transactions gave rise to this litigation. He contracted many debts; and decrees were passed against him, both for money, and upon hypothecations of parts of the zamindari.

In 1871 the whole estate was attached by a creditor, and a receiver was appointed. This continued till 1874, and the creditors, having issued their attachments, received rateable distribution to about 34 per cent. of their debts. In 1872, the present respondent, as son, obtained a declaratory decree that the life estate of his father was alone affected by the incumbrances. Pending an appeal, however, by the creditors, who set up that the zamindari was not ancestral estate of such a character that the son took a vested interest in it, the late zamindar died, on the 20th September 1873. The above declaration being then no longer necessary, the suit for the declaratory decree was dismissed (25th November 1873).

Application for sale of the zamindari had in the meantime been made (18th November 1872), the present respondent objecting; and a proclamation of sale was issued, relating only to the right, title, and interest of the late zamindar during his life. It stated that he was then in his fifty-fifth year. Before the sale took place he died, as above mentioned. The present respondent, as his son and successor, then obtained an order that the zamindari be made over to him, stating also that he was not entitled to the rents due at the death of the late zamindar.

On the application of two decree-holders for a sale of the property attached, the Court (19th December 1873) again ordered issue of proclamation for the sale of the right, title, and interest of the late zamindar. It was notified that the zamindari of Sivagiri, the estate of the late zamindar, would be sold, and that the sale would extend "only to the right, title, and interest of the said deceased defendant, in the estate."

On the 5th February 1874 the respondent filed a petition against the sale, stating that he was in possession, and that the estate was not answerable for his father's debts. This petition was dismissed, and the sale took place on 25th February following, the zamindari being said to be subject to other incumbrances, amounting to Rs. 1,40,000.

The sale-certificate (18th April 1874)

was as follows: "We do hereby declare that in the public auction held before the Court on the 25th February 1874 for the amounts, &c., of the decrees in the said suits, Subramania Moodelly purchased for Rs. 12,600 the right, title, and interest of the judgment-debtor, the said defendant, deceased, in the properties hereunder mentioned." Then followed particulars of the twenty-three vanithamas making up the entire zamindari, and a note "The hills in the said villages also are included in the sale of the said villages."

The present respondent on the 24th April 1874 petitioned that all proceedings taken in execution of the decrees without giving notices to him, should be cancelled; but this was rejected, on the ground that the execution was not against the petitioner as the legal representative of the deceased, but against such right, title, and interest as the late zamindar had in the estate.

The auction purchaser having applied (4th September 1874) for delivery of possession of the estate purchased by him, a warrant for delivery by proclamation was issued under s. 264 of the Code of Civil Procedure (Act VIII of 1859). He having also issued notices to the karnam and raiyats that rents should be paid to him, the respondent instituted a suit against him for an injunction to restrain him from interfering with the estate as he had only acquired the right to the rents due down to the death of the late zamindar.

The appellants (having bought the purchaser's rights for Rs. 13,600) were then made the defendants in the above suit. Of these four were so made, on their own petition of 13th April 1875. But the respondent, as he was in possession, was considered not to be entitled to a declaratory decree. Meanwhile some of the decree-holders, whose decrees had proceeded upon hypothecation of parts of the zamindari, contested orders made by the Court refusing to declare the sale subject to their liens. In the course of the litigation that took place in reference to these last matters, the High Court in *Muttayan Chetti* v. *Sangili Vira Pandia Chinnatambiyar*(1) decided that the zamindari was not, as the creditors had attempted to make out that it was, the "self-acquired" property of the late zamindar in consequence of its having been inherited through a maternal ancestor; a decision which on this point was supported by the Judicial Committee (which, however, would not express any opinion about the rights of a son upon birth in property so inherited), holding that the property, at all events, was liable to be attached and sold for the father's debt.(2)

The creditors now sued (3rd November 1877) for possession of the zamindari, and for mesne profits from November 1874, making title through the purchaser. The plaint, among other things, alleged that the late zamindar having succeeded to the inheritance as a daughter's son, had full power to dispose of the estate. The defence was that the defendant held the zamindari by hereditary right as ancestral property, and that the purchaser acquired only the arrears of rent due at the death of the late zamindar.

The District Judge dismissed the suit, being of opinion that the auction sale only conferred a right to the rent in arrear at the date of the death of the late zamindar. On 31st January 1879 the High Court reversed that decree, remanding the suit for decision. The result was another judgment to the same effect upon issues, for the settling of which the remand had been made; and the principal of these related to the nature of the right, title, and interest acquired under the sale-certificate.

An appeal to the High Court was dismissed by a divisional bench (Turner, C.J., and Muttusami Ayyar, J.). On the incidental question, relating to the descent of the zamindari from Viramamlal's father, the Judges observed that until the effect of the descent of an estate from a maternal grandfather, as distinct

(1) I. L R, 3 Mad, 370.
(2) I L. R., 6 Mad., 1, L. R.. 9 I. A., p. 128.

from its descent in the male line, had been recently decided in another suit connected with the same estate, it was regarded as a controverted point whether a son's right, acquired upon birth, extended to such property; but that it was not necessary to enter upon the subject. They would dispose of the case in reference to the main question. Their judgment continued as follows:—

"The main question is, as the Judge has rightly apprehended, what was the nature of the right of the judgment-debtor of which the sale was ordered and effected. Where the language of the orders passed in execution of decree respecting the attachment and sale of property is ambiguous, it is no doubt pertinent to the determination of that issue to consider what interest the Court was competent to sell. But where the orders of the Court afford a sufficiently clear indication of the nature of the interest of the Court intends to sell, it is immaterial that the Court was competent to have sold a larger interest than it has actually sold, since the purchaser would not be entitled to take advantage of the circumstance and claim a larger interest than it is apparent from the orders of the Court it was the intention of the Court to sell. If a Court directs the sale of an interest less than that of which the decree-holder is entitled to demand the sale, the remedy lies in an appeal by the decree-holder before the sale takes place.

"Assuming then for our present purpose that the Court executing the decrees was competent to order the sale of the zamindari so as to bind the interest of the respondent, it must be determined whether the entire estate was in fact sold or no more than the right alleged by the respondent. We allow that the appellants cannnot be affected by the report made by the Judge to the High Court subsequently to the sale, and that it would be unsafe to deduce any inference from the action of those of the decree-holders who held mortgages. The inadequacy of price too is a circumstance not unimportant in determining whether the bidders were aware of the character of the rights offered for sale. It may well be, as has been suggested on the part of the appellants, that the apprehension of claims of incumbrancers would have greatly affected the prices bid, if the entire zamindari had been offered for sale. To ascertain what was sold, we must look to the proceedings which preceded and resulted in the sale, and of which intending purchasers were bound to inform themselves."

The judgment then referred to the proceedings, of which the principal are mentioned above, and continued thus:—

"These references to the death of the judgment-debtor and the restriction of the sale to the right of the deceased only point to an estate distinct from the interests of which the living zamindar was then in possession.

"It is to be noticed that at the time the order for the second sale was obtained, no steps had been taken to make a representative of the deceased judgment-debtor a party to the proceedings in any of the suits under execution, and the earliest orders passed for this purpose, which have been put in evidence, are the orders of the 19th January unserved before the 1st February, whereby the respondent was not, as the Code requires, called on to show cause, but informed he had been admitted as representative of the judgment-debtor.

"The respondent at once took exception to the terms of the sale proclamation, which was certainly ambiguous and inappropriate if the Judge intended to sell no more than he had declared available for sale. Unfortunately, advantage was not taken of the occasion to correct the notification.

"The grounds of the objection were not disallowed, but the Judge on dismissing the application gave as his reason that the right, title, and interest of the judgment-debtor was attached, was still under attachment, and would be sold. Construing this declaration in the light of his previous orders, it is plain he considered the right, title, and interest of the

judgment debtor was the right, title, and interest which alone the Judge believed the judgment-debtor possessed, and which was defined in the first proclamation. The receiver's accounts were made up, and before the sale the purchasers had the means of knowing the amount undistributed, and approximately the amount of arrears. The respondent produced no evidence to show what took place at the sale, but one of the witnesses for the appellants, himself a decree-holder, had sworn that he heard it given out at the time of the sale that the interest of the late zamindar alone was sold, and that he heard it stated the profit due to the late zamindar was alone being sold. What took place subsequently to the sale has no material bearing on the main issue. The appellants, it is true, obtained an order for the delivery of possession of land in the possession of raiyats. It may be that this order was considered not inappropriate, seeing that there were rents outstanding due to the interest sold—the estate of the deceased judgment-debtor—and it is noticeable that the application for such an order as would be made when the judgment-debtor or his representative is himself in possession, was not persisted in. We are unable to say that the Judge was in error in finding that all that was offered for sale and bought was the arrears of rent due up to the date of the decease of the third zamindar."

The plaintiffs appealed.

Mr. J. D. Mayne, and *Mr. H. H. Shephard*, for the appellants, argued that the decree-holders were entitled under the purchase by their assignor at the auction-sale to the whole estate, including the interest of the respondent. If when the proclamation of sale, dated 26th April, 1873, was made, the Court held the erroneous opinion that the inpending sale would not affect the interest of the zamindar's successor, the intention of the creditors was to sell all that they could attach during the zamindar's life; and it was the law that the sale of the son's interest, as well as that of the indebted father, was authorized in order to satisfy the debts of the latter. Inasmuch as the debts, the subject of the decrees under execution had not been incurred for any immoral purpose, the entire estate was, in the hands of the son of the late zamindar, assets for their discharge. The entire estate was, in fact, attached, and in offering for sale the right, title, and interest of the late zemindar, the Court offered what was legally available for sale; and it was bound to sell every interest which was capable of being sold, to satisfy the creditors. The amount of interest which passed by the sale could not be affected by any error on the part of the Judge as to the legal result of that sale. Moreover, the wording of the second proclamation was consistent with the sale of every interest which could be disposed of in satisfaction of the judgment-debts. The legal operation of an execution sale so conducted did not depend upon the view taken of it by the Court, which view moreover was not shared by those who really brought the zamindari to sale, viz., the creditors whose rights rested upon the law as declared in *Girdharee Lall* v. *Kantoo Lall* (1).

(LORD WATSON.—The questions were—What did the Court intend to sell; and what did the purchaser understand that he bought?)

If these were the only questions, they were inseparable from a prior one, viz., what estate had the Court the power to sell, and what was it bound to sell? The purchaser could not be prejudiced by any mistake on the part of the Court as to what interest it could sell, when the language of the proceedings was sufficient to comprise all that it was empowered to sell.

Reference was made to *Suraj Bunsi Koer* v. *Sheopersad Singh* (2), *Pitam Singh* v. *Ujagar Singh* (3), *Muttayan Chettiar* v. *Sangili Vira Pandia Chennatambiar* (4).

(1) L R., 1 I A, 321; 14 B.L.R., 187.
(2) I.L R., 5 Cal., 149; L.R., 6 I.A., 88.
(3) I L R., 1 All., 651.
(4) I.L.R., 3 Mad., 371; and on appeal to P.C., I.L.R., 6 Mad., 1 L.R., 9 I.A., 128.

Besides the above reasons, it was suggested that the entire estate in the zamindari passed at the sale, because the son had not obtained an interest at his birth, on account of the zamindari not having descended from a line of fathers, but from a mother's father, to the late zamindar. As to this, however, it was observed that there having been a brother of the late zamindar, it was not only the interest of a son that might be brought in question in regard to what was sold, but also that of another member of the family.

Mr. J. Graham, Q.C., and *Mr. G. P. Johnstone*, for the respondent, were not called upon.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR BARNES PEACOCK.

This is an appeal from a decision of the the High Court at *Madras* affirming the decision of the Lower Court upon the first issue in the suit. That issue was: "What is the nature of the right, title, and interest acquired under the sale certificate issued by this Court to the purchaser?"

The first Court, after considering all the facts and the evidence in the case, came to the conclusion that all that was offered for sale, and all that was purchased under the sale, was the interest which the father of the Defendant had at the time of his death.

The High Court stated the facts very fully, they considered them very maturely, and they reviewed them very carefully; and they came to the conclusion that the decision of the Judge of the first Court was correct.

There were two concurrent findings of the Courts. It may be said that they were not upon a mere question of fact, but on a question of mixed law and fact. As regards the fact, both Courts came to the conclusion that what was offered for sale, and what was intended by the purchaser to be purchased, was the right and interest which the father had at the time of his death.

There is no doubt that when the execution was issued, and the attachment made, in the time of the father, the proclamation expressly stated that all that was to be sold was the life interest of the father. At page 220 of the record it will be found that a petition was put in by the creditor in one of the suits, praying that that notification might be altered. He said: "I pray therefore that in conformity with the above sections of Civil Procedure Code, a fresh advertisement may be made expunging the words 'during his lifetime.'" Those words having been put into the proclamation that nothing was to be sold except the interest which the father had in his lifetime, one of the creditors asked to have those words expunged. But the Court made this order: (page 221) "The advertisement is that the right, title, and interest of the said Defendant in the estate during the term of his life be sold, the judgment having distinctly declared that only such is liable for this decree debt. This prayer cannot therefore be granted." At that time, in the father's lifetime, it was expressly decided by the Judge that what was intended by the decree to be sold, and what could be sold under the decree, was only the interest of the father during his lifetime. The sale was postponed at the instance of the creditors, in consequence of the father's illness. They said: "As the estate is to be sold only for the father's interest during his lifetime, the sale will not fetch so much during his illness as it would if he were in a better state of health," and therefore they asked to have the sale postponed in consequence of the illness of the father. The sale was postponed. If it had taken place during the lifetime of the father, the purchaser would have obtained all that the father was entitled to during his life, and that only, and he would have been entitled to possession of the estate during the father's lifetime, and to receive the rents which were then in arrear.

The father died. No fresh attachment was made. The sale was to take place after the father's death upon the attachment which had been made during his

lifetime. The proclamation stated that the property was to be sold only for the interest of the father; but after the father's death, as it appears, the Court allowed the son, notwithstanding the attachment (because it was only for the life interest of the father) to take possession of the estate, stating that all that was to be sold was the life interest of the father, namely, not then the right to the possession of the estate, but the right to receive the rents in arrear.

The property was put up for sale, and it is said that the proclamation was ambiguous, that it did not state that the sale was merely for the life interest of the father, but that it was a sale of only the interest of the father. And it is contended on behalf of the Appellants that by the change of the terms the purchasers necessarily thought that they purchased the whole interest in the estate. But, even if the fresh proclamation was ambiguous, the purchasers, if they had made the ordinary inquiry which they ought to have made, would have discovered that all that was intended in the first proclamation was the life interest of the father in the property which had been attached, and that the same interest was intended to be sold under the second proclamation.

The purchaser purchased for a small sum, about Rs. 12,000, but he had not the money to pay. He paid merely a deposit. He subsequently conveyed to the creditors themselves. There can be no doubt, in their Lordships' minds, that when he purchased he was purchasing benamee for those creditors, and although they might have purchased in their own names, they did not do so, because, if they had done so, they would have purchased, having themselves the knowledge of all that had previously taken place. They therefore allowed the property to be purchased in the name of a clerk of one of the execution creditors in order that it might appear that it was purchased by a man who had no notice of what had taken place previously.

It is unnecessary to go into the question whether the estate came from the paternal ancestors, or, in other words, whether it was ancestral estate or not. The learned counsel, in a very ingenious argument, endeavoured to shew that a difference existed in consequence of its being an estate which came from the maternal and not from the paternal grandfather, and consequently that it was not ancestral estate. But that makes no difference in the present case. If the whole estate could have been put up for sale it was not put up. It is not a question of what the Court could have done, or what they ought to have done, but they did, what was put up for sale, and what was purchased. If what was put up for sale was merely the estate which the father had in his lifetime, then what the purchaser purchased was only that interest.

The High Court having carefully reviewed the whole of the evidence, and the whole of the documents, came to the conclusion that the first Court was right in finding that all that was intended to be sold, and all that was sold was the life interest of the father, and not the whole interest in the zemindari.

Their Lordships entirely agree with the conclusion at which the High Court has arrived, and they will therefore humbly advise Her Majesty to affirm the decree of the High Court, and the Appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for Appellants:—Messrs. *Burton Yeates, Hart & Burton.*

Solicitors for Respondent:—Messrs. *Lawford, Waterhouse and Lawford.*

10th and 11th March 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Watson, the Right Hon. Lord Fitzgerald, and the Right Hon. Sir Barnes Peacock.

On Appeal from the High Court in Bengal.

ANANGAMANJARI CHOWDHRANI AND OTHERS* } *Plaintiffs.*

and

TRIPURA SUNDARI CHOWDHRANI AND OTHERS... } *Defendants.*

Title, Evidence of—Presumption arising from Possession—Issue as to identity of land re-formed on a site formerly submerged.

In a suit for the possession of a chur, formerly carried away and afterwards re-formed upon its former site, the issue was whether the land belonged to the plaintiffs or to the defendants This issue was found in favor of the plaintiffs by the first Court; and the Appellate Court, finding that the plaintiffs had been in possession for more than twelve years, concluded that, at all events, they had a title by adverse possession. On an appeal, the High Court considered that the latter decision was not upon the issue raised, the plaintiff's claim being founded on an original title to the site of the chur—a title denied by the defendants; and remanded the suit for judgment on this issue, whereupon the Appellate Court maintained the judgment of the first Court in favor of the plaintiffs, finding on the evidence that the land belonged to the plaintiffs.

Upon a second appeal the High Court reversed the decree of the Appellate Court, and dismissed the suit, on the ground that there was an entire absence of evidence as to which party was entitled at the date to which the dispute related. *Held*, that this was erroneous. On a question of parcel or no parcel, when possession has been established for a period, there is not an entire absence of evidence of anterior ownership, because *presumitur retro.*

APPEAL from a decree (3rd April, 1882) of a Divisional Bench of the High Court, reversing a decree (12th April, 1881,) of the District Judge of Pubna.

The parties to this appeal were at one time entitled, as joint owners, to villages Nalchongi and Nalchongi Silpatta in Rajshahye, which were partitioned between them in two lots: one consisting of a 13½ annas share which fell to the plaintiffs, appellants; and the other lot, consisting of a 2½ annas share, which went to the defendants, respondents.

The subject of the present suit was some chur land which had re-formed, after having been carried away by the river Ichamutti, on a site which was part of one or other of the above shares. The plaintiffs alleged that the chur had re-formed within the boundaries of the 13½ annas share. The defendants alleged that it had re-formed within the 2½.

The District Magistrate, when disputes arose about the year 1872, the chur having re-appeared many years before, proceeded under s. 530 of the Code of Criminal Procedure of 1872 then in force; and by an order of 24th February, 1873, maintained the possession of the appellants. But the respondents, on the 30th April of the same year, obtained a judgment, under Act XIV of 1859, for possession, under which the appellants were dispossessed on the 15th Jeyt 1280, corresponding to 27th May, 1873.

The present suit (5th September, 1876) was instituted by the appellants in the Court of the Subordinate Judge of Rajshahye, and an issue raising the above question having been fixed, and a report made by an Amin, it was found that the chur was covered by the 13½ annas share; and judgment was given, accordingly, for the plaintiffs.

This judgment the District Judge, on appeal, considered himself bound to accept (with only a slight variation as to a portion, which he found to belong to a third and different village), as it had not been shown to be erroneous, but he placed his decision of the case on a title by adverse possession accrued to the plaintiffs who had, as he found, been in possession for upwards of twelve years.

The High Court (MORRIS and PRINSEP, JJ.), on an appeal against the above

* I. L. R. 14 Cal p. 740; 14 Cowell p. 101.

decision, observed that the plaintiffs had not claimed the land upon the latter title, but as forming part of their original estate, and as having been taken out of their possession in 1873. They pointed out that it was not the case made out by the plaintiffs, but one found by the lower Appellate Court, that they had occupied the chur in suit for a sufficient time to confer title upon them, even supposing that, before its diluviation, the land was part of the 2½ annas allotment, and not part of the 13½. It was also, in their opinion, apparent that the Judge had no definite opinion of his own, as to whether the chur originally belonged to one or the other. And what he, in effect, decided was, that whether it fell within either the one or the other, it had, as a re-formation upon its old site, been so long in the possession of the plaintiffs as to confer upon them a title by prescription. This, however, was not the issue raised between the parties, and the Judges felt bound to adhere to the principle laid down in *Shiro Kumari Debi* v. *Gobind Shaw Tanti* (1), that no title can be claimed by prescription unless it has been put in issue against an adversary. The Judges were also dissatisfied with the mode in which the District Court had dealt with the evidence, remarking that "it was incumbent on the Appellate Court to form an independent judgment on the evidence, and not to give a decree in favor of the plaintiffs, unless they had, in its opinion, established their case."

The High Court, for these reasons, remanded the suit to the lower Appellate Court for judgment.

On this remand, the District Judge decided that the Subordinate Judge's finding was correct, the chur having been formed upon the land covered by the 13½ annas share.

There was again an appeal to the High Court on behalf of the principal defendants. A Division Bench (WHITE and MACPHERSON, JJ.) reversed the decree of the lower Appellate Court, and dismissed the suit. After referring to the remand order, and its grounds, the High Court said that, although this had been correctly understood by the lower Appellate Court, it appeared in Mr. Peterson's judgment that there was not a particle of evidence offered to prove when the chur lands re-formed, nor where they re-formed, much less evidence which showed that they reformed upon the site of the 13½ annas share which originally belonged to the respondents. "Such remarks," continued the judgment, "as the District Judge has made upon the evidence, are limited to the proof which was given by the respondents of the long and continuous possession which they enjoyed previous to their ouster by the appellants.

"Such being the case, the decree of the lower Court cannot be sustained. It is not suggested that there is any evidence on the record showing when the reformation took place, or that it was a reformation on the 13½ annas share, nor does the remand order allow of further evidence being given. After reading the various judgments of the three Courts below, which have had possession of this case for so long a time, and hearing what the pleaders for the parties have to say, it becomes plain that there is no evidence in this case on the above points, and that when the remand order was made which tried the respondents' case up to the third issue, their suit was virtually decided against them.

"As there is no evidence in the case as to the date or site of the re-formation, and the Court below has no materials upon which it could come to a finding on the third issue, it would be useless to send this case down again to the lower Court, and we have no alternative but to reverse the decree of the lower Appellate Court, and dismiss the suit of the plaintiffs, which we do with costs in all Courts."

On this appeal,—

Mr. *R. V. Doyne*, and Mr. *C. W. Arathoon*, for the appellants contended that the judgment of the High Court was erroneous. Upon a second appeal, the Courts below having concurred, the

(1) I. L. R. 2 Cal., 418.

High Court had not to decide upon the weight of the evidence as to the site of the chur. That there was some evidence was apparent, whether weighty or not and whether sufficient or not. They referred to *Shiro Kumari Debi* v. *Gobind Shaw Tanti* (1).

Mr. *T. H. Cowie*, and Mr. *J. H. A. Branson*, for the respondents, argued that the judgment of the High Court was correct. The issue was as to the re-formation of the chur in question having taken place on a particular site, within a certain period. The fact of possession, inasmuch as the right to that possession had been all along disputed, was not relevant evidence upon the point raised, which was that the chur had been re-formed, *in situ*, under such circumstances [see *Lopez* v. *Muddun Moyun Thakoor* (2)] that the original owner had a right to have possession of that which remained his property, the right of property never having been lost.

Counsel for the appellants were not called upon to reply.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD WATSON.

In this case the parties are the respective owners of two divided shares of mouzahs *Nalchongi* and *Silpatta*. The Plaintiffs are interested in the larger of those shares, extending to 13 annas 10 gundahs. The Defendants are proprietors of the smaller share, extending to 2 annas 10 gundahs. The area of land which is in dispute in this action is situated on the bank and close to the *alveus of the Ichamutti* river. It is subject to the action of the stream; and it appears that from time to time the soil on the surface of the area has been washed away, and new soil has been subsequently deposited capable of cultivation. The exact date when the surface was last denuded does not appear; but it seems to be admitted on all hands that for many years past a new deposit has been growing up, and that in point of fact such deposit, since some time after the year 1850, has become culturable. In the end of 1872, or the beginning of 1873, disputes arose between the Appellants and the Respondents as to the right to the disputed ground. The magistrate intervened in February 1873, and, after inquiry, he adjudged that the Plaintiffs were in possession, and had a right to retain possession of it. The Defendants then instituted a possessory suit, and on the 13th of April 1873, they obtained a decree affirming their right to possess. That led to the institution of the present action, in which the plaintiffs, who were ousted under the decree of April 1873, claimed the property of the disputed area as having been all along in their possession as part of their 13 annas 10 gundahs share of the two mouzahs in question. The Defendants resist the action on the ground that they had been in possession, and that the land in dispute was an integral part of their smaller share of these mouzahs—the 2 annas 10 gundahs share. Throughout these proceedings, at least since proof was closed, it is admitted on both sides that the area in dispute belongs to one or other of these two demarcated shares.

Issues were adjusted by the Subordinate Judge. It is only necessary to deal with the third of them: because it is conceded now that, if the Plaintiffs shall be held to have a right to the land, as part of their 13 annas 10 gundahs share, they are not barred by limitation from prosecuting the present suit. The third issue adjusted was in these terms:—"Is the land in claim a re-formation on the site of the original diluviated land of the 13 annas 10 gundahs share of *Kismat Nalchongi* and *Silpatti*, held by the Plaintiffs and *pro forma* Defendants, or of the 2 annas 10 gundahs share held by the substantive Defendants?" The Subordinate Judge, after an elaborate review of the evidence before him, came to the conclusion, which is embodied in this finding. "The allegation made by the Plaintiffs that the land in claim is a re-formation

(1) I. L. R., 2 Cal., 418, [J. 594.
(2) 13 M. I. A., 467; 5 B. L. R., 521; 2 P. C.

on the site of the original land of *Nalchongi* and *Silpatta* covered by their 13 annas 10 gundahs share, and that they have from before been in possession of it is found true." In other words his finding amounts to an express affirmation of the first alternative branch of the third issue, which exhausts the issue.

Upon appeal by the Defendants to the District Judge, he came to the conclusion that the Judgment of the Subordinate Judge ought to be maintained. He concurs to a great extent in the view taken by the Judge of that evidence, but he differs from him in his estimate of that evidence in many respects. The conclusion which he came to upon the part of the case which we are now dealing with was this, that the Plaintiffs "held, occupied, and enjoyed the lands in suit by the title above set forth as part and parcel of the lands appertaining to the 13½ annas demarcation for much more than twelve years before ousted by the Defendants." That was not a simple affirmation of the conclusion at which the Subordinate Judge had arrived. It pointed to a very different kind of case from that to try which issue No. 3 had been adjusted. It affirms a title, at least it is sufficient to affirm a title by adverse possession, which is a title in derogation of the Defendants' right, even assuming it to be proved that at an earlier period the land in dispute formed part of the smaller share, and not of the 13 annas 10 gundahs share belonging to the Plaintiffs. Accordingly when the case was carried by appeal before the High Court of *Calcutta*, the learned Judges came to the conclusion that the decree of the District Judge ought to be set aside, and the case remanded for re-trial. The High Court were of opinion that the District Judge had not disposed of issue No. 3, that his finding No. 2 was not an answer to that issue, but the affirmance of a title which would prevail over the title which would have arisen to the defendents by the negation of the first branch of issue No. 3, and the affirmance of the second branch; and they were also of opinion, although their Lordships are not altogether disposed to concur with them in that respect, that the District Judge had not applied his judicial mind to the consideration of the somewhat intricate evidence before him.

On remand the case was heard and disposed of before the successor of the District Judge, who had first disposed of the case. He, in the main, agrees with the Subordonate Judge in his estimate of the evidence, and he affirms the judgment of the Subordinate Judge. The conclusion which he came to on the evidence is very concisely expressed in these words: "On the whole then I come to the conclusion that the Subordinate Judge's decision is correct, and that the plaintiffs have proved that the lands claimed by them belong to their 13½ annas share of mouzahs Bil Nalchongi and Bil Slipatta."

Again the defendants appealed to the High Court, and the cause there was heard and determined before two fresh Judges, who came to the conclusion that the decree of the lower Appellate Court ought to be reversed, and the suit dismissed, and accordingly they gave effect to that opinion in their judgment.

The grounds upon which the learned Judges of the High Court came to that conclusion are very distinctly expressed in their judgment. They are two-fold; and, in the opinion of their Lordships, neither of these grounds is sufficient to sustain the judgment which was pronounced. They came, in the first place, to the conclusion that Mr. *Peterson*, who last disposed of the case, had fallen into the same error as his predecessor, and, instead of dealing with the identity of this disputed parcel with one or other of the two shares of the mouzahs in question, had disposed of the case on the footing that the Plaintiffs had enjoyed prescriptive possession which vested them with a good title as against the Defendants. The learned Judges say: "The judgment now before us contains a finding by the Court that, prior to the ouster by the Appellants, the Plaintiffs had a sufficiently long as continuous possession

of the chur lands to confer upon them a title to it." Their Lordships are of opinion that the learned Judges erred in supposing that the judgment of Mr. *Peterson* contains any finding to that effect.

Then having come to the conclusion that Mr. *Peterson* had erred in the same way as his predecessor, and had not dealt with the proper issue in the case, they proceed to consider whether they ought to remand the cause for the purpose of having that 3rd issue tried. They came to the conclusion that it was unnecessary to do so for these reasons: "As there is no evidence in the case as to the date or site of the re-formation, and the Court below has no materials upon which it could come to a finding on the 3rd issue, it would be useless to send this case down again to the lower Court." They came to a conclusion the very reverse of that at which their predecessors, who remanded the case, arrived; they were of opinion that there was evidence in the case bearing upon the subject-matter of the 3rd issue, which ought to be disposed of by the Judge in the Court below. The High Court, on this last occasion, came to the opposite conclusion—that there was no evidence whatever which was fit for the consideration of the Judge, or had any bearing on that issue.

It must be borne in mind that the decree appealed from to the High Court on this occasion being a decree after remand, on a second or special appeal, the learned Judges had not, and accordingly they did not profess to have, jurisdiction to deal with it on its merits. But it was, in the opinion of their Lordships, within their jurisdiction to dismiss the case if they were satisfied that there was, as an English lawyer would express it, no evidence to go to the jury, because that would not raise a question of fact such as arises upon the issue itself, but a question of law for the consideration of the Judge.

Their Lordships are very clearly of opinion that the reasons assigned by the learned Judges cannot be sustained. They are of opinion, with the Judges who made the remand, not only that there was an issue proper to be tried, but that there was evidence in support of that issue, or bearing upon that issue which was proper to be considered and disposed of by the District Judge. The theory upon which the learned Judges who last disposed of the case proceeded, so far as one can gather from their observations, appears to have been this: that evidence of possession is not receivable as evidence of the identity of a piece of ground; that, in other words, evidence of possession is not material or good evidence in a question of parcel or no parcel. Perhaps they do not go quite so far as that, but they certainly go the length of indicating their opinion that evidence of subsequent possession is not good evidence upon the question of parcel or no parcel at a previous date. To countenance that proposition would be to introduce an entirely new rule into the law, and their Lordships do not think that a judgment resting upon such a ground can be upheld. When the state of possession for a long period of years has been satisfactorily proved, in the absence of evidence to the contrary, *presumitur retro.* In the present case there is evidence tending to prove possession by the Plaintiffs for a considerable period antecedent to February, 1873. Whether it is sufficient to establish the Plaintiff's possession, and whether, if established, that possession is sufficient to warrent the inference of fact derived from it, are questions upon the merits of the case. The evidence has been disposed of by the Judge below as a Court of appeal, after careful consideration, and upon the merit his judgment was final in the High Court, which was sitting upon a second appeal, and is final and binding upon this Board.

Their Lordships will accordingly humbly advise Her Majesty that the last judgment of the High Court ought to be reversed, the judgment of Mr. *Peterson*, the District Judge, affirmed, and the appeal dismissed with costs in the High

Court. The Respondents must pay to the Appellants the costs of this appeal.

Appeal allowed.

Solicitors for the Appellants: *Messrs. T. L. Wilson & Co.*

Solicitors for the Respondents: *Messrs. Watkins & Lattey.*

14th June 1887

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir R. Baggallay, and the Right Hon. Sir R. Couch.

On Appeal from the Court of the Recorder of Rangoon.

MYLAPORE IYASAWMY VYAPOORY MOODLIAR* } *Plaintiff.*

and

YEO KAY AND OTHERS ... *Defendants.*

Limitation Act, 1877, s. 19 and Art. 140—Claim to share in immovable property under will—Acknowledgment of liability—Basis of decision of Case.

The right to property left by will (assuming that the testator had power to dispose of it) falls into possession, by Hindu law, immediately upon the death of the testator; and, therefore, a claim, making title to shares in immovable property under a will, is barred by time, unless brought within twelve years from the date of the testator's death under Art. 140 of Act XV of 1877, Sch II.

Acknowledgment of liability, in order to be within the meaning of s. 19 of the same Act, must be an acknowledgment of liability to the person who is seeking to recover possession, or some person through whom he claims.

The determination in a cause must be founded upon a case, either to be found in the pleadings, or involved in, or consistent with, the case thereby made. *Eshen Chunder* v. *Shama Churn Bhutto*(1), referred to.

APPEAL from a decree (24th June, 1884) of the Recorder of Rangoon.

The suit out of which this appeal arose was brought by the present appellant against the respondents to obtain a declaration that the appellant in his own right, also as executor of the will of M. I. Mooroogasum Moodliar, deceased, and as administrator of the estate of M. I. Kristnasami Moodliar, deceased, was entitled to the possession of two-fifths of one half of five separate lots of land and buildings situate in Rangoon, formerly belonging to Mooroogasum.

The question now raised was whether the suit was not barred by the law of limitation, Act XV of 1877, Sch. II, Art. 140. Mooroogasum died at Madras on the 19th September, 1864, having by his will, dated the same day, appointed his five brothers, who all survived him, his executors, and having bequeathed to them, equally, his residuary estate in these words: "I will and bequeath that all the rest, residue, and remainder, of all my property, movable and immovable, of which I may die possessed (all being my sole earning, and none having come to me from my father's estate) be divided equally between my five brothers, share and share alike."

The five brothers of the testator were respectively named Coomarasami, Ramasami, Kristnasami, Soobroy, and Vyapoory, the last named being the present appellant.

Soobroy on the 25th August, 1865, and Ramasami on the 7th June, 1866, obtained probate of the will from the High Court of Madras; and on the 21st October, 1870, the recorder of Rangoon granted to Ramasami letters of administration with the will annexed. On the 4th January, 1873, Ramasami died in Madras. In 1882 administration, with the will annexed, of the property and credits of

* I. L. R., 14 Cal., p. 801; 14 Cowell p. 168.

(1) 11 Moore's I. A., 7; 2 P. C. J. 209.

Mooroogasum was granted by the Recorder of Rangoon to Vyapoory, the present appellant. None of the other brothers ever took out administration in Rangoon to the estate of Mooroogasum, and no distribution of the respective shares given to the brothers under the will was made. In fact, the whole of the five lots of land and buildings had been, along with other lands, in the year 1869, mortgaged by Ramasami to Mr. Cephas Bennet, a resident in Rangoon, in pursuance of a prior equitable mortgage by deposit of title deeds, in favor of the latter, made by Ramasami. To this it was said that Mooroogasum had consented, he having been surety for the mortgage debt.

Bennet also in 1870 obtained a decree (19th December, 1870) against Ramasami for the mortgage debt, amounting to Rs. 35,283; and in execution brought to sale the right, title, and interest of Ramasami in the lots above mentioned, purchasing the same himself at the auction, having obtained leave to bid. Afterwards (2nd April, 1874) Bennet, as the duly empowered agent of Soobroy and Coomarasami, sold and conveyed the half share in the same lots to Bee Moh Chan and Company, and others, who afterwards assigned to certain of the defendants in this suit.

Kristnasami died at Madras on 21st September, 1882, Vyapoory (also called Mylapoor) the plaintiff in this suit, obtaining administration of his estate. The plaint which was filed on 12th September, 1883, admitted that the shares of Ramasami, of Soobroy, and of Coomarasami, might have been validly transferred, but claimed the remaining two-fifths. The defence was the transfer above stated, with the assignments from the firms, which had purchased, to some of the defendants who had transferred part of the purchased lots to others of the defendants; all of whom, however, relied on the law of limitation in Act XV of 1877, Sch. II, Art. 140.

Issues were settled, of which the principal raised the question of limitation, and of the validity of the defendants' title, either absolutely, or as purchasers for value, without notice. The Recorder of Rangoon (Mr. W. F. Agnew) dismissed the suit, with costs, as barred under Art. 140, Sch. II, Act XV of 1877, stating his reasons as follows:—

"It is not necessary for me to trace the steps by which the property sought to be recovered came into the hands of the defendants; the first question is whether the suit is not barred by limitation. For the defendants it is argued that the case is governed either by Art. 140 or Article 144 of the second Schedule to the Limitation Act, and that, whichever may be held to apply, the suit is barred. Article 140 prescribes a period of twelve years for a suit by a devisee for possession of immovable property, to be computed from the time 'when his estate falls into possession.' That must begin from the time when the devisee became entitled to possession of the property, which would be not later than one year after the death of the testator. Article 144 prescribes a period of twelve years for a suit 'for possession of immovable property or any interest therein not hereby otherwise specially provided,' to be computed from the time 'when the possession of the defendant becomes adverse to the plaintiff.' The possession of Mr. Bennet became adverse to the plaintiff at all events on the 24th of April, 1871, when he obtained his certificate of purchase from this Court.

"The plaintiff has not shown any reason for his delay, and it is proved that he was in Rangoon from January, 1870, to August, 1872, and he must have been cognizant of the execution proceedings, for he says that he lived with his brothers, but whether he was cognizant or not is, in my opinion, immaterial, for I consider that his suit is barred under Article 140 of the Second Schedule to the Limitation Act.

"Mr. Porter has argued that s. 10 of the Act applies, and that the plaintiff's co-executors were trustees for him. The devise was to the testator's five brothers, to be divided equally between them share

and share alike. These words created a tenancy in common between the brothers (Jarman, 4th edition, 257). I am not aware of any authority for holding that tenants in common are trustees for each other. The fact that the testator's brothers were also appointed his executors does not, in my opinion, make them trustees for a specific purpose within the meaning of s. 10 of the Limitation Act. The suit must therefore be dismissed with costs."

On this appeal Mr. *J. D. Mayne* and Mr. *Laing*, appeared for the appellant.

Mr. *J. Rigby, Q.C.*, and Mr. *A. Young*, for the respondents.

For the appellant it was argued that the claim was not barred by limitation. Bennet's possession from February, 1871, till April, 1874, was not adverse to any one except perhaps Ramasami, through whom no title could be made except in respect of his own share by those who relied on the transfer from Bennet. Ramasami may have had possession; but, if so, it was, as regards the four brothers, only as agent in respect of their interests as tenants in common, and as distinguished from his own one-fifth. Only the interests of the brothers who assented to the sale could pass to Bennet, who was aware of other persons having interests in the property, and, on behalf of such others, he became only agent, holding the property. Both the conveyances of 1874 were acknowledgments that Bennet's only right, or title, was as agent of Soobroy, who could not dispose of the whole estate. Reference was made to *Umr-un-nissa* v. *Muhamad, Yar Khan*(1).

Counsel for the respondent were not called upon.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR BARNES PEACOCK.

The learned Judge in this case has decided that the suit was barred by limitation under the 140th, or the 144th article of the second schedule of the *Limitation Act*, XV. of 1877. He stated that, in his opinion, it is barred by art. 140. Their Lordships are of opinion that the learned Judge was right in the conclusion that the suit was barred by art. 140 of that Act.

In order to ascertain whether the suit was so barred or not, we must look to what was the nature of the case which the plaintiff made.

By the Act of 1882, which was the Civil Procedure Code in force when the suit was commenced, the plaintiff must shew the grounds, &., the cause of action, and when that cause of action accrued.

In the case of *Eshenchunder Singh* v. *Shamachurn Bhutto*(1), Lord *Westbury*, who delivered the judgment, said: "This case is one of considerable importance, and their Lordships desire to take advantage of it for the purpose of pointing out the absolute necessity that the determination in a cause should be founded upon a case, either to be found in the pleadings, or involved in, or consistent with, the case thereby made."

Now what is the case made out by the pleadings, or what is involved in, or consistent with, the claim which is thereby made? The plaintiff alleges in the plaint that Mooroogasum died on the 19th September, 1864, having made a will, the 6th paragraph of which was in the words following: "All the rest, residue, and remainder of all my property, movable and immovable, of which I may die possessed (all being my own sole earning, and none having come to me from my father's estate) be divided equally between my five brothers, share and share alike." The five brothers included Vyapoory, the present plaintiff, and Kristnasami, another brother, to whose interest in the estate Vyapoory, the plaintiff, claims to have succeeded; he therefore claims to have two of the five shares devised by Mooroogasum. He rests his title upon Mooroogasum's will, and claims that the will gave him a right to recover possession, and to have a declaration of his right to

(1) I. L. R., 3 All., 24.

(1) 11 Moore's I. A. 7; 2 P. C. J. 209.

possession of two-fifths of the estate, and also to have a partition. He does not allege in distinct terms that Mooroogasum had an estate in this property, but it is to be implied from, or rather is involved in, the statement which he made in the plaint. At paragraph 16 of the plaint he says: "Coomarasmi and Soobroy"—those are two of the other brothers—"had no right, power, or authority, to sell more than their respective one-fifth shares in the land, set out in paragraph 7 of this plaint." But when he says that they had no right to sell more than their two shares, it implies that they had the right to sell those two. Then he says, in paragraph 18, "that there remains undivided the respective one-fifth shares or interests of Vyapoory"—that is the plaintiff himself—and Kristnasami, deceased, in each of the several pieces or parcels of land set out in paragraph 7 of this plaint." He could not have been entitled, nor could his brother have been entitled, to one-fifth, unless the testator had the property to dispose of; and then, having made out, or professed to make out, a title under the will, he declares that he is entitled to possession of those two-fifths, and he asks to have it declared that he is entitled to them, and to have a partition of the estate.

Now when did his title arise, assuming that the testator had the estate, and had the power to devise it? It arose on the death of Mooroogasum on 19th September, 1864. The Judge in his judgment puts it one year later, and says he must at least have had a title at the expiration of one year from the death of the testator. It appears to their Lordships that according to the Hindu law he became entitled to his one-fifth on the death of the testator.

The words of Art. 140 are: "Suit by a remainder man, or a reversioner (other than a landlord), or devisee for possesison of immovable property"—which this is: he is claiming as a devisee of immovable property. Then it says the suit is to be brought within 12 years from the time when his estate falls into possession. Now, from 1864, he was entitled to possession, but Mr. Bennet had the possession; and it is said now that Mr. Bennet had not an adverse possession, because he was holding as in the nature of a mortgagee, and that the testator was not absolutely entitled to the estate. There is nothing, however, in the plaint from which anything of that kind can be inferred. It is to be inferred that the case rests upon the title of the testator to devise the estate, and upon that title only.

The issues are: "(1) Does the plaint disclose a good or sufficient cause against the defendants, or any or either of them?" It does not strictly show a good cause of action, for there is no allegation that the testator was entitled; but whatever cause of action it does show is a cause of action derived from the will of the testator and from the death of the testator, and the title accrued at that time. Then comes the issue No. 2: "Is the plaintiff's claim, or any portion thereof, barred by limitation?" Now, if his title accrued in 1864 then it is clear that the judgment of the learned Judge was correct, and that the suit which was not brought till the 12th September, 1883, is barred.

Then it was contended that by virtue of s. 19 of the Limitation Act, an admission had been made which gave a further period from which the right of bringing the action was to be dated. Section 19 is this: "If, before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing, signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed." But what liability does this mean? It must mean a liability to the person who is seeking to recover possession, or some person through whom he claims. Was

there any admission made in this case by Mr. Bennet at any time, or by any of the defendants? The admission is said to have been made by Mr. Bennet in the conveyance which was executed in 1874. It is contended that in that conveyance Mr. Bennet admitted that he was liable in respect of the property. The only admission is that he was acting as agent for one of the executors in selling the estate. He was selling the estate for the purpose of getting paid out of the proceeds of the sale. He does not admit that he was liable to be turned out of possession, or that anyone had a right of possession as against him, nor does he make any admission at all to the plaintiff or to any one through whom he claims. Under those circumstances the clause does not apply. No liability has been admitted to take the case out of the statute of limitations; and under those circumstances Art. 140 must prevail, and the decision of the learned Judge was correct upon that point.

Under these circumstances their Lordships will humbly advise Her Majesty to affirm the decision of the Court below, and to dismiss the appeal. The appellant must may the costs.

Appeal dismissed with costs.

Solicitors for the appellant: Messrs. *Frank Richardson & Sadler.*

Solicitors for the respondents: Messrs. *Sanderson & Holland.*

16th June 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Richard Baggallay, and the Right Hon. Sir Richard Couch.

On Appeal from the High Court of Madras.

MINAKSHI NAIDU* } *Defendant, Appellant.*

and

SUBRAMANYA SASTRI, } *Petitioner, Respondent.*

Act XX of 1863 (Religious Endowments), s. 10—Appellate jurisdiction—Order of District Judge filling vacancy on committee not appealable.

It is not to be assumed that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by the enacted law, or equivalent authority.

The High Court has no jurisdiction to hear an appeal from the order of a District Judge made by him on petition pursuant to s. 10 of Act XX of 1863 (Religious Endowments), appointing a member to fill a vacancy in a Committee. Neither that Act, nor the general law, gives any right of appeal, which therefore does not exist, from such an order.

In a cause which a Judge is competent to try, if the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground of irregularities, which, if objected to at the proper time, might have led to the dismissal of the suit. But when the Judge has no jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process.

Ledgard v. *Bull* (1) referred to and followed.

APPEAL from an order (11th November 1881) of the High Court, affecting to reverse an order (10th February 1881) of the District Court of Madura, made under s. 10 of Act XX of 1863, an Act "to enable the Government to divest itself of the management of religious endowments."

* I. L. R., 11 Mad., p. 26; 14 Cowell p. 160.
(1) L. R. 13 I. A. 134; I. L. R., 9 All., 191.

The order of the District Court of Madura, to which this appeal related, appointed a member to fill a vacancy in the committee managing the Minakshi Sundraswrar Devasthanam in Madura, that being a religious endowment within the scope of Act XX of 1863, of which s. 10 is as follows :—

"Whenever any vacancy shall occur among the members of a committee appointed as above, a new member shall be elected to fill the vacancy by the persons interested as above provided. The remaining members of the committee shall as soon as possible give public notice of such vacancy, and shall fix a day which shall not be later than three months from the date of such vacancy for an election of a new member by the persons interested as above provided under rules for elections which shall be framed by the Local Government, and whoever shall be then elected under the said rules shall be a member of the commitee to fill such vacancy. If any vacancy as aforesaid shall not be filled up by such election as aforesaid within three months after it has occurred, the Civil Court on the application of any person whatever may appoint a person to fill the vacancy, or may order that the vacancy be forthwith filled up by the remaining members of the committee, with which order it shall then be the duty of such remaining members to comply, and if this order be not complied with the Civil Court may appoint a member to fill the said vacancy."

On the 8th December 1880 Ponnambalam Pillai and twenty-three other inhabitants of Madura informed Mr. P. P. Hutchins, District Judge, by petition, that Gurusami Sastrayal, one of the five members of the committee, had died on the 5th September preceding, and that the surviving members had taken no steps to fill up the vacancy.

The following order was consequently made on the 10th February 1881 :—

A vacancy occurred some months ago on the committee of the Minakshi Sundraswrar Devasthanam by the decease of Gurusami Sastrayal. The committee failed to fill it up within the allotted period, and petitions were presented to this court to take the matter into its own hands. I sent for the lists of voters, and, as a preliminary step for my own satisfaction, I endeavoured to ascertain the wishes of the public by appointing a date for the registration of votes.

The election was held on the 28th December last.

The tellers recorded 300 votes for Minakshi Naik; 141 for Subbaragava Sastry, son of the late Gurusami Sastry; 13 for Vakil Dorasami Aiyar; and 8 for Ramia Munian, a Patnul Chetti.

Subsequently, I heard Mr. Scott for the last-named candidate, Mr. French for the second, and Mr. Pole for the first. I at once intimated that I should not appoint the second, as I thought him too young, nor the third, because apart from other objections, it would not be becoming for me to put a second vakil of my own court on the Committee. The remaining candidates were Minakshi Naik and Ramia Munian Chetti, and I said that I should probably appoint the former, unless the pamphlet referred to by Mr. French, as subversive of the worship of Siva and as bearing Minakshi Naik's signature, should show that he would not be a proper person for the office. I find nothing whatever in that publication which can possibly be construed into hostility to the worship of Siva.

Mr. Scott has repudiated the election as an indication of the popular opinion, and perhaps it may be so. Very probably, the result is more due to better party organization than to real public feeling. But I am quite satisfied that some of the complaints were groundless and that the Patnul Chetti's adherents had free access both into the palace and to the tellers' tables, and that the proceedings were conducted in a perfectly impartial way—at all events, the election is sufficient to support the preference which I should naturally give to one with whose qualifications I am personally acquainted than to one of whom I know nothing except that he cannot read

Tamil. I say this without intending to cast the slightest slur on Ramia Munian Chetti's character which seems to be well guaranteed, and notwithstanding my natural desire that so large a section of the population as the silk-weavers should be represented on the committee.

Since hearing the argument, another candidate has come forward in Mr. Rama Row, the Treasury Deputy Collector. I at once wrote to him that I should be glad to appoint him if he was about to retire, as I felt sure that his official habits and experience would be of great benefit to the institution. He is, however, unable to assure me that he will retire very shortly, and I do not think it desirable that a public official of his standing, and far less a magistrate, should be on the committee.

I have read the Tinnevelly judgment, but it does not support the objections to the appointment of a Vishnuvite. The great Tirumal Naik himself, to whom the pagoda owes its chief grandeur, was, I believe, of that sect. The two members last elected held the same opinions, and so have many others entrusted with great authority by the committee. They all worship Siva as well as Vishnu.

It is accordingly ordered that Minakshi Naidu be and he hereby is appointed to be a member of the committee for the management of the Minakshi Sundraswrar Devasthanam of Madura *vice* Gurusami Sastryal deceased.

On the 21st April 1881 the respondent presented a petition to the High Court of Madras praying that the order of the Civil Judge might be rescinded, that one G. Subramanya Sastry might be appointed, or that a new election might take place.

On the 8th August the respondent presented a petition to the successor in office of the District Judge of Madura, praying that he would take further evidence in the matter for submission to the High Court, or would cancel the order of his predecessor. Upon this the District Judge passed the following order :—

"Looking to the wording of Mr. Hutchins' order, I find it to be perfectly clear that this is not an election under the Act with which I could exercise any interference. Mr. Hutchins was exercising his power under s. 10 of the Act, and, for his own satisfaction, held an election as a test of the wishes of the people; his order was, no doubt, passed in consideration of the wishes of the people as expressed in the election, but it can only be upset by an appeal to the High Court. The petition is dismissed."

On the 11th November 1881, the High Court (Turner, C. J., and Muttusami Ayyar, J.), made an order cancelling the appointment of this appellant, and directing the District Judge to make a new appointment guided by the observations contained in the following judgment :—

"The institution is admittedly, at present, devoted to the worship of Siva, and in accordance with the letter and spirit of the Act its concerns should be directed by persons of the same persuations—persons whose religious convictions will be enlisted in support of their fiduciary office. We shall set aside the appointment made by the Judge, not because we entertain any doubt of the fitness of the gentleman selected on the score of integrity and reputation, but because he has pronounced himself actively in favor of the cult of Vishnu.

"We shall not, however, take it upon ourselves to make an appointment, but shall direct the Judge to do so, having regard to the consideration we have mentioned. Each party will bear his own costs of this appeal."

The same Judges, on the 20th September 1882, rejected a petition of review under s. 623 of the Code.

Minakshi Naidu then applied under s. 600 of the Code for a certificate in order to appeal to Her Majesty in Council, making it the first of his grounds that the order of the District Court of Madura was final. On 20th April 1883 the Judges holding that they could not give leave to appeal in this case, rejected the application. However, on the 9th Feb-

ruary 1884, he obtained special leave to appeal.

On this appeal Mr. *J. D. Mayne* appeared for the appellant.

Mr. *R. V. Doyne* for the respondent.

For the appellant, it was argued that the High Court was wholly without jurisdiction to reverse or vary the order of the Civil Court. By s. 10 of Act XX of 1863, the Civil Court, meaning the officer holding the post of District Judge, was directed to appoint, upon default of an appointment having been made by the remaining members of the committee. In conforming to the Act, he was not acting as Judge of a court vested with a jurisdiction in a suit of any kind, nor did he recognize a right. He was only in this manner a *persona designata*. No jurisdiction to the High Court, or to any court, was given to hear an appeal from an order made under s. 10; nor was there a jurisdiction given by the general law.

Reference was made to s. 2 of Act X of 1877, the code then in force, where "decree" was defined; also to s. 11, explaining "civil suit" to be where a right is contested; also ss. 588 and 622. The amendment of the latter section by s. 92 of Act XII of 1879 and its appearance as amended in the present Code (Act XIV of 1882) was also referred to.

Reference was also made to *Rajah Amir Hassan Khan* v. *Sheo Baksh Singh* (1), *Maharaja Dhiraj Mahtab Chand Bahadur of Burdwan*, in re(2), *Sankar Doday*, in re(3), and *Anthony* v. *Dupont* (4). In the last case the Madras High Court had interfered under s. 622, but there was no other precedent for such a course. *In re Venkateswara* (5); that an appeal does not exist in the nature of things and that a right to appeal from any decision of any tribunal must be given by express enactment appeared in *Sandback Charity Trustees* v. *North Staffordshire Railway Company* (6); and by the Indian law, appeals were allowed in suits of a civil nature, where they were not disallowed, but a suit there must be; in other words, there must be parties, there must be a right presented to a court, and a decision thereupon. All these elements were wanting here. Lastly, it could not be concluded that the objection to the jurisdiction had been waived. As the High Court had no jurisdiction to entertain the appeal, no waiver in that court could operate. Neither express, nor implied, consent of the parties could give jurisdiction to a court which did not possess it by law—*Ledgard* v. *Bull*(7).

Mr. *R. V. Doyne* was called upon only in reference to the question of jurisdiction, which, it was intimated, would be disposed of before the order would be discussed on its merits.

For the respondent, Mr. *R. V. Doyne* contended that under the general powers of superintendence which the High Court possessed as the successor of the Sadar Diwani Adalat, the jurisdiction to hear the appeal had been duly exercised, and that such authority having really existed in the court, the objection as to the jurisdiction was now taken too late; an argument to which was added that the appellant by applying for a review had himself invoked it.

Reference was made to Regulation V of 1802, preamble; Charter Act, 24 & 25 Vic., c. 104, ss. 9 and 15; Letters Patent of 1865, clauses 15 and 16; Code of Civil Procedure, Act X of 1877, s. 622.

An application might be distinguished from a suit, but the order of the Judge when made fell under s. 622, not being such an order as was excluded from appeal by s. 588, which gave an appeal from specified orders, excluding other orders of a similar class. The appointment, however, amounted to a decree within the meaning of the definition in the code; and it was hardly correct to apply the expression that unless an Act

(1) L. R., 11 I. A., 237; 4 P. C J 559.
(2) 2 B.L.R. 217; see also pp. 181 & 301.
(3) 4 B.L.R., 65; see also 5 B.L.R., app. 59.
(4) I. L. R., 4 Mad., 217.
(5) I.L.R., 10 Mad., 98.
(6) L R., 3 Q.B. Div., 1, at p. 4.
(7) L.R., 13, I.A., 134, and I.L.R., 9 All., 191.

creating a right gave an appeal there could be none, inasmuch as the superintending power of the High Court made it rather that there would be an appeal, unless it had been expressly taken away.

Counsel for the appellant was not called upon to reply.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR R. BAGGALLAY.

This is an appeal against an order of the High Court of Madras, which cancelled an order of the District Judge of Madura appointing the present appellant to fill up a vacancy in the committee of a pagoda in the Madras Presidency.

The appointment was made by the District Judge under the provisions of s. 10 of Act XX. of 1863, entitled "An Act to enable the Government to divest itself of the management of religious endowments," and commonly known as the *Pagoda Act*. By that Act it was provided that the local government should appoint one or more committees in every division or district to take the place, and to exercise the powers of, the Board of Revenue and the local agents, under the regulations thereby repealed, that the members of such committees should be appointed from among persons professing the religion for the purposes of which the temple, or other religious establishment, was founded or should be maintained, and in accordance, so far as could be ascertained, with the general wishes of those who were interested in the maintenance of such temple or religious establishment, and that the appointments should be for life; s. 10 provided for supplying vacancies in the following terms: "Whenever any vacancy shall occur among the members of a committee appointed as above, a new member shall be elected to fill the vacancy by the persons interested as above provided. The remaining members of the committee shall, as soon as possible, give public notice of such vacancy, and shall fix a day, which shall not be later than three months from the date of such vacancy, for an election of a new member by the persons interested, as above provided, under rules for elections which shall be framed by the local government, and whoever shall be then elected under the said rules shall be a member of the committee to fill such vacancy. If any vacancy as aforesaid shall not be filled up by such election as aforesaid within three months after it has occurred the Civil Court, on the application of any person whatever, may appoint a person to fill the vacancy, or may order that the vacancy be forthwith filled up by the remaining members of the committee, with which order it shall then be the duty of such remaining members to comply; and if this order be not complied with, the Civil Court may appoint a member to fill the said vacancy."

The interpretation clause provided that the expression "Civil Court" should mean the principal Court of original civil jurisdiction in the district in which the temple was situated.

The committees appointed under the Act appear to have varied in number; in the case under consideration a committee of five was originally appointed. There had been changes from time to time, and, on the 5th of September, 1880, Gurusami, one of the then five members of the committee, died.

The period of three months expired on the 6th December 1880, and several applications were thereupon made to the District Judge at Madura to take such course as he might deem advisable. He accordingly issued a notice that, unless an election was held before the end of the year, he would take the matter into his own hands. An election did in fact take place on the 28th December 1880, and at such election, tellers, appointed by the District Judge, attended and reported to him the result; the present appellant obtained the largest number of votes, and by an order of the District Judge, dated 10th February 1881, was

appointed to fill the vacancy in the committee. As the three months from the death of Gurusami had expired before the election, the power and the duty of appointing his successor had devolved upon the District Judge; the object of the Judge, in permitting an election to take place after the expiration of the three months, was, as he states, to satisfy his own mind as to who would be the proper person for him to select.

The Judge having appointed the appellant on the 10th of February 1881, a petition of appeal was presented to the High Court by persons, who were either interested as candidates, or were in favor of other candidates. The substantial grounds of the appeal were that the Madura temple was devoted to the worship of Siva, and that the present appellant was a Vishnuvite. The High Court agreeing with the petitioners, discharged the order of the District Judge.

From that order of the High Court the present appeal is brought, and the question has now been, for the first time, raised whether the High Court had jurisdiction to deal by way of appeal with the order of the District Judge. It should be mentioned that after the High Court had decided adversely to the present appellant, a petition of review was brought before that court, and they declined to further interfere. During the proceedings in the High Court it was never suggested that that court had no jurisdiction to deal with the question until an application was made for leave to appeal to the Queen in Council, when it was inferentially stated; it was, however, then too late for the High Court to entertain the question.

On the 4th March 1884, leave was given to the appellant by Her Majesty in Council to enter and prosecute his present appeal.

When the appeal was opened, it appeared to their Lordships desirable that the question of the jurisdiction of the High Court to entertain an appeal from the order of the District Judge should be first taken into consideration, as, if that objection should prevail, it would be unnecessary to go into the disputed questions by which the merits of the case were surrounded; and with the question of jurisdiction alone their Lordships now proposed to deal.

In approaching the consideration of this question, their Lordships cannot assume that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by statute, or by some authority equivalent to a statute. The first question which arises in the present case is whether any right of appeal is given by the Pagoda Act itself. There is nothing in the Act which would suggest it, unless it is to be found in s. 10, to the terms of which their Lordships have already referred. Sections 14 to 20 of the Act provide for the interference of the court by way of suit in certain cases, but they are entirely limited to cases which may be classified as breaches of trust or neglect of duty. There is no other provision whatever for the institution of suits in the Pagoda Act itself. In the opinion of their Lordships the tenth section places the right of appointing a member of the committee in the Civil Court not as a matter of ordinary civil jurisdiction, but because the officer who constitutes the Civil Court is sure to be one of weight and authority, and with the best means of knowing the movements of local opinion and feeling, and one can hardly imagine a case in which it would be more desirable that the discretion should be exercised by a person acquainted with the district and with all the surroundings. The exercise of the discretion being so placed in the District Judge their Lordships are unable to find anything in the tenth section which confers a right of appeal.

It has however been suggested that, though there may be no right of appeal under the Pagoda Act itself, yet a right of appeal must be found in the general law, and their Lordships' attention has

been particularly directed to s. 540 of Act X of 1877, which gives a general right of appeal from decrees of court exercising original jurisdiction; the jurisdiction conferred by the code (s. 10) is to try suits of a civil nature. The Act of 1877 contained, in its interpretation clause, a declaration of the meaning of the word "decree," as used in that Act, but this interpretation was modified by Act XII of 1879, and, as modified, the interpertation is as follows:—

"'Decree' means a formal expression of an adjudication upon any right, claim, or defence, set up in a Civil Court where such adjudication decides the suit or the appeal." In the opinion of their Lordships there was no civil suit respecting the appointment, and it would be impossible to bring an order made by the District Judge pursuant to s. 10 of the Pagoda Act within the definition of a decree as contained in the code, and no other general law has been suggested. Mr. Doyne, in the course of his argument, contended that if a person, very improper and unfit by reason of his religious qualifications, or moral conduct, was appointed, there must be a right, either by appeal against the Judge's order, or by suit, or in some other way, to remove the person so appointed. There is force in this argument, but whether a person so improperly appointed could, as has been suggested, be removed by proceedings equivalent to proceedings by *quo warranto* in England, or whether, upon a full consideration of the merits, the appellant could be considered as a person improperly appointed, are questions upon which their Lordships are not called upon to express an opinion. In their opinion it is clear that there is no appeal from that which was a pure discretion vested in the District Judge.

It has been suggested, and it is not right altogether to pass that suggestion over, that, by reason of the course pursued by the present appellants in the High Court, they have waived the right which they might otherwise have had, to raise the question of want of jurisdiction. But this view appears to their Lordships to be untenable. No amount of consent under such circumstances could confer jurisdiction where no jurisdiction exists. Upon this point, it may be convenient to refer to the judgment of their Lordships delivered by Lord Watson in the comparatively recent case of *Ledgard* v. *Bull* (1), as it in very concise terms deals with the circumstances under which there can be a waiver of a right to complain of a want of jurisdiction. Their Lordships say:— "The defendant pleads that there was no jurisdiction in respect that the suit was instituted before a Court incompetent to entertain it; and that the order of transference was also incompetently made. The District Judge was perfectly competent to entertain and try the suit if it were competently brought; and their Lordships do not doubt that in a such case a defendant may be barred by his own conduct from objecting to irregularities in the institution of the suit. When the Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot, by their mutual consent, convert it into a proper judicial process, although they may constitute the Judge their arbitrator, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue and go to trial upon the merits, the defendant cannot subseqently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure, which, if objected to at the time, would have led to the dismissal of the suit." In the persent case there was an inherent incompetency in the High Court to deal with the question brought before it, and no consent could have conferred upon the High Court that jurisdiction which it never possessed.

Having regard to all the circumstances of the case, their Lordships will humbly advise Her Majesty to allow the appeal,

(1) L.R., 18 I.A., 144; s.c. I.L.R., 9. All., 203.

to discharge the order of the High Court, and to dismiss the appeal to the High Court without costs. There will be no costs of the present appeal.

Solicitors for the appellant:—*Messrs. Gregory, Rowcliffes & Co.*

Solicitors for the respondent:—*Mr. R. T. Tasker.*

16th and 17th June 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Richard Baggallay, and the Right Hon. Sir Richard Couch.

On Appeal from the High Court of North-Western Provinces.

BINDESHRI PRASAD* ... *Plaintiff*,

and

MAHANT JAIRAMGIR ... *Defendant.*

Specific performance of contract—Act I of 1877 (Specific Relief Act.)

Upon a contract for the sale of the proprietary right in land, the intending purchaser, insisting on a right to compel the vendor to give an absolute warranty of the title, withheld payment of the purchase money beyond the time fixed. He also sued for specific performance of the contract, requiring a guarantee from the vendor, until it appeared that the judgment of the appellate Court was about to be given against him on the ground that he was not entitled to what he claimed.

Held that certain reported cases where, apparently, the plaintiff had been willing to submit to have the agreement which was actually proved performed, were different from this; and that the decree dismissing the suit ought to stand. Here the plaintiff, insisting upon having that which he had no right to have, had delayed performing his part of the agreement on that account.

Appeal from a decree (23rd June, 1884) of the High Court (1) affirming a decree (9th June, 1883) of the Subordinate Judge of Allahabad.

The suit out of which this appeal arose was brought by the present appellant to obtain a decree for specific performance of a contract for the sale of the proprietary right in twenty-five mauzas forming taluka Dhobha, pargana Kiwai, in the Allahabad district. The plaint set forth that on the 3rd October, 1882, the defendant contracted with the plaintiff, at Mirzapur, to sell to the plaintiff for Rs 10,075, his whole zamindari right in the above, the plaintiff paying Rs. 200 earnest-money, and Rs. 105 for the stamp; promising also to pay the remainder of the purchase money within fifteen days, at the time of the execution and registration of the sale-deed. Refusal to complete on the tender of a sale-deed for execution on the 18th October was alleged, and the relief sought was a decree for specific performance by execution and registration of a sale-deed, with terms involving a warranty of tittle.

The *satta*, or agreement, dated 3rd October, appears at the commencement of their Lordships' judgment. Its factum was not disputed; but the defence was that the plaintiff had not paid the purchase money within the stipulated time, and this notwithstanding that he had been informed when the *satta* was signed that the risk of claims on the property that possibly might be brought forward by persons claiming through the former owners, must be taken by him as purchaser; and that no warranty could be given. He had, however, afterwards insisted upon one.

The issues recorded by the Subordinate Judge raised questions whether the fact that the plaintiff did not pay the purchase money to the defendant within the stipulated time, affected his right to sue, whether, at the time of the agreement, it was stated that the defendant was not to be answerable for disputes as to the

* I. L. R. 9 All. p 705; 14 Cowell 173.

(1) Weekly Notes, 1884, p. 169.

title to the property raised by other parties, and whether if the plaintiff should be found entitled to have the sale-deed executed, he would be entitled to have it executed with the warranty of title claimed by the plaintiff.

It appeared that the material facts about taluka Dhobha were that, prior to December, 1873, it belonged to Chedi Lal and other members of his family. Chedi Lal had three brothers Madho, Sheo and Sadho. Of these Madho, about 1869, separated in estate from Chedi Lal, and died some three years after, leaving a widow Ramdai. Sheo died in 1861, leaving a widow Lachmania. Sadho, and, after his death, his son, Kalka Prasad, continued joint with Chedi Lal; and against them in 1872 the respondent obtained a decree, in satisfaction whereof he caused to be sold in execution and purchased their right, title and interest in taluka Dhobha, of which he obtained possession. In November, 1881, the appellant, through Chedi Lal, who acted for him, commenced the arrangements, with a view to purchasing the property, which ended in the execution of the *satta* of 3rd October, 1882. A dispute then arose as to an absolute warranty of title, which the appellant required, and after the interchange of proposed clauses in the sale-deed, this suit was brought.

Both the Courts below held that the plaintiff was not entitled to a decree for specific performance. The Court of first instance held: first, that the admitted fact of non-payment of the purchase money within fifteen days was a sufficient defence to the suit, the willingness of the defendant to have executed a sale-deed, without the guarantee of title insisted on by the plaintiff, after the expiration of the fifteen days, not barring him in this suit from relying upon the condition as to payment within that time; secondly, that the defendant was not under the contract between the parties bound to guarantee the title.

The High Court, (Straight and Oldfield, JJ.,) without expressing an opinion as to the correctness of the first ground relied on by the lower Court, concurred with that Court in substance as to the second. The material part of their judgment was as follows:—

"What we read the plaint to mean, and what we believe the plaintiff intended it to mean, was that the defendant should be compelled to execute a contract of sale, with a covenant therein guaranteeing an absolute and valid proprietary title to the whole of the villages in taluka Dhobha, and indemnifying the plaintiff against loss or damage in the event of his being hereafter ousted from the whole or any part thereof, by the subsequent assertion, on the part of any other person, of a title paramount to the vendor, whose position, it must not be forgotton, is that of an auction-purchaser and mortgagee. No doubt, under ordinary circumstances, it is an accepted principal of law, that "in every contract for the sale of land a condition is implied for a good title;" and the failure to mention it does not necessarily render such contract incomplete. And it is laid down "that the Court will carry into effect a contract framed in general terms, where the law will supply the details". (Fry, para. 349, p. 156). But, in the present case, it is patent, from the evidence of Chedi Lal, that the plaintiff was fully alive to, and well aware of, the precise character of the rights possessed by the defendant in the taluka of Dhobha; and we can only interpret the *satta* of the 3rd of October, 1882, as evidencing the preliminaries of a sale by which all that the defendant undertook to sell, and all that the plaintiff contracted to buy, was the rights and interests of the defendant, whatever they might be. The statements of Chedi Lal make it perfectly clear that the plaintiff knew of the existence of the two widows of Madho Prasad and Sheo Prasad, the deceased brothers of Chedi Lal, and that they had actual or apparent claims against the property proposed to be sold; indeed, it would seem that he at one time contempleted purchasing their interests, with a view to asserting them by litigation. Under such circumstances, while, on the

one hand, it cannot be said that the plaintiff was in any way misled, on the other, the conclusion is irresistible that the defendant at no time either contemplated giving or agreeing to give such a guarantee of title as the plaintiff now seeks to put upon him. There is not a word in the *satta* from which we should be justified in drawing the inference that the defendant ever undertook to do more than to convey such rights and interests as he possessed to the plaintiff; and it seems to us that to accede to the prayer of the plaintiff's plaint would be to compel the defendant, by the coercive powers of a Court of law, to do something he had never agreed to do, and which could not legally be expected from him, having regard to the nature of the interest he was to be at the same time required to convey. In other words, upon the facts disclosed, the plaintiff virtually invites us to compel the defendant to vouch a title which, to his own knowledge, is, to say the least of it, doubtful, and to force him to sell to the plaintiff a higher estate than he ever undertook to transfer. The case does not appear to us one in which the discretion of this or any Court to enforce specific performance, under Act I of 1877, can properly be exercised; and for these reasons we hold that the decision of the Court below, dismissing the suit, should be maintained. The appeal is dismissed, with costs."

On this appeal,

Mr. *T. H. Cowie, Q.C.*, and Mr. *C. W. Arathoon* appeared for the appellant.

Mr. *R. V. Doyne*, for the respondent.

For the appellant it was contended that as the difference between the parties had not been cleared up when the litigation between them ensued, resulting in the Courts' finding what the contract, in fact, had been, there was no reason why a decree for the performance of the contract as found to have been actually entered into, should not be made. That the plaintiff had at one time insisted upon more than he was entitled to was no obstacle to this, nor did the lapse of the fourteen days, the position of the parties not having been altered by the delay, alter the case. Reference was made to *Joynes* v. *Statham* (1), *Lindsay* v. *Lynch* (2), *Ramsbottom* v. *Gooden* (3) and Dart's Vendors and Purchasers, ed. 1876, p. 1037.

Counsel for the respondent was not called upon.

The judgment of their Lordships was delivered by

THE RIGHT HON. SIR RICHARD COUCH.

The Appellant in this case, and the Respondent, on the 3rd of October, 1882, entered into an agreement for the sale of an estate which is described in the agreement as *Taluka* Dhoba*. The agreement is very short, and is in these words:—"Out of Rs. 10,075 (ten thousand and seventy-five) at which it has been settled by *Mahant Jairamgir* to convey *Taluka Dhoba* to *Babu Bindeshri Parshad*, Rs. 200 (two hundred) have been received as earnest money, through *Lala Chedi Lal* and *Mata Parshad Malwai*. The balance, viz., Rs. 9875 (nine thousand eight hundred and seventy-five), exclusive of costs, will be received in cash within fifteen days, and then I will execute the sale deed and get it registered. The purchaser will bear the costs on account of the stamp paper and the registration and mutation fees. I will have nothing to do with them. I will take the entire amount in cash. If the balance is not paid within fifteen days the earnest money will be forfeited, and the vendor will be at liberty to sell the *Taluka** or not."

On the 16th of October the following letter was written to the Appellant: "My dear *Mahant Jairaimgir*,"—after compliments—"I beg to say that you contracted with me to sell the zamindari of taluka* *Dabha*, pargana *Kiwai*, zilla *Allahabad*, for Rs. 10,075, and accepted Rs. 200 as earnest money. The draft of the sale

(1) 3 Atkyns. 338. *Ilaka (see Cowell).
(2) 2 Sch. & L. 9.
(3) 1 V. & B. 168.

deed is also ready. However, you make excuses in executing the sale deed. It is thirteen days since you were paid the earnest money. You have also sent to me the stamp, but nobody appears on your behalf to write and complete the sale deed. I have over and over again sent my man to you, but you have put the matter off from day to day. As I have some misgivings in the matter, and I am ready to pay the money and have the sale deed executed by this writing, I request you to duly execute the said sale deed in accordance with the corrected draft, and accept the money from me as soon after the receipt of this as possible." It is stated in the statement of the pleader who was examined by the Subordinate Judge before the settlement of the issues, that this notice was served on the 18th of October, "and about three or four days after this, the aforesaid draft of the sale deed was sent to *Madho Chaubay*, Defendant's gumashta, at *Mirzapur*. The draft was not sent to the Defendant's gumashta within the term of fifteen days." It is stated afterwards that there was some mistake as to that date, and it would seem that the draft of the sale deed was sent three or four days before the 18th, probably on the 14th of October. As sent to the Defendant, it contained this clause:—"Should a stranger now or hereafter acquire any other title in the property sold, or any kind of flaw, arise, I, the vendor, my heirs and assigns, shall in every way be responsible therefor. The vendee shall, at all events, be at liberty, if any such contingencies arise, to seek his relief in the Civil Court and realize his losses and damages from me, the vendor, from my person and property, and that of my heirs and assigns, together with interest and costs incurred in the Court; and to this I will have no objection whatever," thus requiring the Defendant to give an absolute warranty of title to the property which was sold. The Defendant objected to this, and struck out this clause, and it would seem that he substituted for it a clause to the following effect:—"Should any kind of dispute arise, whether now or hereafter on my part, or that of my heirs or assigns, in the property sold, I, the vendor, and my heirs will be responsible therefor," and the draft thus altered was returned to the Plaintiff. The Defendant appears to have thought that the Plaintiff was entitled to this, but their Lordships are not prepared to hold that such a contract of sale as this gave the purchaser a right to insist on any formal covenants such as the practice of English lawyers has attached to an English contract of sale, if that is what was in the minds of the parties.

The Plaintiff, the purchaser, was not satisfied with this. After the 18th of October there appears to have been some correspondence or negotiation between the parties with respect to the receipt of some outstanding rents, and it is said that a letter was written on the 30th of October, but that letter does not appear in the proceedings. The plaintiff insisted upon having in the sale deed the agreement or covenant which had been inserted being an absolute warranty of title; and on the 4th of December he brought his suit in the Court of the Subordinate Judge of *Allahabad*, in which, after stating the contract and the payment of the earnest-money, he alleged that "the defendant did not perform the aforesaid contract, and when the plaintiff saw that the defendant delayed in the complete execution of the deed in question, he requested the defendant to have the deed completely executed and registered by means of written and registered notice on the 16th October, 1882," and that he sent the draft on the 18th October, 1882, which, as has been stated, was admitted to be a mistake. Then he said: "the plaintiff has all along showed readiness to have the contract completely performed as far as he himself was concerned;" and prayed that a judgment might be passed ordering the defendant to execute and get registered a sale-deed in favour of the plaintiff in respect of the property claimed, by entering a guarantee of good valid title.

Now there he distinctly claimed to have the contract performed by having this warranty of title; and when he says that he was ready to have the contract completely performed, as far as he himself was concerned, it must be taken that he was ready to have it performed in that way.

The case went for trial before the Subordinate Judge of Allahabad, and he, in his judgment, came to the conclusion that the time fixed for the payment of the balance of the purchase-money was material, and that the plaintiff had not paid the purchase-money at the time fixed, and no valid excuse had been shewn for his not doing so, and consequently he was not entitled to have a decree, and he dismissed the suit. It then went by way of appeal to the High Court, and it is important to see what the Plaintiff insisted upon when he made his appeal to the High Court. In his memorandum of appeal, he said that he appealed because the Appellant had done "all that lay in his power within the stipulated period to secure the due execution and completion of the sale contract which had been previously accepted in unqualified terms by the Defendant, the Respondent; because there is ample evidence to prove that the Appellant could not deposit with the Respondent the balance of the consideration money in consequence of the refusal of the latter to execute a proper conveyance with a warranty of good title," distinctly insisting then on his right to have a warranty of good title; and "because upon the facts admitted by the Respondent himself, the plaintiff appellant is entitled to an equitable decree for his claim," namely, the claim for a deed with a warranty of good title. It has been suggested that the Plaintiff was willing to take a decree upon the terms which was said the Defendant admitted he was liable to perform, namely, to have a sale-deed with a qualified covenant; but there is no evidence that at any time before this stage of the case the Plaintiff had in any way submitted or shewn his willingness to take any other sale-deed than one with a warranty of title. The pleader was examined, and there is no trace of any willingness to do this.

When the case came before the High Court, it went into a consideration of some evidence, which, in its opinion, shewed that the agreement between the parties was different from that which was stated in the writing; that all that the Defendant undertook to sell, and the Plaintiff contracted to buy, were the rights and interests of the Defendant whatever they might be; that it was known to them that the subject-matter of the agreement was the right and interest of certain persons, and that the vendor could not be expected to give any absolute warranty of title. Their Lordships have not gone into this evidence, and therefore express no opinion as to the ground upon which the High Court rested their judgment. They came to the conclusion, upon the oral evidence, that it was not a proper case for a decree for specific performance.

The question which has now to be considered, is whether the decree of the Subordinate Judge dismissing the suit ought to stand, and the position of the parties appears to be this: that the Plaintiff has all along, until he saw that the judgment of the High Court was likely to be given against him, been insisting upon having the sale-deed with the warranty of title; and it is admitted by his learned counsel at the bar, that he had no right to any such covenant. It has not been attempted to be shewn that he had. Thus he was insisting upon having that which he had no right to have, and he delayed performing his part of the agreement for the payment of the purchase-money on that account. Under such circumstances as these, it certainly is not a case in which it would be right for this Committee to advise Her Majesty to make any decree for specific performance.

The cases to which their Lordships have been referred are very different from this. They are cases where apparently the plaintiff has been willing to submit to have the agreement which was actually proved performed. Their Lordships will

therefore humbly advise Her Majesty that the appeal should be dismissed, and the decree of the High Court affirmed, and the Appellant will pay the costs of this appeal.

Appeal dismissed.

Solicitors for the Appellant: *Messrs. T. L. Wilson & Co.*

Solicitors for the Respondent: *Messrs. Pyke & Parrot.*

30th June, 1st and 9th July 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Richard Baggallay, and the Right Hon. Sir Richard Couch.

On Appeal from the High Court in Bengal.

WATSON & COMPANY* ... *Defendants,*

and

SHAM LAL MITTER ... *Plaintiff.*

Guardian and Minor—Enhancement of rent, Effect of—Acts of mother and guardian, how far binding on minor son—Kabuliyat given by widow in possession to bind her son and successor to pay enhanced rent decreed against her—Admission not amounting to estoppel.

A putnidar obtained decrees for the enhancement of the rent of holdings in the possession of the widow of a deceased tenant, one decree being in respect of land formerly held by the latter, and the other in respect of a holding purchased by the widow, on behalf of her minor son by the deceased, whilst the enhancement suits were pending. The widow also signed kabuliyats relating to both tenancies, agreeing, as mother of the minor, to pay the enhanced rent.

Held, that as the putnidar was entitled to sue for enhancement, and it was not to be presumed that the mother held adversely to her son; also as she had come to what she believed to be, and was, a proper arrangement, the son on his attaining full age, and entered into possession of the tenancies, was bound by the kabuliyats.

The putnidar was not precluded by the fact that he had, after the son had attained full age, suit the mother as tenant, stating that she, and not the son, was tenant.

APPEAL from a decree (12th September, 1884) of the High Court, in part affirming, and in part reversing, on the appeal and cross-appeal of the plaintiff and the defendants, a decree (12th May, 1882) of the Subordinate Judge of Midnapore.

The object of the suit, out of which this appeal arose, was to establish the plaintiff's right to hold, at their original rents, two tenancies, one paying Rs. 65-13-9, and the other Rs. 113-13, in two villages, called respectively Kuilibadi and Gilabani, situate within the defendants' putni taluk, Pergunnah Bogri, in the Midnapore district, unaffected by a decree for enhancement in respect of the rent of each. These decrees had been obtained by the defendants, during the plaintiff's minority, against his mother, and the issues at the hearing were, in effect, whether the plaintiff was bound by the decrees, or by kabuliyats executed by his mother, agreeing to pay the enhanced rent.

It appeared that pottahs were granted by former zemindars of Pergunnah Bogri to former ryots of the tenancies in question at the above mentioned rents, and that the holdings had come by transfer to Gopinath Mitter and his sister, Pearimoni Dasi, who, although the names of the original jotedars were kept in the appellants' serishta, took receipts in their joint names for the rents paid by them. Gopinath died in 1858, leaving his wife Haimabati, then pregnant, who in 1859 bore a son to him. This son was Sham Lal Mitter, the present respondent. Haimabati had taken possession, and against her, on the 16th May 1859, a few days after Sham Lal Mitter was born, the present appellants commenced proceedings

* I. L. R. 15, Cal. p. 8; 14, Cowell 178.

to enhance the rent payable by her; also against Pearimoni Dasi for the same purpose. While these suits were pending Pearimoni Dasi, on the 18th November, 1860, executed a deed of sale to Haimabati as "mother and guardian of Sham Lal Mitter, minor," by which Peari Dasi, in consideration of Rs. 5,000, sold her moiety to her.

On the 26th January, 1861, the Principal Sudder Amin held that these appellants, the plaintiffs in the enhancement suits, had a right to enhance, and on an enquiry by an Amin deputed for the purpose fixed the rent of the lands in Kuilibadi at Rs. 529-14-9, and of those in Gilabani at Rs. 675-13-2.

On the 3rd September, 1865, Haimabati, describing herself as mother and guardian of Sham Lal Mitter, minor, executed two dowl settlements for the two holdings, with the rent fixed at the enhanced rate; and on the 28th January, 1867, she, describing herself in like manner, executed kabuliyats to these appellants. The respondent attained the age of 18 years on 10th May, 1877, and on 16th July, 1877, he desposited in Court the rent of Gilabani at the original rate, and obtained the issue of a notice by the Court calling on the appellants to accept that rent. This they declined to accept, alleging in their petition of the 19th January, 1878, that there was no settlement in the name of the respondent, but that the name of Haimabati was registered in their serishta in respect of the enhanced rent.

They, about the same time, instituted two rent suits against Haimabati to recover the rents of the holdings at the rate fixed in the kabuliyats for the years 1284 and 1285 (April, 1876, to January, 1878), and having proceeded to execute their rent decrees against the holdings under s. 59 of the Bengal Rent Act, VIII of 1859, the respondent, under s. 63 of the same Act, made (16th August, 1880) two deposits of Rs. 1,632-6-5, and Rs. 1,570-9, respectively, in payment of the two decrees against his mother Haimabati, but claiming all the money in excess over the original rents. Other payments he also alleged, and made similar claims in respect of them. The Court, however, refused to recognize these claims, referring him to a regular suit to establish them; and thereupon he brought the present suit, praying for a declaration that the holdings in Kuilibadi and Gilabani were mokurari, and not liable to enhancement of rent; also a declaration that he was not bound by the decrees for enhancement obtained in 1861, nor by the kabuliyats given by his mother to the putnidars in 1867. The plaint further asked that the defendants might be required to refund to him the sum of Rs 7,800, the amount paid by him to save the estate from sale.

The Court of first instance held against the plaintiff as to the liability of the holdings to enhancement of rent; also that the plaintiff was not liable under the kabuliyats, but that he was bound by the decree in respect of the tenancy taken over from Pearimoni, as his mother had purchased on his behalf.

Against the above, as dealt with in the decree, the plaintiff appealed to the High Court.

The defendants appealed against that part of the decree by which the plaintiff was held not to be bound either by the decrees, or by the kabuliyats, to which his mother Haimabati was a party.

The High Court (TOTTENHAM, and NORRIS, JJ.), observing that the suit was for a declaration of the plaintiff's right, his immediate cause of action being the rejection of his claim in the execution proceedings, confirmed the findings of the lower Court; first, as to the liability to enhancement of the rent of the tenancies; secondly, as to the plaintiff not being bound by any of the transactions to which his mother Haimabati was a party.

But having come to that conclusion the High Court regarded it as impossible to say that the plaintiff was bound by the results of the litigation relating to the enhancement, he having been in existence before the litigation commenced, a fact within the knowledge of the putnidars, and they having omitted to make him a

party to the suit, as they ought to have done. Nor could they hold that the plaintiff was bound, because he was virtually purchaser of Pearimoni's holding by the decree against her. They even doubted whether Pearimoni would have been bound by it. They held the plaintiff to be free from liability, either under the decrees of 1861, or the subsequent kabuliyats of 1865 and 1867, and maintained that he was liable only to pay the original rents. The appeal of the defendants was, therefore, dismissed (under the circumstances without costs); and on the appeal of the plaintiff, the High Court declared that the plaintiff was not liable to pay anything more than the rents existing before 1861.

On this appeal,—

Sir *H. Davey, Q. C.*, and Mr. *R. V. Doyne*, appeared for the appellants.

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon* for the respondent.

For the appellants it was argued that, as to the tenancies, the decrees obtained by the appellants against the actual rent-payers enhanced the rents, and that Sham Lal Mitter was bound by the kabuliyats given by Haimabati, his mother, who was, at the time when the decrees for enhancement were made, and at the date of the kabuliyats, acting as his natural guardian. Peari Dasi, had she retained her interest until decree, would have been bound by it; and the plaintiff was also bound.

As regards Haimabati's position as guardain, reference was made to Regulation V of 1799, s. 2; Act XL of 1858 (relating to minors); *Hunoomanpersaud Panday* v. *Munarj Koonweree* (1); *Ramchunder Chuckerbutty* v. *Brojonath Mozumder* (2).

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the respondent, argued that he was not bound by the decrees for enhancement, or by the kabuliyats. Except as gurdain to her son, Haimabati on his birth became disentitled to the estate; and therefore no decrees obtained against her, and no agreements entered into by her, in her personal capacity, could bind the estate. In fact, she did not profess to act, and was not supposed to be acting, as guardian to her son in any of the dealings relating to the estate, which took place between her and the appellants, subsequently to her son's birth. In reference to the widow's agency, and the power of an agent to bind either himself or his principal, but not both, reference was made to the judgmemt in *Priestly* v. *Fernie* (1); and in regard to powers of a guardian, *Waghela Rajsanji* v. *Shekh Masludin* (2) was cited.

The appellants were estopped from asserting that Haimabati represented, or that they dealt with her as representing, Sham Lal Mitter, or that she was capable of binding him, as being his agent. They had treated her as the tenant herself in the two rent suits of 1878.

Counsel for the appellants were not called upon to reply.

On a subsequent day (July 9th) their Lordships' judgment was delivered by

THE RIGHT HON. SIR RICHARD COUCH.

The plaintiff in this suit and respondent in the appeal is a tenant of two mouzahs, named Kuilibadi and Gilabani, under the defendants and appellants, who are putnidars of pergunnah Bogri. The principal object of the suit was to obtain a declaration that the plaintiff is not bound by two decrees for enhancement of the rent of those mouzahs obtained in January, 1861, against Srimati Haimabati and Srimati Peari Dasi, and by kabuliyats given by Srimati Haimabati to the putnidars in January, 1867. The plaintiff also asked for a declaration that the mouzahs were not liable to have the rent enhanced, and that the defendants might be required to refund to him the sum of Rs. 7,800-1-5 gundahs, the amount paid by him to prevent the

(1) 6 Moore's I. A., 393; 1 P. C. J., 552.
(2) I. L. R., 4 Calc., 929.

(1) 3 H. and C., 977.
(2) L. R., 14 I. A., 89; I. L. R., 11 Bom., 559; *See Ante page*, 16.

sale of the mouzahs, in execution of decrees obtained by the defendants against Srimati Haimabati. It has been found by both the lower Courts that the mouzahs were liable to an enhanced rent, and so that question is no longer in dispute.

The mouzahs were oringinally held by Jaggut Mundal Saontal and Soonder Mundal Saontal, and by a succession of transfers they came into the possession of Kasi Nath Ghose. He, on the 17th of September, 1850, sold one moiety of them to the plaintiff's father, Gopinath Mitter, and about the same time made a gift of the other moiety to his wife, Srimati Peari Dasi. Gopinath died in October, 1858, leaving his widow Haimabati, who on the 10th of May, 1859, gave birth to the plaintiff. On the death of Gopinath, Haimabati appears to have entered into possession of his estate, and to have been recognized by the defendants as tenant. On the 16th of May, 1859, immediately after the birth of the plaintiff, the defendants caused notices of enhancement to be served upon Haimabati Dasi and Peari Dasi; and on the 17th June, 1859, they instituted two suits against them for enhancement of rent, one as to each mouzah. On the 18th of November, 1860, whilst the suits were pending, Peari Dasi sold her moiety to Haimabati, who is described in the deed of sale as "mother and guardian of Sham Lal Mitter, minor," and it is apparent from the deed that the purchase was made on his behalf. No change, however, was made in the suits.

On the 26th of January, 1861, the defendants obtained a decree in each suit against Haimabati Dasi and Peari Dasi, declaring that they had the right of enhancement, but the rate of enhancement was to be determined after local investigation. This was made, and by an order dated the 25th of June, 1861, the rent of Kuilibadi was fixed at Rs. 529-14-14 gundahs, and of Gilabani at Rs. 675-2-13-2 cowries. Soon after this, on the 26th of September, 1861, a compromise was made between the defendants and Haimabati for payment by instalments of what was due on account of Gilabani. In 1865 the defendants appear to have caused a re-survey to be made of the mouzahs, and Haimabati on the 3rd of September, 1865, executed two dowl settlements of land and jumma, one of each mouzah. In these the rents fixed by the decrees are stated, and also a rent for other lands which had apparently come under cultivation, or for which rent might be claimed. The additional rent was Rs. 270-3-0 for Gilabani, and Rs. 114-8-0 for Kuilibadi. These documents are both signed "Haimabati Dasi, mother of Sham Lall Mitter, minor." On the 28th of January, 1867, Haimabati executed two kabuliyats, one for each mouzah, signed in the same way as the dowls in which the rent fixed by the decree for enhancement is stated, and also the additional rent named in the dowl, together with a small sum for other land, and she agreed to pay the rent by instalments, year by year. Probably there was some land which had become subject to pay rent since the dowls were executed.

The plaintiff attained his majority on the 10th of May, 1877. On the 16th of July, 1877, he deposited in Court Rs. 35-1-15 gundahs for rent of Gilabani, the defendants having refused to take it, and on the 19th of January, 1878, the defendants presented a petition, in which they stated that the name of Sham Lal Mitter was not registered in their serishta, and he was not a tenant of Gilibani mouzah; that Haimabati Dasi held under them 3579 bighas 17 cottahs 8 chittacks of land in Gilabani mouzah, on an annual rental of Rs. 946-13-13-2 cowries, and the name of Haimabati was registered in their serishta, and, therefore, they were not bound to take the money in deposit. About this time they appear to have brought suits against Haimabati for arrears of rent. They are numbered 2 and 3 of 1878, but the date of the filing of the plaints does not appear in the record of proceedings. The judgment in each was given on the 2nd of December, 1878, and it states that the defence of Haimabati was that she executed the

kabuliyat upon which the suit was based, not in her personal capacity, but as guardian of her, the then minor son, Sham Lal Mitter, and, as he had become a major, the suit ought to be instituted against him, and not against her. An issue was settled on this allegation, and the Subordinate Judge, adopting the translation of her signature which has been given, held that the words used in the kabuliyats did not themselves convey the meaning contended for by the defendant, *viz.*, that Haimabati executed the instrument as guardian of her minor son, and made a decree in both suits for the amount claimed.

The defendants proceeded to execute the decrees, and, the mouzahs having been attached, the plaintiff made a claim under s. 63 of Act VIII. of 1869, which was rejected by the Subordinate Judge on the ground that the claimant's name was not registered in the serishta of the defendants, the Judge saying that he "ought to bring a suit in the usual way to find out whether he was bound to pay the former rent, and whether the payment of the enhanced rent of the jote was binding on him." The 10th of January, 1881, was fixed for the sale, and on that day the plaintiff paid into Court the whole amount due under the decrees, whereupon it was ordered that the sale be stayed. The present suit was instituted on the 11th of February, 1881, the sums so paid being what is sought to be refunded. The substantial question in the suit is whether the plaintiff is bound by the decrees for enhancement obtained against Haimabati and Peari, or by the kabuliyats. It was admitted by the learned counsel for the appellants that he is not bound by the decree as against Haimabati, but they contended that he is bound by it as against Peari, having purchased her moiety during the suit, and that it made him liable to pay the whole of the enhanced rent. Upon this question the lower Courts have differed. The learned counsel relied upon the kabuliyats as being executed by the plaintiff's mother, who was his natural guardian, and upon the absence of any suggestion that the enhancement of rent was otherwise than proper. At the close of the argument for the appellants their Lordships intimated to Mr. Mayne, who appeared for the respondent, their wish that they should first hear his argument upon the effect of the kabuliyats. Having done that they have come to a conclusion which makes it unnecessary to hear any further argument.

The addition to Haimabati's name of the words "mother of Sham Lal Mitter, minor," must, in their Lordships' opinion, be considered as meaning that she was contracting as the mother and guardian of her infant son. Undoubtedly, the statement of the apppellants in their petition of the 19th of January, 1878, and their suing Haimabati after the plaintiff's coming of age for rent due partly before and partly after that time, are weighty evidence against their present contention, but the evidence amounts only to admissions by them that Haimabati was the tenant, and no fact is proved which would make the admissions conclusive against them. The evidence of the dowls and kabuliyats has to be considered, and their Lordships think that outweighs the admsssions. It is to be observed that this evidence is treated rather lightly by both the lower Courts. The Subordinate Judge does not notice the addition to the signature, and says; "these kabuliyats were executed by the plaintiff's mother, not as his guardian, but for herself. They cannot, therefore, bind the plaintiff. It has been held in previous rent suits, based upon these kabuliyats, that the plaintiff's mother granted them in her personal capacity, and was liable for rent." The judgment of the High Court in the statement of facts merely says; "Subsequently, in 1865 and 1867, Haimabati, not professedly as guardian of the plaintiff but in her own name, gave kabuliyats to the putnidars."

It cannot be presumed that Haimabati claimed the estate adversely to her son, and the substance of the case is, that the estate being under her management as his

natural guardian, and the appellants being able to sue for an enhancement of the rent, she came to what appeared to be, and she was advised was, a proper arrangement with them. If there were any doubt as to the capacity in which she acted, it should be presumed that she did so in her lawful capacity. As the other questions in the appeal have not been argued on behalf of the respondents, their Lordships give no opinion on them. They will humbly advise Her Majesty that the decrees of both lower Courts should be reversed, and a decree be made dismissing the suit, with costs in both those Courts. The respondent will pay the costs of this appeal.

Appeal allowed.

Solicitors for the Appellants: *Messrs. Freshfields & Williams.*

Solicitors for the Respondent: *Messrs. T. L. Wilson & Co.*

2nd, 5th and 6th July 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Richard Baggallay, and the Right Hon. Sir Richard Couch.

On Appeal from the Court of the Judicial Commissioner of Oudh.

UMAN PARSHAD* ... *Plaintiff,*

and

GANDHARP SINGH ... *Defendant.*

Evidence—Validity of Transfer—Benami transaction—Wajib-ul-arz.

A transfer by registered deed, admitted to have been executed, but alleged to have been benami and merely colorable, was held, on the evidence, to have been valid and effective in the absence of evidence showing the contrary.

A settlement officer should not receive for entry in the wajib-ul-arz of a village a mere expression of the views of a proprietor, or enter it upon the records relating to the village, the wajib-ul-arz being intended to be the official record of local customs.

APPEAL from a decree (10th November, 1884) of the Judicial Commissioner of Oudh, reversing a decree (17th April, 1883) of the District Judge of Sitapur.

The suit out of which this appeal arose was to obtain possession of four villages in the Sitapur district, claimed by the present appellant, who was plaintiff, under two sale deeds, dated 29th May, 1863, and 9th February, 1864. It was the common case of both parties that before the execution of these deeds by Gulab Kunwar, widow of Tuskaran Singh, she was entitled to the villages in full proprietary right, and she purported to convey the latter by the sale deeds in question to Bissessur Baksh, her son-in-law, the deeds being duly registered.

The plaintiff alleged that the effect of these deeds was to pass the title in the villages to Bissesur Baksh, who died childless on the 7th November, 1865, and that he was succeeded by his widows, the survivor of whom died in October, 1879, and that thereupon the plaintiff as the next heir of Bissesur Baksh, being his uncle, became entitled to succeed to the proprietary right.

The defendant contended that the sale deeds of 1863 and 1864 were benami transactions never acted upon, and not intended to pass the title, which remained in Gulab Kunwar till her death, which took place on the 7th December, 1866; that on her death her daughter Fatteh Kunwar succeeded her; and that Fatteh conveyed these four villages in 1876, by a deed of gift, to her daughter Munnia, who died in her mother's lifetime childless in March, 1879; and that thereupon the defendant, her husband, succeeded by right of inheritance, and had since, with the consent of Fatteh, been in possession.

The main questions on this appeal were whether these sale deeds were benami

(1) * I.L.R. 15 Cal. 20; 14 Cowell 127.

only, or operated to pass title; and whether there had been possession of the four villages by Gulab Kunwar continuously from the date of the transaction, there being no dispute as to the making of the instruments at their respective dates.

The District Judge held that the deeds were executed for good consideration and valid, and that therefore Bissesur Baksh was entitled, on the death of Fatteh, to obtain possession. He was of opinion that the defendant had failed to prove that the sale by Gulab in 1864 was not real, and had failed to prove Fatteh's title as heir to the villages through her mother Gulab, they having been alienated by Gulab before her death; also that the villages were the subject of a gift from Fatteh to Munnia had not been proved.

The Judicial Commissioner on appeal was of the contrary opinion. He decided that Gulab did not, when she executed the deeds of 1863 and 1864, part with possession to Bissesur, but continued herself to hold the villages; and therefore, in his judgment, the suit was barred by limitation, not having been brought within twelve years from the dates of the deeds of sale. Another reason for deciding in favor of the defendant was, according to the Judicial Commissioner, that Bissesur's widows could not have taken more than an interest each for her life, one of the grounds on which the Judicial Commissioner so held being the evidence afforded by certain wajib-ul-arz, or records of rights, appertaining to the villages in suit, put in evidence by the defendant. These were considered by the Judicial Commissioner as affording proof that a widow, such as Fatteh, had, by custom, power to alienate absolutely her husband's estate, this showing, in the Judicial Commissioner's opinion, that Fatteh's gift to her daughter Munnia was valid, his opinion on this point being opposed to that of the District Judge, the latter holding them to be valueless as evidence.

On this appeal,—

Mr. *R. V. Doyne* and Mr. *J. D. Mayne* appeared for the appellant.

Mr. *J. Graham, Q.C.*, and Mr. *H. Cowell*, for the defendant.

For the appellant it was argued that the defendant had failed to prove that the deeds of 1863 and 1864 were merely colorable. They were followed by possession, and as to the estate supposed to be taken by the widow of Bissesur, she took no more than the ordinary estate of a Hindu widow. No sufficient evidence, if any, had been given by the respondent of a custom in derogation of the ordinary law on this point, which law would invalidate the alienation by the widow except for proved necessity. The wajib-ul-arz should not, under the circumstances, and with regard to what the entry was, be regarded as affording any evidence of the custom alleged for widows to transfer without restriction.

For the respondent it was contended that upon the evidence the deeds in question were benami and inoperative. Mutation of names in favor of Fatteh had taken place, and she had made a valid gift to her daughter.

The following authorities were referred to: *Sreeman Chunder Day* v. *Gopaul Chunder Chuckerbutty* (1); *Faez Baksh Chowdhry* v. *Fukeeroodeen Mahommed Ahassun Chowdhry* (2); *Kedhanath Mahatah* v. *Kadumbinee Debea* (3); *Lekraj Kuar*, v. *Mahpal Singh* (4); Regulation VII of 1822; Act XVII of 1876 (the Oudh Land Revenue Act).

Counsel for the appellant were not called upon to reply.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD HOBHOUSE.

In this case only one question was argued, and that was whether the two transfers executed by Gulab in the years 1863 and

(1) 11 Moore's I. A., 28; 2 P. C. J., 215.
(2) 14 Moore's I. A., 234; 3 P. C. J., 733.
(3) 10 W. R., 239.
(4) L. R., 7 I. A., 63; I. L. R., 5 Calc., 744; 4 P. C. J., 93.

1864 to Bissesur, the husband of her only daughter, were real transfers, or benami. That question turned out to be a complicated one, and it was necessary to go into a good deal of evidence of a vari ed and rather voluminous nature. The plaintiff maintains that the substance of the transaction is the same as the form of it, and that the property, consisting of four villages, conveyed to him by deeds, duly attested, registered immediately afterwards and subsequently proved and filed in a suit, was actually sold to him. As to the deeds there was no doubt. The only question is whether Bissesur, the grantee, was a benamidar.

It is familiar to us all that the system of putting property benami is so extremely common in India that the mere fact of a deed being executed in proper form, and apparently effecting a valid transfer to another, is not as good evidence of a real transfer as it would be in other countries, and even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose. Still such a transfer cannot be considered as nothing. The person who impugns its apparent character must show something or other to establish that it is a benami or sham transaction.

The first question here is, what are the probabilities of the case on consideration of the deeds themselves, and the position of the grantor? What motive had Gulab for putting the property into benami? She was not purchasing the property. It was vested in her in possession, and had been so for a considerable number of years. It is not suggested that she was in any difficulties, so that creditors might be baffled by the proceeding. On the contrary it appears that she was a woman of substance and position in her own country. The only suggestion is that, inasmuch as there was a suit between her and her brothers-in-law. represented by one Balbhadar, concerning these villages, she used this transaction in order to impede Bhalbhadar's proceedings. But whatever such a transfer might do to impede general creditors, it is difficult to see how it could impede Balbhadar, who was claiming the property by a title as directly available against a transferee from Gulab as against Gulab herself. Moreover the four villages were part of fifteen villages which were the subject of dispute between her and her brothers-in-law, and which she had received on a partition between them. With regard to some of the fifteen villages she was out of possession. With regard to these four she was in possession. She was in possession of more; it requires a minute examination to tell how many, but certainly of five, and no reason can be assigned why she should have selected four villages out of those which were in dispute, and which were in her possession, and have placed those four in the name of a benamidar. There is no antecedent probability that this is a benami transaction.

Then their Lordships ask what is the direct evidence on the point—oral evidence given by witnesses who profess to speak to it. There are two witnesses called for the Defendant—Hira Singh, and Sitaram—who say that the transaction was a sham one, and that Gulab remained in possession, apparently they mean to say during the rest of her life. But they give no details; they speak to no acts of possession; even as to the time of possession their language is quite vague and general; and they tell, both of them, the most extraordinary story with respect to these deeds, namely, that when Balbhadar, the person against whom it was suggested that these deeds were to be a defence, appeared upon the scene, Gulab immediately told Balbhadar that the deeds were all sham deeds. Their Lordships have no hesitation in treating the evidence of those witnesses as worthless.

The only other witness who gives direct evidence on the subject is in rather a curious position. He was the patwari of one or more of these villages—certainly of the village of Turni—and he was called in this suit. His name is Sheo Sahai. In this suit he stated first that

the transaction was a sham one, and that Gulab remained in possession, and received the rents. But then a document was put into his hands, which was a deposition made by him in a mutation proceeding sixteen years before and within three or four years of the date of the transactions, and he was asked whether it was true, and he said it was true. He was rather indignant at the truth of it being impugned, and he said: "Do you think I would tell a falsehood? Of course it is true." But that deposition shows that there was a sale by Gulab to Bissesur, and that Bissesur entered into possession and received the rents, and that when Fatteh, who was the common heir of the two, Gulab and Bissesur, applied for a mutation of names, she applied for it on the footing of Sheo Sahai's evidence and as the heir of Bissesur. Therefore the evidence of Sheo Sahai must be taken as some evidence to show possession on behalf of Bissesur. There is actually no evidence the other way, and so the balance of testimony on that point inclines in favor of the plaintiff.

Their Lordships will now return to another branch of the case. It is said that there is no mutation of names; that no witnesses have been called to prove the deeds; that no proof has been given of payment of the money; no proof of the receipt of the rents; and no proof of the payment of the revenue by Bissesur. It is quite true that all that negation of evidence appears in the case. With regard to the mutation of names, the matter is explained in this way. It is said that, owing to the dispute between Gulab and her brothers-in-law, the application for mutation was delayed; and their Lordships certainly find it to be the case that, when a decree had been given in favor of Gulab in August, 1866, and when such a time had elapsed as, in the opinion of the patwari Sheo Sahai, had precluded an appeal, the application is made, namely towards the end of 1866 or the beginning of 1867. That may be the true explanation. But, however that may be, the absence of any mutation of names hardly tells much in favor of the defendant's view, because, if this were a benami transaction entered into for the purpose of baffling somebody who was claiming the property, the mutation of names would be an important part of the proceeding; because without that mutation Gulab remained the ostensible owner in the Collector's records, and the process of baffling her adversary would be a very imperfect one. Indeed it is common experience that in these benami transactions there is a mutation of names when it is intended to baffle creditors, and all the proceedings which would attend a real transfer are carefully gone through in order to throw a veil over the reality.

With regard to all the other points, it must be remembered that this is not the ordinary case of a benami dispute. In the ordinary case you have the benamidar or those claiming under him on the one side maintaining that the transaction is a real one; and you have the former owner and those claiming under him on the other side maintaing that it is a sham; and each party has in his own power such receipts, such evidence of payments, such connexion with the agents concerned, as should suffice to prove his own case if it is a true one. But the peculiarity of this case is that the title of benamidar, and the title of the original true owner, coalesced in the person of Fatteh Kunwar within four years of the first transaction and within three years of the second; and it was she—and it is the defendant who is her representative—who have had in their hands the whole of the evidence necessary to prove whether the transaction was a sham or a real one. Therefore the absence of evidence certainly does not tell against the plaintiff, but it rather tells against the defendant, who might have produced both witnesses and documents which would throw light upon the case.

Under these circumstances great importance is to be attached to assertions of title made, either by Gulab or Fatteh, from time to time in legal proceedings. Let us follow them in chronological

order. In the first place there was Balbhadar's suit, which was commenced in 1863, and in which a decree was made in 1866. The Judicial Commissioner has rested great weight upon the decree in that suit as against the plaintiff. What he says is: "Seeing then that Gulab Kunwar continued in possession long after the sale deeds, and sued on her own title in her own name, and got a decree for this property in her own name for herself and her heirs, I can hardly imagine a clearer case of adverse possession as against Bissesur Baksh and his heirs." As to the possession, that has been dealt with; as to the suit, there is clearly an inaccurate statement by the Judicial Commissioner. The suit was instituted by Gulab for recovery of several villages which came to her under the partition, and of which, by a series of complicated proceedings, she had lost possession. She never sued for the five villages of which she was clearly in possession, and of which the four now in suit are part. The way in which those villages came in was on the plea of the defendant, who said that, so far from Gulab having the right to recover from him the villages for which she sued, he had the right to recover from her five villages of which she was in possession. How exactly that matter was dealt with in Court before the Judge we do not know. It may have been that the parties agreed there should be a decree covering the whole matter in dispute, but those five villages were not regularly in suit at all. The decree does deal with them. It gives to Gulab the absolute proprietary right in them, and dismisses the defendant's claim—the counterclaim to recover from the plaintiff the five villages in her possession. Those words are relied upon as proving Gulab's possession. But it is obvious, independently of the fact that it was quite irregular to make a decree about these villages, that there was no question of possession as between Gulab and Bissesur in this suit. Such an issue never was raised or thought of. The only question of possession, if any, was as between Gulab and Balbhadar. Strictly and regularly there was no question whatever of possession, but if any were brought in, then it was only as between Gulab and Balbhadar, and as between those two she was in possession. She was then recorded in the Collector's books, and it was quite sufficient for the determination of any question that could possibly be brought, even irregularly and by consent of the parties to that suit, to treat her as the party in possession. And in point of fact the decree uses the right language upon that point. It decrees to her a right against the defendant Balbhadar Singh, and against nobody else.

Then come the mutation proceedings on the 1st of January, 1867, in which the evidence of Sheo Sahai, which has been before observed upon, was given. In those proceedings Fatteh Kunwar, who was the heir both of Gulab and of Bissesur, claims to be registered as the heir of Bissesur. Why should she have made that claim? Her interest was all the other way. If she were heir of Gulab, she had absolute dominion over the property. If she were heir of Bissesur, she had only the widow's estate, and we shall see presently what importance she attached to that distinction. Moreover it was more simple to claim as the heir of Gulab. She was the recorded owner, and, as far as the Collector's records went, Fatteh had only to show that she was Gulab's only child, and the mutation would be made as a matter of course. But she does not do that. She introduces that which is entirely new matter into the Collector's records—the conveyance to Bissesur, and then makes out her claim as heir of Bissesur. That seems to their Lordships strong evidence that, in the opinion of Fatteh Kunwar, or of her advisers at that time, her true title was as heir of Bissesur.

Next comes Ratan Singh's suit in 1868. Ratan Singh after the death of Gulab revived the old dispute between Gulab and her brothers-in-law, with only this difference: that, whereas in Gulab's lifetime they contended that she was

entitled only to maintenance, now after her death they contended that she was only entitled to the widow's estate. That dispute was raised in 1868. Fatteh Kunwar appears and puts in a plea by her agent, in which she again sets up her title through Bissesur. The judgment proceeds on that footing. The judgment is to the effect that the plaintiff's claim is declared "not to lie against defendant, who holds as her husband's heir the property acquired by him by purchase from Gulab, who was possessed of the legal power to settle." Of course that is no decision binding the present parties, but it shows as distinctly as anything can show the position which Fatteh Kunwar thought it right to assume in the year 1868.

All these things are rather emphasized by the wajib-ul-arz which was made at Fatteh Kunwar's instance in 1869. Before dealing with the effect of it, their Lordships wish to make some observations upon the extraordinary and startling character of that document. A wajib-ul-arz has been considered to be an official record, of more or less weight according to circumstances, but still an official record, of the local customs of the district in which it is recorded. It has been received before this tribunal and elsewhere as important evidence. In the case cited of *Lekraj Kuar* v. *Mahpal Singh*(1) it is stated that "these documents are entered on record in the office. They must be taken upon the evidence, which is general evidence, to have been regularly entered and kept there as authentic wajib-ul-arz papers." In that case effect was given to the wajib-ul-arz produced. In this case the Judicial Commissioner has treated the wajib-ul-arz in question as a document of weight, which must be taken as showing local customs until some proof to the contrary is produced. But on looking at the evidence their Lordships find that this wajib-ul-arz was the concoction of Fatteh Kunwar herself, received by the settlement officer as an expression of her views which she had a right to enter upon the village records, because she was proprietor of the estate. But they are not entered as her views; they are entered as the official record of a custom. And supposing 50 years had gone by, and then a dispute arose about the family or the local custom, this would probably have been produced from the office as an entry made 50 years ago, under circumstances of no suspicion at all, and it would be taken that the Government officer had recorded it as the local custom. And now we find it deliberately stated (though there was an appeal from the entry of this wajib-ul-arz) by the Oudh Courts that the proprietor has the right to enter his own views upon the village records, and have them recorded as if they were the official records of the local customs. Well, that is an exceedingly startling thing, and their Lordships think that the attention of the local Government should be called to what has appeared in this case to have been done in one instance, and may be done in other instances. It does not only render those records useless—they are worse than useless—they are absolutely misleading, because they are evidence concocted by one party in his own interest. It is to be hoped that under the Act of 1876, which empowers the local Government to make rules under which these records shall be framed, such proceedings will not take place any more.

So much for the character of the document. Now for its effect. It is not now contended that, if Bissesur was entitled, the custom which the wajib-ul-arz asserts can prevail. In fact there is no evidence of it. Mr. Graham most properly abandoned that part of the case. But that does not get rid of the circumstance that in 1869 Fatteh Kunwar thought it to her interest to put this fictitious document on the village records, asserting her own power to alienate such estate as she had got from Bissesur. If she had taken everything as the heir of Gulab, there

(1) L. R., 7 I. A., 63; I. L. R., 5 Calc., 744, 4 P. C. J., 93.

was no object in getting the entry made; but if she was the heir of Bissesur, then she had a strong object, because otherwise she could not make a complete alienation of the estate.

That, in their Lordships' opinion, strengthens the circumstance that up to that time she had always been asserting herself to be the heir of Bissesur, and leads them to conclude that she could not have asserted it for any other reason than because it was the truth.

Then comes the gift by Fatteh Kunwar to her daughter in 1876; and again we find that, though it is not very precise as to the nature of her title, she states that Munnia is a natural heir "after me and my husband." Now that exactly accords with the position which Munnia would have if the property came from Bissesur, and it does not accord with the position which Munnia would have if the property came from Gulab. Therfore it appears again that Fatteh Kunwar considered herself as taking the property from Bissesur, and as conveying it to Munnia under that right which she alleged on the face of the wajib-ul-arz that she possessed, but which in fact she did not possess.

The only remaining proceeding is the declaratory suit by Uman Parshad in 1876. That raised the very question which has now to be decided in this suit. The suit was got rid of because it was declaratory only. But the parties had now come face to face. Uman Parshad, the very man, or representing the very family, against whom the benami transfer was said to be effected, comes and claims the property. Now clearly is the time when this benami title should be set up to embarrass the enemy. But it is not set up. Nothing is said about it except what may be gathered from a very obscure, and probably very imperfect, sentence taken down by the Judge as either the plea or the argument of Mr. Jackson, who was the Counsel for Fatteh Kunwar. It is difficult to gather anything precise from it; but he seems to have suggested that Bissesur took as benamidar, not for Gulab, but for his wife Fatteh Kunwar—a totally different case from that which is made on the present occasion. That again is very strong evidence that Fatteh Kunwar, or her advisers, felt that they could not with truth and honesty declare that it was a sham transaction.

Thus we find that Fatteh Kunwar had gone on from 1866 to 1879 asserting herself to be in possession of this property as heir of Bissesur; and no assertion to the contrary was made during her lifetime. If she had made the contrary assertion, perhaps some proceedings might have been taken; but the lapse of time affords an additional reason why her grantee or representative should not be allowed to turn round and assert a directly contrary title.

The result is that all these lines of consideration point in favor of the plaintiff's contention; and inasmuch as he has the form of the transaction on his side, and everything points in favor of the substance of the transaction being with him too, his case should prevail.

Their Lordships will humbly advise Her Majesty to discharge the order of the Judicial Commissioner, and to dismiss the appeal to him with costs, and the respondent must pay the costs of this appeal.

Appeal allowed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

Solicitor for the Respondent: Mr. *H. W. Payne.*

15th July 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

On Appeal from the High Court in Bengal.

GIRISH CHUNDER MAITI*... *Defendant,*

and

ANUNDOMOYI DEBI AND ANOTHER } *Plaintiffs.*

Limitation Act (XV of 1877), Art. 132.—Construction of will—Charge on immovable property.

A will devising immovables stated that the father of the devisee had lent a sum of money to the testator, and directed the devisee to repay the debt with interest. This was construed to be a charge on immovables, and it was held that a suit, brought by the auction-purchaser of the creditor's claim to recover the above-mentioned debt, was within Art. 132 of the second Schedule of Act XV of 1877; and having been brought within twelve years from the date when the debt was so charged was not barred by time.

APPEAL from a decree (10th August, 1881) of the High Court(1) reversing a decree (5th March, 1880) of the District Judge of Midnapore.

The question raised by this appeal was what was the period of limitation applicable under Act XV of 1877, the Indian Limitation Act, to the recovery of a debt due by a deceased testator, who in his will had directed a relation, to whom he devised all his property, movable and immovable, to pay this debt; a question dependent on whether the will validly charged the debt on the immovable property, or created a valid trust for its payment, or did neither.

The suit out of which this appeal arose was filed on the 5th May, 1879, by Anundomoyi Debi against Goluck Chunder, guardian, manager, and father of Girish Chunder Maiti, to recover Rs. 15,000 lent by Goluck Chunder to Shib Pershad Giri in 1867. In 1872, Shib Pershad Giri died, having left all his property to Girish Chunder, and having directed him by the same will to pay the above-mentioned debt. The plaint stated these circumstances, and that another person, Jogendro, as execution-creditor of Goluck Chunder, had obtained satisfaction of part of a claim against the latter to the extent of Rs. 10,200, and that Jogendro had, at the execution sale, purchased all that was unpaid of Goluck Chunder's claim against Girish Chunder. The plaint then stated the death of Jogendro, and the representative character of his widow, Anundomoyi Debi, the plaintiff, as residuary legatee and executrix of the will of her deceased husband. She prayed by her plaint payment of her claim out of the estate of Girish Chunder, that claim being the money stated above to have been lent by Goluck Chunder, and interest thereon, with the deduction of Rs.10,200, which had been already paid.

The defendant Girish Chunder, among other defences, set up limitation.

The arguments in the Court of first instance related only to the question of limitation. The Court decreed in favor of the defendant, dismissing the suit with costs. The grounds of this decision were that Art. 57 of the second Schedule of Act XV of 1877 being applicable, inasmuch as no lien was created by the will in the plaintiffs' favor by the will of Shib Pershad Giri, Art. 132 was therefore inapplicable; and the suit was barred by lapse of time.

On appeal, this decision was reversed by the High Court, (CUNNINGHAM, PRINSEP and WILSON JJ.) The judgment of the last-named Judge, with which the other Judges agreed, was to the following effect, and it is reported at p. 774 of I. L. R., 7 Calc., where the cases cited in

* I. L. R., 15 Calc. p. 66; 14 Cowell 137.
(1) I. L. R., 7 Calc. p. 772.

argument, and referred to by the Court are given. The opinion of the Court was that the charge in the will of 1872 differed from a general charge of a debt by a testator upon his property. For here, particular property was given upon trust to pay a particular debt, the result being that a trust arose. That was a trust within the meaning of s. 10 of the Limitation Act; and, although the cases showed that a general charge of debts, upon a testator's property, did not add to the legal liabilities of executors, yet here, for the above reason, the case was different. The suit was accordingly remanded to the first Court for trial on the merits.

On this appeal,—

Mr. *R. V. Doyne* appeared for the appellant.

Mr. *J. D. Mayne* for the respondents.

For the appellant it was argued that the will of Shib Pershad Giri neither varied the legal liabilities of the parties, so as to charge the loan of Rs. 15,000 therein mentioned upon the property therein devised, nor invested the appellant with any trust as regards that property for the purpose of repaying the loan.

Counsel for the respondents was not called upon.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR RICHARD COUCH.

The only question which has been decided in this suit is whether it is barred by the law of limitation. The Subordinate Judge, before whom the case came in the first instance, was of opinion that the claim was a claim for money lent, and by Art. 57 of Act XV of 1877 a term of three years only was given for bringing the suit, and that time had expired before the suit was brought.

When the case came before the High Court the learned Judges there were of opinion that s. 10 of that Act applied on the ground that there was a valid trust for the payment of the money which was claimed in the suit. That section says: "Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives, or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, shall be barred by any length of time." It does not clearly appear whether the learned Judges intended to deal with the other question, that it was a charge, and so came within the 132nd Article of the second Schedule of the Act, in which case a period of 12 years is given for bringing the suit. They appear to have rested their judgment upon its being a trust for the payment of the money.

Their Lordships consider that the case may be disposed of upon the question whether the money is charged upon immovable property; and in order to see whether that is so or not, they have to look at the terms of the will. The will was made by Shib Pershad, and purports to be addressed to the present appellant, who was the defendant in the suit. It states that the father of the appellant, Goluck Chunder, had supplied the maker of it, Shib Pershad, with money to sue for the recovery of property of which he had been dispossessed by his cousin, Jai Narain Giri, and that a suit had been carried on in the different Courts which had been successful, and that a decree had been obtained for the recovery of the property; and after stating that fact, and also that Goluck Chunder had shown great kindness to Shib Pershad, it contains these words: "Therefore you being my nephew (sister's son), and competent to give the *pind* (funeral cake) to my ancestors, I give you under this will the whole of my movable and immovable properties specified in the decrees I have obtained in the original suit, No. 17 of the District Court, and the appeals Nos. 167 and 168 of the High Court, under these conditions, *viz.*, that you will perform, and cause to be performed *antim-kria* (cremation) and rites and

ceremonies in the proper manner at a reasonable cost, and that you will cause the said *kria* to be performed. The loan of Rs. 15,000 which I took from your father, the aforesaid Maiti, and by means of which I carried on the cases aforesaid from the Zillah Court up to the Sudder Court, in which I have been successful, you will repay with interest from the properties specified in the decrees, and so set me free from liability for that debt." Now if by that will a charge was created upon the property which had been recovered, and which was specified in the decrees, the case clearly came within the 132nd Article; and their Lordships think there can be no doubt that there was such a charge. It is a charge upon specific property, namely, the property specified in the decrees. On that ground their Lordships are of opinion that the decision of the High Court ought to be affirmed, and the appeal dismissed, and they will therefore humbly advise Her Majesty accordingly. The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the Appellant: *Messrs. Lambert, Petch & Shakespear.*

Solicitors for the Respondents: *Mr. H. Treasure.*

15th July 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

On Appeal from the High Court for the North-Western Provinces.

RAJESWARI KUAR AND ANOTHER* } *Defendants,*

and

RAI BAL KRISHAN ... *Plaintiff.*

Evidence—Burden of proof.

In a suit for money due on a bond between the representatives of the original parties to it, the defendant attempted to reduce the claim on the ground that the money had not been received in full, the bond having been given partly in respect of an old debt, and partly in respect of a credit in account, upon which the debtor had not, in fact, drawn certain items.

The Judicial Committee concurred with the High Court, which had reversed so much of decree of the Court of first instance as disallowed these items; the latter Court not having correctly adjusted the burden of proof, and having acted as if the plaintiff had relied on his own books to prove the debt; besides, having erred in weighing the evidence.

APPEAL from a decree (21st March, 1884) of the High Court modifying a decree (19th March 1883) of the Subordinate Judge of Benares.

The suit was brought by the plaintiff on the 3rd February, 1882, to recover Rs. 16,144-15 principal, and Rs. 7,733-2 interest, due on a bond mortgaging a taluka called Uchagaon Karotha, which was executed by the defendant's deceased husband, Raghubans Sahai, to the plaintiff's deceased father, Rai Narain Das, on the 9th of July, 1869, to secure payment

* I.L.R. 9 All. p. 713; 14 Cowell p. 142.

of Rs. 20,000 on the 9th of July, 1874, with interest at 6 per cent. per annum.

The execution of the bond was not disputed, nor the liability of the obligor to pay Rs. 13,000 out of the total amount of Rs. 20,000, admitted in the bond to have been previously due with interest thereon, but the defendant's contention was that the remaining sum of Rs. 7,000, which is stated in the mortgage bond to have been borrowed from Rai Narain Das for the settlement and disposal of the claim for monthly allowance of one Vilayati Begam, not having been applied to that purpose, the plaintiff was bound to prove that it had been paid to, or expended for other purposes of, Raghubans Sahai, and that he had not so done.

The Subordinate Judge threw the burden on the plaintiff of proving that the amount in question of Rs. 7,000, which appeared by his books of account produced in Court not to have been paid over to Raghubans at the time of the execution of the bond, had been in fact subsequently paid, and by his judgment disallowed out of that amount as insufficiently proved, one item of Rs. 1,000 entered in the plaintiff's books as paid for Government revenue of the mortgaged estate on the 6th July, 1869 (*i.e.*, three days before the date of the bond), a second item of Rs. 826-5-6, shown by the plaintiff's books to have been transferred on the date of the execution of the bond to the plaintiff's account in satisfaction of the interest due up to that date upon the previous debt, and various other items, aggregating Rs. 1,673-10-2, together with interest on those amounts, and gave plaintiff a decree for the rest of his claim.

The ground on which the Subordinate Judge rejected the proof of the two first of those items was that, having regard to the date of the bond, it seemed highly improbable to him that those items, of which that for Rs. 1,000 appeared by the plaintiff's accounts to have been paid to Raghubans three days before the date borne by the bond, and the second, that for Rs. 826-5-6, to have been debited to him on that date, should have formed part of the Rs. 7,000, which the bond stated was to be applied to buying of Vilayati Begam's claim.

On appeal, the High Court (Oldfield and Tyrrell, JJ.) gave judgment as follows:—

"The plaintiff brings this suit to recover money due under a bond dated 9th July, 1869, executed by the husband of the defendant, Rai Raghubans Sahai, in favor of the father of plaintiff, Rai Narain Das. There is no dispute as to the execution of the bond, which is for a sum of Rs. 20,000, of which Rs. 13,000 are on an old book debt, and Rs. 7,000 is stated to be borrowed for the settlement and disposal of the claim for monthly allowance of one Vilayati Begam.

"It is admitted by plaintiff that this sum was not expended in the way stated, nor paid to Rai Raghubans Sahai in one sum, but it is alleged that it was placed to his credit and drawn by him at various times for various purposes.

"The defendant does not distinctly deny that Rai Raghubans Sahai received it, but rather suggests that it could not have been received, as it was not required for the purpose named, and in fact puts plaintiff to the proof that the sum was paid.

"The only items of this sum which the Subordinate Judge disallows are items aggregating Rs. 3,499-15-8 and the interest claimed on them, and the plaintiff has appealed in regard to them.

"The items are Rs. 1,000, alleged to have been paid to Rai Raghubans Sahai on 6th July, 1869, for payment of Government revenue, Rs. 826 paid on 9th July 1869, as interest to date of bond due on the old book debt of Rs. 13,000, and the above sum of Rs. 1,000 and items aggregating Rs. 1,673-10-2, paid to Rai Raghubans Sahai on various dates.

"The reasons of the Subordinate Judge for disallowing the items appear to us quite insufficient, and we have no doubt whatever that Rai Raghubans Sahai received the full sum of Rs. 7,000, of which the above items form portions. The Subordinate Judge dwells chiefly on the

admitted fact that the recitals in the bond as to the manner in which the sum of Rs. 7,000 was drawn are opposed to the real facts as alleged by plaintiff, and to their being no evidence apart from the account books. But in the first place there is the bond for the amount, both Rai Raghubans Sahai and Rai Narain Das are admitted to have been shrewd men of business, and it is most unlikely that Rai Raghubans Sahai would have for many years allowed the sum for which he had given a bond to remain undrawn. Next there is the evidence of the plaintiff's account books. They are the properly kept books of a firm of character and respectability, and have been proved by the gomashta of the firm, and contain particulars of all the items. The circumstance that items in these accounts may not be supported by vouchers in the handwriting of Rai Raghubans Sahai is accounted for by the admission that he and Rai Narain Das were very great friends, and the former was not in the habit of requiring from the latter vouchers for every sum he might draw from him, and the Subordinate Judge's objection in respect of the item of Rs. 1,000, that if it had been paid, plaintiff could produce the receipt, has little force, as it would have been with Rai Raghubans Sahai and not plaintiff. Moreover the admitted friendly terms on which Rai Narain Das and Rai Raghubans Sahai lived does not allow us to suppose that the former would cheat him by making false entries in his books, and we cannot hold that the claim as to these items fails without at the same time holding that the entries of the items are forged. But this supposition is preposterous, and, indeed, is not suggested by the Subordinate Judge, who, on the contrary, accepted the general correctness of the account-books by decreeing the larger portion of the claim in accordance with them.

"It is also noteworthy that the defendant does not distinctly deny that Rai Raghubans Sahai received the sum, but rather pleads ignorance, and has not attempted, by the production of his books of account (and it is impossible to believe that he left no memoranda of accounts), to disprove the claim. We therefore consider that the payment of the entire sum in the bond has been established.

"There is another item disallowed about which the appellant also appeals.

"It is admitted that plaintiff's father received from the defendant's husband at various times a sum of Rs. 10,000; but plaintiff alleges that Rs. 1,000 of this was credited not in satisfaction of the bond in suit, but of another loan.

"We consider that he has established this fact by the evidence of the accounts and of the gomashta, whose statement there seems no reason whatever to disbelieve.

"We decree the appeal, and modifying the decree of the Subordinate Judge, we decree the claim in full with all costs and interest at 6 per cent. from date of institution of the suit to realization."

On this appeal,—

Mr. *W. A. Raikes* and Mr. *Dunlop Hill*, appeared for the appellant.

Their contention mainly was that the entries in the books did not support the claim on the bond. The objection also was taken that the payments made had not been credited on their correct dates, whereby the interest account had been incorrectly made up.

Mr. *R. V. Doyne* for the respondent was heard on this last point only.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD HOBHOUSE.

In this case the appellant and respondent are the representatives of the original parties to the transaction, but no change of interest or any legal question is raised by their succession to their predecessors, and the case is exactly the same as if the present plaintiff and defendant were the original parties themselves.

The plaintiff sued on a bond for a debt of Rs. 20,000, and the nature of that debt is stated on the face of the bond. Rs. 13,000 was an old debt, and Rs. 7,000

was stated to be a new debt contracted at the time of the bond, and the bond stated also what the object of the contract for the new debt was. The defendant alleges that those recitals are false. In effect he alleges that the bond must be taken as of no value, and that the account between the parties must be taken as between an ordinary debtor and creditor. In the first place it is alleged that the object for which the Rs. 7,000 is said to be borrowed was not the object, and that the money was not applied to that object. Their Lordships think that is a matter of no importance whatever. It may be that the object stated was not the object. It may be that a week afterwards the recipient of the Rs. 7,000 changed his mind and did not apply the money to that object. It does not signify what the object was. To prove that the Rs. 7,000 was not actually advanced, the defendant called for the plaintiff's books of account. Those books of account were produced, and they showed apparently the whole transaction between the parties, and the impugned recital was substantially correct. About the old debt for Rs. 13,000 there was no question, and the Rs. 7,000, the new advance, was made out in this way: Rs. 1,000 was paid for revenue some two or three days before the date assigned to the bond; a sum of Rs. 800 odd due for interest was allowed on account and taken as capital; and the remainder, Rs. 5,000 odd, was credited to the defendant in the books of the plaintiff to be drawn as occasion required. Then the books of the plaintiff showed that the money was drawn out, and if they are to be taken as evidence in favour of the plaintiff, there is a complete answer to the charge of incorrectness made by the defendant.

Now what the Subordinate Judge did, was to look whether the items of discharge in the plaintiff's books were corroborated or not. Where they were corroborated he allowed the discharge, and where they were not corroborated he disallowed them. In doing that their Lordships think that the Subordinate Judge acted on an entirely wrong principle. He acted on a principle which would have been correct if the plaintiff had relied on his own books as proving his debt; but that was not the case. The plaintiff relied upon the bond which was executed by his debtor, and unless that bond is displaced there is no answer to the action. It is the defendant who seeks her defence in the books of the plaintiff. She calls for the books and extracts her defence out of them, and it would be a monstrous thing if the party sued were allowed to call for the accounts of the plaintiff, and extract from them just such items as proved matters of defence on her part, and were not to allow those items which make in favour of the plaintiff. The High Court held that the books must be admitted in toto. Their Lordships think the High Court were entirely right, and that the decree cannot be complained of on that ground.

Then a much smaller matter was put forward, just at the end of Mr. Raikes' argument on behalf of the appellant. It appears from the plaintiff's books that a number of sums were received from time to time by him on behalf of the defendant. The dates of those receipts are given, and it is alleged that they were not carried into account on those dates as against the principal or the current interest, as it may be, of the bond, so as to discharge the defendant from interest *pro tanto* from those dates. The principle that they should be so carried into account is a sound one, but their Lordships are exceedingly doubtful whether that principle has been violated, and it certainly is the duty of the appellant who asks them to modify a decree of the High Court on this point to show them clearly that it has been violated. Their Lordships find that the plantiff's gomashta, who is the battle-horse of the defendant on this matter, was not asked a question on the subject, and it may have been that if he had been asked questions he might have shown that in taking the interest account the receipts were credited on the right dates; or he may have given some

other explanation of the mode in which the account was made out. That the parties were in habits of very great intimacy is shown by the gomashta, and it is also shown that the defendant's predecessor was a shrewed careful man of business, and it is unlikely that he should not have known how his own account was standing with the plaintiff. His own books are not produced, so that their Lordships do not know whether he himself would have given any different account of the transactions. Moreover it does not appear that this point was raised before the High Court, and even if it were raised as late as the appeal to Her Majesty, it is raised in so obscure a way that it requires Mr. Raikes' explanation to understand how it was raised at all.

Under these circumstances their Lordships must say that although the principle contended for by Mr. Raikes is a sound one, they have no evidence before them that the decree contains any violation of it. They therefore think that the decree appealed from should be affirmed, and the appeal dismissed with costs, and they will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitors for the Appellant: *Messrs. Oehme and Summerhays.*

Solicitors for the Respondent: *Messrs. T. L. Wilson & Co.*

19th July 1887.

PRESENT:

Members of the *Judicial Committee*, The Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir James Hannen, and the Right Hon. Sir Richard Couch.

On Appeal from the Chief Court of the Punjab.

DAULAT RAM* ... *Plaintiff,*

and

MEHR CHAND AND OTHERS } *Defendants.*

Hindu law, Joint family—Mitakshara Law—Sale of joint family property in execution of decree, as the result of a mortgage by Managing Member- Liability of shares of members of family not parties to the decree.

Although some of the members of a joint family had not been made parties to a suit upon a mortgage effected by the managing members, the entire family estate was bound by the act of the latter, and passed at the sale in execution of a decree upon the mortgage.

Whether the shares of all were bound depended on the authority of those who executed the mortgage. This authority they had to raise money to pay a debt owed by the family as joint members of an ancestral trading firm

The managing members of a joint trading family, having purported to mortgage the family estate, to pay a debt due by the firm, were sued upon it by the mortgagee, who afterwards purchased the property at the execution sale. In a suit brought by the latter against the other members of the family to obtain a declaration that he had purchased the entire family estate, the defendants, without showing that the mortgage did not validly bind the family estate, contended that, not having been made parties to the suit, they were not affected by the decree, and their shares had not passed at the sale in execution.

Held, that, as the defence was substantially on the latter ground only, though there was every opportunity given to the defendants to raise the former ground also, the suit need not be remanded;

* I. L. R. 15, Calc. p. 70; 14 Cowell 142.

and that the whole estate had passed to the purchaser. *Nanomi Babuasin* v. *Modhun Mohun* (1) referred to and followed; *Pursid Narain Sing v. Honooman Sahay* (2) referred to and approved.

APPEAL from a decree (4th April, 1883) of the Chief Court of the Punjab, affirming a decree (28th March, 1881) of the Commissioner of the Delhi division, which affirmed a decree (22nd July, 1880) of the Judicial Assistant Commissioner of Delhi, dismissing the suit with costs.

The suit out of which this appeal arose related to a mortgage executed by two members of a joint family of Jains, their law on this point agreeing with that of the Mitakshara. The family carried on an ancestral business, as a firm trading in Delhi, managed by the two members. The mortgagee, having obtained a decree against the latter on the mortgage, issued execution, and attached and brought to sale the mortgaged property, becoming himself the purchaser of it.

The question now raised was whether the shares of the members of the family other than those who were parties to the decree, or those only of the parties to the decree, had passed to the purchaser.

The mortgage was of nine shops and six houses in Delhi, for Rs. 20,000, executed in favor of the plaintiff by Rattan Chand and Jiwan Mul on 11th January, 1871. The deed described the property as solely belonging to the abovenamed, but stated that the money was borrowed in order to pay the debts of their firm, *viz.*, Nanak Chand, Sarup Chand. Of this firm the other members, *viz*, Mehr Chand and Hazuri Mul, sons of Sarup Chand, and Sumar Chand, son of Kastur Chand, were minors in 1871, and were not mentioned in the mortgage deed.

In July, 1878, the mortgagee sued Jiwan Mul and Lal Chand, and son of Rattan Chand who had died, and obtained a decree (11th November, 1878), making the mortgaged property primarily liable, with power, if necessary, to recover from the other property of Jiwan Mul, and from the estate of Rattan Chand, deceased. In execution of that decree he brought the mortgaged property to sale, and himself purchased it for Rs. 44,100. On his applying for possession the present defendants, Mehr Chand, Hazuri Mul and Sumer Chand objected, and (23rd July, 1879) succeeded in establishing their title to three-eighths of the property. The mortgagee thereupon brought the present suit (11th June, 1880) for a declaration that the shares of the defendants in the family property had been validly mortgaged to him, and had passed under the execution sale; also claiming possession. Amongst other defences it was contended that, as the defendants were not parties to the decree, it did not affect their interests. Issues were fixed as to what the purchase had covered, and as to whether the defendants, having recited in a subsequent mortgage effected in 1878, to another mortgagee, that their property was already mortgaged to the present plaintiffs, were estopped in this way or otherwise, from denying it to have been so mortgaged.

The Judicial Assistant Commissioner, Delhi, who heard the suit in the first instance, found that there was nothing on the face of the record of the previous suit showing that the present defendants were liable; and held that the plaintiff could not, by his purchase at the execution sale, have acquired more than the rights of the actual mortgagors and Judgment-debtors. On the authority of *Loki Mahto* v. *Aghoree Ajail Lal (3)*; and *Deendyal* v. *Jugdeep Narain Sing* (4), he held that the plaintiff was bound by the proceedings in the suit of 1878, and could not go behind the decision in that case. The evidence that the plaintiff desired to offer, implicating the defendants' shares, he held to be inadmissible, and dismissed the suit.

On an appeal by the plaintiff to the Commissioner, the suit was remanded to

(1) I. L. R., 13 Calc., 21; L. R., 13 I. A., 1; 4 P. C. J 682.
(2) I. L. R., 5 Calc., 845.
(3) I. L. R., 5 Calc., 144.
(4) I. L. R., 3 Calc., 198, L. R., 4 I. A., 247; 3 P. C. J. 730.

give the plaintiff the opportunity of proving that the defendants were estopped from objecting to their being made liable, as it was alleged that the plaintiff was induced, by information obtained from the defendants and their agents, to buy the property.

The Commissioner, in the end, found that there was no evidence of anything to constitute an estoppel against the defendants, pointing out that the plaintiff himself had not come forward to state that he had been misled by any conduct on their part. He agreed with the Court of first instantce that the plaintiff could not be allowed to go behind the record of the previous case to ascertain whether the defendants had been sued in their representative capacity; and dismissed the appeal.

A second appeal was preferred to the Chief Court, mainly on the ground that the defendants were bound by the acts of Rattan Chand and Jiwan Mul, as managing members of a joint trading family; that they derived benefit from the mortgage; and that the rights of the defendants in the property passed at the auction sale to the plaintiff.

The Chief Court (BARKLEY and BURNEY, JJ.), taking the facts to be that the mortgagors were the managers of an ancestral business belonging to a family of which the defendants, who were minors when the mortgage was effected, were members, and that the mortgage was necessarily entered into in order to pay the debts of that business, held that there had been a valid mortgage of the entire property, including the rights of the defendants, though the deed erroneously stated the parties to the mortgage to be the sole owners. They held that the property sold was the mortgaged property, and not merely the right of the judgment-debtors therein. The Judges then held the question to be whether the suit of July, 1878, was so framed as to entitle the plaintiff to a decree which would bind the interests of all the members of the family, and whether the defendants were so bound.

In connection with this they referred to *Subramaniyayyan* v. *Subramaniyayyan*(1); *Maruti Narayan* v. *Lilachand* (2); *Dasaradhi Ravulo* v. *Jaddumoni Ravulo*(3); *Gangulu* v. *Ancha Bapulu* (4); *Suraj Bansi Koer* v. *Sheo Pershad Singh*(5); *Ramnarain Lal* v. *Bhawani Prasad*(6); *Deva Singh* v. *Ram Manohar*(7); *Pursid Narain Singh* v. *Honooman Sahay*(8); *Ramphul Singh* v. *Deg Narain Singh*(9); *Bemola Dassee* v. *Mohun Dassee*(10); *Laljee Sahoy* v. *Fakeer Chand*(11); *Upooroop Tewary* v. *Lalla Bandjhee Sahay*(12); *Luchmun Dass* v. *Giridhur Chowdhry*(13); *Ganesh Pande* v. *Dabi Dyal Singh*(14) holding the general rule to be correctly given in the judgment in the last case (in which both *Muddun Thakoor* v. *Kantoo Lall*(15), and *Suraj Bansi Koer* v. *Sheo Pershad Singh* (16) were cited.) In conclusion, on the ground that the defendants were not parties to the decree, or represented in the proceedings in which it was passed, the appeal was dismissed, affirming the dismissal of the suit.

On this appeal,—

Mr. *J. Graham, Q.C.*, and Mr. *J. H. A. Branson*, for the appellant, contended that the Chief Court ought to have held that the appellant had, by his purchase at the execution sale, acquired a title to the whole property mortgaged, including the shares of the respondents. The appellant had alleged, and was prepared to prove,

(1) I. L. R., 5 Mad., 125.
(2) I. L. R. 6 Bom., 564.
(3) I. L. R., 5 Mad., 193.
(4) I L. R., 4 Mad., 73, at p. 87.
(5) I. L. R., 5 Calc. 148, at p. 165; L. R., 6 I. A., 88; S. C. nom. *Ramsahai* v. *Sheo Pershad Singh*, 4 C. L. R., 226; 4 P. C. J.1.
(6) I. L. R., 3 All., 443.
(7) I. L. R., 2 All., 746.
(8) I. L. R., 5 Calc., 845, at p. 852.
(9) I. L. R., 8 Calc., 517, at p. 525.
(10) I. L. R 5 Calc., 792.
(11) I. L. R., 6 Calc., 135.
(12) I. L. R, 6 Calc., 749.
(13) I. L. R., 5 Calc., 855. (14) 5 C. L. R., 36.
(15) 14 B. L. R., 187; L. R., 1 I. A., 321.; 3 P. C. J., 380.
(16) I. L. R., 5 Calc., 148 at p. 165; L. R., 6 I. A., 88; S. C. nom. *Ramsahai* v. *Sheo Prosad Singh*, 4 C L. R., 226.; 4 P C. J., 1.

the facts of the case, which were sufficient to show that the two managing members had executed a mortgage under circumstances legally empowering them to make a valid and binding mortgage of the interests of the entire family. This allegation had not in effect been contradicted. The defence had been put on the ground that the defendants were not personally parties to the mortgage, or to the suit thereupon, or to the decree. It was, in effect, the defence that, for the above reasons, the sale was ineffective to pass the defendants' interests in the family property. For the appellant, however, the case was that the defendants being made parties to any of the above was not essential. The managing members had authority to bind their interests. They had exercised this authority by mortgaging the family property to raise money for the purpose of paying a debt due by the joint family.

Reference was made to *Hunoomanpershad Panday* v. *Munraj Koonwaree*(1); *Bhaisankar Narbheram* v. *Harivallabh*(2); *Deendyal Lal* v. *Jugdeep Narain Singh* (3); *Pettachi Chettiar* v. *Sangili Vera Pandia Chinnatambiar*(4): *Nanomi Babuasin* v. *Modhun Mohun*(5); *Bissesur Lal Sahoo* v. *Luchmessur Singh*(6); *Ramphul Singh* v. *Deg Narain Singh*(7); *Umbica Prosad Tewari* v. *Ram Sahai Lal*(8); *Suraj Bansi Koer* v. *Sheo Pershad Singh*(9).

Mr. *C. W. Arathoon*, for the respondents, contended that only the interests of the parties to the decree were affected by the execution sale. The defendants were neither directly, nor indirectly, parties to the mortgage deed; and they had not ben made parties to the suit, having on their part no right to redeem. The decree-holder having himself become the purchaser, he was especially bound to make it clear that the decree bound the mortgagors as representing the entire family. By omitting to make the co-sharers parties to the suit he had, however, given intending purchasers to understand that only the interests of the judgment-debtors were sold. Reference was made to the judgments in *Deendyal Lal* v. *Jugdeep Narain Singh*(10), and in *Hardi Narain Sahu* v. *Ruder Perkash Misser*(11).

Counsel for the appellant were not called upon to reply.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR BARNES PEACOCK.

This is an appeal from the decision of the Chief Court of the Punjab in a suit brought by Daulat Ram against Mehr Chand and others, in order to have it declared that under a purchase, which he had made under an execution, he acquired not only a 10 annas share, but also the other 6 annas share which the defendants dispute, and also to recover possession of that six-annas share. In his plaint he says: "That on the 11th January, 1871, Jiwan Mul and Rattan Chand mortgaged the property to plaintiff for Rs. 20,000, under the necessity of paying a debt due to the firm known as Nanak Chand, Sarup Chand, of which defendants are also the proprietors." There seems to be a mistake in stating that the debt was due to the firm instead of a debt by the firm. He then states "that on the 11th November, 1878, plaintiff brought a suit by virtue of the mortgage deed and obtained a decree against Jiwan Mul and Lal Chand, son of Rattan Chand; that in execution of the aforesaid decree, plaintiff purchased the said

(1) 6 Moore's I. A. 393. 1 P. C. J., 552.
(2) 1 Bom., 20;
(3) L. R., 4 I. A., 247; I. L. R., 3 Calc., 198; 3 P. C. J. 730.
(4) L. R., 14 I. A., 84; I. L. R., 10 Mad., 241.; See *Ante page 38.*
(5) I. L. R., 13 Calc., 21; L. R., 13 I. A., 1.; 4 P. C. J., 682.
(6) L. R., 6 I. A., 233.; 4 P. C. J., 76.
(7) I. L. R., 8 Calc., 517.
(8) I. L. R., 8 Calc., 898.
(9) L. R., 6 I. A., 88; I. L. R., 5 Calc., 148.; 4 P. C. J., 1.
(10) L. R., 4 I. A., 247; I. L. R., 3 Calc., 198; 3 P. C. J., 730.
(11) I. L. R., 10 Calc., 626; L. R., 11 I. A., 26.; 4 P. C. J., 510.

property for Rs. 44,100 at an auction sale; but when he wanted to take possession, defendants, who were minors at the time of the mortgage, set up an objection, and on the 23rd July, 1879, prevented plaintiff from taking possession of 6 out of 16 annas of the property, the value of which is Rs. 16,537-8." Then the plaintiff prayed for a declaration to the effect "that the share of the property regarding which the defendants set up the objection was held in mortgage by plaintiff in a lawful manner; and that the plaintiff purchased the same in execution of the decree.

Now the circumstances of the case are these: by a mortgage executed by Rattan Chand and Jiwan Mul, the property in question, with some other property, was mortgaged to the plaintiff. In their mortgage the two mortgagors, who were members of a joint family, including the present defendants, stated that they held ancestral possession of the property, that it was purchased and built by them, and that they owned it to the exclusion of everyone else. Then, having stated that the old title deeds were destroyed during the Mutiny, they proceeded: "In these days we have pledged and given in mortgage this property with all its rights, internal and external, to Seth Daulat Ram, son of Lala Nanu Ram"—that is the plaintiff—"proprietor of the firm known as Daulat Ram and Sri Ram, bankers." Then they say in consideration of Rs. 20,000 Queen's coin "under the necessity of paying a debt due to"—it is there also said "due to" but it should be "due by"—"the firm known as Nanak Chand, Sarup Chand, the proprietors of which are the two of us (promisors) mortgagors (*viz.* Rattan Chand, son of Nanak Chand, and Jiwan Mul, son of Sarup Chand) and also Mehr Chand," and the other defendants. Then they say "we have given up possession of the mortgaged property in question, and given it into the possession of the mortgagee after the execution of a separate lease containing our promise in regard to the interest. Our agreement is that we will pay the interest month by month, and the principal sum in a period of three years."

It appears to their Lordships that, although the mortgagors stated that they were the sole proprietors, the statement that they were in ancestral possession showed that they intended to mortgage the whole of what they held as ancestral property, and that the mortgage passed the whole 16-annas of the property which they professed to mortgage, and they mortgaged it, stating that they did so for the purpose of paying the debt due from their firm. The defendants stated that they were not members of that firm, and they relied upon that fact. They did not state that no debt was due from the firm, but merely that they were not members of it. If they had intended to say that the mortgage being executed by the managers of the joint family was executed by them for their own private purposes, and not for such as would benefit the whole joint family, they ought to have said so, and they would have said so. But instead of saying there was no necessity for the mortgage, they say it was a mortgage for a debt of a firm of which they were not members.

Then there was a second mortgage afterwards executed, to which the defendants were parties, which is to be found at page 9 of the record, in which it was stated that, "whereas the whole of our property, consisting of shops and houses situated in the city of Delhi, being ancestral property belonging to our common ancestor Nanak Chand, is already mortgaged to Lala Daulat Ram and Sri Ram, bankers of Delhi." To some extent that might be evidence against the defendants, that the first mortgage was binding upon them, and that it included the whole 16-annas, but their Lordships do not think it necessary to place any great reliance upon it.

Now the mortgage having been executed and the debt not being paid, the mortgagee brought an action, not against the whole joint family, but against the two members of the joint family who

were managers of it, and who had executed the mortgage. The plaint in that suit is not set out in the record before their Lordships, but it has been brought before them during the course of the argument, it having been sent up under the seal of the Court in another appeal, and consequently their Lordships cannot hesitate to accept it as being a correct copy of the plaint in the suit which was instituted by the mortgagee against the two mortgagors under that mortgage. In that plaint the mortgagee claims not only to recover against the mortgagors the amount of the mortgage debt and interest, but asks that he may have execution and be satisfied out of the mortgaged property. He obtained a decree in that suit, and issued an execution and applied for an attachment of the property. Unfortunately the application for execution of the decree, like the decree itself, is not before their Lordships in this record, but they have it in a manner similar to that in which they have the plaint, and from that application it appears that the mortgagee asked to execute his judgment, not by seizing the right, title and interest of the two mortgagors under the execution, but that he might be satisfied by seizing and selling that portion of the mortgaged property which was the subject of the suit, and if anything further remained due, that he might levy it upon the separate property of the two defendants. That application was granted, and their Lordships find by the certificate of sale, that the whole property was sold. It should be stated that the plaintiff in this suit was not only the mortgagee of the property and the plaintiff in the suit upon the mortgage, but he himself purchased, as he had a right to do, the property under the execution. The certificate of sale says: "It is hereby certified that on the 27th March, 1879, by means of a sale by public auction, Lala Daulat Ram, proprietor of the firm of Daulat Ram and Sri Ram, was declared to be the purchaser of six houses and nine shops immediately adjoining one another, situated in the Sakhanand Lane, and the Jozri Bazar, the property of the judgment-debtors, for the sum of Rs. 44,100, in execution of a decree in this case, and that the said auction sale was formally sanctioned by the Court." It was contended on the part of the defendants, that although the plaintiff purchased the property under execution, he was not entitled to the 6-annas share that belonged to the defendants, inasmuch as they had not been made parties to the suit upon the mortgage deed, and the learned Judges in the Courts below seem to have acted upon the principle that, inasmuch as that suit was brought against the two mortgagors alone, and not against the defendants, all that could be sold, and all that was sold, in execution of the decree, was the right, title, and interest of the two mortgagors, namely, their shares in the property, excluding the 6-annas shares which belonged to the defendants.

It appears to their Lordships that the decree cannot stand. The Senior Judge of the Chief Court, Mr. Barkley, says: "For the purposes of this appeal it may be assumed, though there is no finding on this point by the Courts below, that the mortgagors were the managers of an ancestral business belonging to a family of which the defendants, who were minors when the mortgage was effected, were members, and that the mortgage was necessarily entered into, in order to pay the debts of that business. If this were so, the mortgage would be a valid mortgage of the entire property, including the rights of the defendants, though it was erroneously stated that the mortgagors were the sole owners, and had no co-sharers. It may also be assumed that the property brought to sale was the mortgaged property, and not merely the rights of the judgment-debtors therein." Their Lordships think that the learned Judge was correct in making those assumptions. It appears from the record that the plaintiff proposed to prove those facts, but the defendants rested their defence upon the ground that they had not been made parties to the suit, and consequently that their

share in the property had not been sold, and could not be sold under the execution. The plaintiff's counsel stated: "We propose to call evidence to prove (1) that the defendants were a joint Hindu family with Jiwan Mul and Lal Chand" —those were the two mortgagors—"and that the two last-named were the managers of this firm of defendants. The transactions were carried out in the name of 'Nanak Chand, Sarup Chand,'"—the name of the banking firm. Then "(2) the rents of this property were credited in the books of this firm; the expenses of this family were debited in their books; (3) the money we advanced on the mortgage was expended in paying debts, &c., of the joint Hindu family; (4) this family had dealings with Kesri Chand Balmokand when we brought our suit on the mortgage; the defendants joined with the managers Jiwun Mul and Lal Chand, and mortgaged the equity of redemption of the whole property to Kesri Chand Balmokand, reciting in that deed that the property was already in mortgage to us." That is the second mortgage to which allusion has already been made, and upon which their Lordships have not placed much reliance. Then "(5) after we attached the property, Jiwan Mul, in virtue of a certificate under s. 305, tried to sell the whole property per Ganga Pershad, auctioneer. The property was twice put up for auction after being advertised, and the defendants took no steps to make any objections. These sales fell through. (6) Subsequently at the sale in execution of decree, Kesri Chand Balmokand bid us up to Rs. 44,000, and we eventually purchased for Rs. 44,000." That is the plaintiff's purchase at that sale. Then in another part of the record it appears that they also proposed to prove that, after the sale had taken place, the defendants received a portion of the purchase money, which was more than sufficient to pay off the mortgage, but the defendants objected, and refused to allow the plaintiff to go into evidence of those facts. Again Jiwan Mul in his evidence stated that the business was managed by Rattan and himself; that it was an ancestral business; that there had been no partition; and that the debt for which the mortgage was executed was due from the business in which the defendants had a beneficial interest.

Under those circumstances their Lordships think that the learned Judge of the Chief Court was perfectly justified in making the assumptions which he did make, but that he was in error in deciding as he did the question upon the point upon which the defendants have made their stand, namely, that as they had not been made parties to the action, their shares in the property had not been sold.

It appears from the cases that have been cited, that notwithstanding the defendants were not made parties to the suit, still as the suit was brought on the mortgage to recover the mortgaged property, and the plaintiff in the suit obtained a decree, and executed that decree by seizing the mortgaged property, the question would be whether the mortgage included the interest of all parties, or only the right, title and interest of the two parties who were made defendants. In the case cited from volume 5 of the Indian Law Reports, Mr. Justice Pontifex in giving his decision says, at page 852: "It has been decided that if the managing member of a family, the other members of which are at the time minors, having authority (the touchstone of which is necessity) mortgages the whole 16-annas of the ancestral property, then, in a suit by the mortgagee, the sale under the decree would pass the whole 16-annas of the mortgaged property, although the mortgagor alone was made defendant; and the reason for such decision probably is that the 16-annas having been validly mortgaged to the mortgagee, and his remedy being foreclosure or sale, the decree of the Court would affect what was in the parties before it, namely, the mortgagee's right, validly acquired, to have the whole 16-annas sold."

The present case was first heard before

the Assistant Judicial Commissioner, who held the same opinion as that at which the Chief Court arrived. Then it was appealed to the Commissioner, and he came to the same conclusion; but at the time of these decisions the Courts certainly had not before them a recent decision which is reported in the 13th volume of the Indian Law Reports, page 1 —*Nanomi Babuasin* v. *Modhun Mohun* (1). There, their Lordships, after very full consideration of the whole case, said: "Their Lordships do not think that the authority of *Deendyal's case* bound the Court to hold that nothing but Girdhari's coparcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right it will avail them nothing unless they can prove that the debt was not such as to justify the sale."

When the plaintiff applied to be let into possession under the certificate of sale, the defendants objected. He thereupon brought this suit, and the defendants had the opportunity of trying whether the mortgage was a valid mortgage which bound the ancestral property. The plaintiff proposed to prove all the facts that were necessary to make the mortgage valid and binding upon them. The defendants had the opportunity of trying that question, but they did not wish to try it. They made their stand upon the ground that they had not been made parties to the suit, and that the two mortgagors alone had been sued. But that ground falls from under them. Then, when they stood upon that ground, and objected to have the evidence gone into at the proper time for going into it, can they now ask their Lordships to remit the case? Their Lordships at first had some little doubt as to whether the case ought not to be remanded; but considering the evidence of Jiwan Mul, and that the plaintiff offered to go into the whole evidence, and to prove that a portion of the purchase money was paid over and received by the defendants, and that the defendants refused to meet the case upon that ground, their Lordships have come to the conclusion that the case ought not to be remanded, and that the decision of the Chief Court must be reversed, as also the decree of the first Court and that of the Commissioner.

It is, therefore, necessary that the decree be made which the Chief Court ought to have made, and their Lordships will therefore humbly advise Her Majesty that the decrees of all the Courts below be reversed, and that it be decreed that the plaintiff is entitled to the 6-annas share for which he sues, and that he is entitled to recover possession thereof, and further that the respondents do pay the costs in all the lower Courts.*

The respondents must pay the costs of this appeal.

Appeal Allowed.

Solicitors for the Appellant: *Messrs. Watkins & Lattey.*

Solicitors for the Respondents: *Messrs. T. H. Wilson & Co.*

* I. L. R., 13 Calc., 21; L. R., 13 I. A., 1; 4 P. C. J., 682.

20th July 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir J. Hannen, and the Right Hon. Sir Richard Couch.

On Appeal from the Court of the Judicial Commissioner of Oudh.

JANKI KUNWAR† ... *Plaintiff,*

and

AJIT SINGH ... *Defendant.*

Limitation Act (XV of 1877), Sch. II, Art. 91—Suit to set aside deed—Fraud.

In a suit instituted in 1884 by a husband and wife to have a deed, granting land, which was executed by the husband in 1872, set aside on the ground that it had been obtained from the latter by fraud and undue influence, the facts relied upon were known to the co-plaintiff husband from the date of the deed. Although in another suit a sale by the husband, effected in 1879, was set aside in 1882, on the ground of his having been unduly influenced, he was not at the time of the previous transaction, nor for some years after it, mentally incompetent or unable to allow that knowledge to operate on his mind. *Held*—that, therefore, the suit, falling within s. 91 of Schedule II of Act XV of 1877, was not maintainable by either of the plaintiffs.

APPEAL from a decree (24th April, 1885) of the Judicial Commissioner, reversing a decree (30th June, 1884) of the District Judge of Rae Bareli.

The appellant and her late husband Raja Bijai Bahadur Singh, who died pending these proceedings, brought this suit on the 18th February, 1884, to obtain cancellation of a deed of sale, dated 29th July, 1872, on the ground that it had been obtained by fraud and undue influence. By that deed the Raja had conveyed forty-six villages with fifty-six hamlets in the Rae Bareli district to the defendant in this suit. The plaintiffs sought to have their property restored to them with mesne profits and costs upon their paying to the defendant so much of the consideration money as might be found to be justly due. The wife was joined with the husbund in the suit, as she alleged that he had, on the 1st November, 1879, made a gift to her of his estate. After the institution of the suit, and before the judgment of the first Court, Raja Bijai died, on 17th June, 1884, and his widow continued the proceedings. Prior to this suit, another one had been instituted by, both the Raja and his wife, in 1880, to set aside a deed of sale executed by the husband in 1879. That suit, which alleged that the husband was of weak mind, was decided in their favor, ending with the judgment of the Judicial Committee June 24th, 1884. (See *Ajit Singh* v. *Bijai Bahadur Singh*(1). The plaint alleged that the wife had not, until the proceedings in the Oudh Courts relating to the later deeds, *viz.*, on the 25th August, 1882, come to the knowledge of the frauds stated to have been practised by the defendant in 1872.

The respondent denied any fraud and undue influence. The consideration paid was the proper value of the estate. He also relied upon limitation under Arts. 91, and 95, and 114 of Schedule II of Act XV of 1877.

The issues fixed raised both the preliminary question and the substantial merits.

It appeared that Raja Bijai succeeded his father in the talukdari in 1854, and about the year 1865 an inquiry as to his capacity to manage his taluk instituted by the Deputy Commissioner, on behalf of the Court of Wards, resulted in his being found, on the 6th November, 1871, to be capable of managing his affairs, and the estate was restored to him after a period of direct management by the District Officer to recover arrears of revenue.

* 14th I. L. R., 15 Calc. 58.

† I. L. R., 15 Calc., p. 58; 14 Cowell 108.

(1) I. L. R., 11 Calc., 61; L. R., 11 I. A., 211; 4 P. C. J., 500.

The District Judge as to limitation held that the 91st article of the second Schedule of Act XV of 1877, which prescribes in the case of a suit "to cancel or set aside an instrument not otherwise provided for" a period of three years from the time "when the facts entitling the plaintiffs to have the instrument cancelled or set aside become known to him" did not apply, and that the 95th article, which in the case of a suit to "set aside a decree obtained by fraud, or for other relief on the ground of fraud," prescribes a like period "running from the time the fraud becomes known to the party wronged," though more applicable, did not, however, bar the suit, as Raja Bijai, by reason of his defective intellect, was "entirely out of the question," and his wife's "assertion that she became aware of the fraud after May, 1881," saved her from the bar of limitation.

On the issues relating to the merits, the Judge held in effect that at the time of the execution of the deed in question Raja Bijai was "not actually of unsound mind, but of extremely weak intellect, totally incapable of studying his own interests," and that this respondent was aware of those defects. That though Raja Bijai was at that time "heavily involved," the only creditor who was pressing him was this respondent, who had at that time sued out execution of a decree for Rs. 6,400, and that there was therefore "no immediate necessity to sell such a large portion of his estate," and that with an ordinary amount of intelligence he might easily have raised a loan on mortgage sufficient to have paid this amount. As to the sufficiency of the consideration money, Rs. 1,25,000, the Judge threw on this respondent the burthen of proving that he paid full value, and finding that the real value was somewhat higher, decided that the respondent had obtained the exection of the deed by fraud and undue influence.

The Judge, accordingly, ordered that the deed of sale in question should be set aside as an absolute conveyance, and that on Janki Kunwar paying into Court within six months the sum of Rs. 1,25,000, the properties in suit should be reconveyed to her, and in default of her so doing her suit should be dismissed, and he declared her right to receive mesne profits from the date of the institution of the suit to that of obtaining possession, and otherwise allowed no interest or mesne profits on either side.

On appeal, the Judicial Commissioner on the merits held that the Judge had fallen into error in supposing that there was no pressure on Raja Bijai's estate except this respondent's execution. There were large outstanding arrears of Government revenue at the time when the sale was made. The affairs of the Raja were so embarrassed that it might have been to his advantage, failing the assistance of the revenue authorities, which, it was plain, did fail him, to part with a portion of his estate, and secure the rest. The Judicial Commissioner found no proof of undue influence or fraud; and on the question whether evidence of fraud was afforded by the purchase money being unconscionably small, taken in connection with the low business capacity of the Raja, the Court found no such evidence. Reversing the decree of the District Judge, the Court dismissed the suit.

On this appeal,—

Mr. *J. D. Mayne*, Mr. *C. W. Arathoon* and Mr. *M. A. Jalil*, appeared for the appellant.

Mr. *J. Graham, Q.C.*, and Mr. *R. V. Doyne*, for the respondent.

For the appellant it was argued that the Courts in India should have decreed restoration of the property in suit with mesne profits, on the widow's paying so much of the consideration money stated in the deed of 1872, executed by the late Raja, as represented what had been properly taken on his behalf, with interest thereon. The Judicial Commissioner had rightly disposed of the quesion of limitation—see *Uma Shankar* v. *Kalka Prasad* (1), but had not correctly disposed of the question of undue influence said to have

(1) I. L. R., 6 All., 75.

been exercised over the Raja, who was incompetent to manage his affairs.

For the respondent it was argued that the suit should have been held barred by limitation under Art. 91 of Sch. II of Act XV of 1877. Also, that there was no evidence to shew that, at the time of the transaction in 1872, the Raja was too weakminded to contract, or was subjected to undue influence.

At the conclusion of the arguments their Lordships' judgment was given by

THE RIGHT HON. SIR RICHARD COUCH.

The appellant in this appeal is the widow of Raja Bijai Bahadur Singh, one of the talukdars of Oudh, who died on the 17th of June, 1884. The question in the suit relates to the validity of a deed of sale executed by him on the 29th July, 1872. By that deed he professed, on account of the exigency of payment of debts to bankers and decree-holders, and of revenue, to sell to the respondent Raja Ajit Singh, 46 villages with 56 hamlets in consideration of Rs. 1,25,000. Before this transaction took place, proceedings in lunacy, under the law for that purpose in India, had been taken against him, which originated in a letter of the Deputy Commissioner of the 7th of January, 1871. An inquiry was made into the state of his mind, which ended in an order being made on the 6th of November, 1871, by which he was found not to be of unsound mind and incapable of managing his affairs, and upon that he was put into the management of his affairs.

Now it is important to observe that this was not long before the making of the deed of sale, being in November, 1871, and the deed of sale being dated on the 29th of July, 1872. So that, although he was, and has been, found in some subsequent suits to be a man of weak intellect, he was at that time considered by the proper authorties, who had made inquiries, to be capable of managing his affairs, and therefore he must be taken to have been capable of entering into contracts, and of knowing the nature of the contracts which he entered into. In 1878 he executed a deed of mortgage to the respondent Ajit Singh, and in 1879 he also executed a deed of sale to the same person. In 1880 two suits were brought, one by Ajit Singh against Bijai and the appellant to recover the principal and interest due upon the mortgage, and the other by Bijai and the appellant to set aside the deed of sale on the ground of fraud, undue influence, and want of consideration. It should be mentioned that shortly before those suits were brought Bijai had made a deed of gift, dated the 1st of November, 1879, to his wife, the present appellant, and it is a matter of remark that she relies upon that deed, and has relied upon it all through the proceedings, at the same time setting up that her husband was a man incapable of entering into the other transaction, and of executing the deed of sale of the 29th July, 1872. These suits went through a considerable course of litigation, and were finally determined in favor of Bijai and the appellant on the 24th of June, 1884, by the judgment of this Committee.

The only material date to be noticed in regard to the different proceedings is that of the first judgment, which was given by the District Judge on the 31st May, 1881, and the final decision was that the deeds should have effect only as securities for such sums advanced or paid by Ajit Singh as should be proved to have been paid to and received by Bijai Singh personally, or as Wahaj-ud-deen the manager of his estate would have been justified in borrowing in the course of a prudent management of it. That was in 1884.

The present suit was brought on the 16th of February, 1884, by Rani Janki Kunwar and Bijai, who had not then died, against Ajit Singh, and the plaint stated that the defendant. Ajit Singh knew that Bijai was a person afflicted with mental and bodily infirmities, and had procured him to execute the deed of the 29th July, 1872, at a considerably low price, namely,

Rs. 1,25,000, and sought to have that deed set aside on the ground of his being incompetent to execute it, and that it had been obtained by fraud. The plaint also contains this allegation, which is important: "That plaintiff No. 1"—that is the wife—"then"—that is after the decision of the District Judge, dated the 31st of May, 1881, and that of the Judicial Commissioner, dated 17th of January, 1882—"commenced to inquire about other matters relating to her husband's property, and on the 25th of August, 1882, she came to know of the real facts of fraud, flattery, undue influence, and other matters relating to the deed of sale of the 29th July, 1872"—the object of that statement being evidently to show that the suit was not barred by the law of limitation.

Now, the Act XV of 1877, Art. 91, provides that a suit to set aside an instrument not otherwise provided for, and this is such a suit, must be brought within three years from the time when the facts entitling the plaintiff to have the intrument cancelled or set aside become known to him.

It is necessary then to see whether the suit has been brought within that period. The suit was brought by Bijai in conjunction with Janki Kunwar, and the facts which are mainly relied upon are these. It is not alleged that the state of his mind was such that it alone would have been a ground for setting aside the deed of sale, and that he was so incapable of entering into any contract that it must be set aside; the case of the appellant is, that the value of the property was such that, having regard to the amount that was given for it, Rs. 1,25,000, it was an unconscionable bargain on the part of Ajit Singh, affording evidence that the transaction was a fraudulent one on his part, and was brought about by the exercise of undue influence by him, and that in fact he procured Bijai Singh to be surrounded by persons in his, Ajit Singh's interest, and acting for him, and Bijai was not in a condition to have, and had not the advice which he ought to have had.

Now these were facts which must have been known long before the date which the plaintiff gives as the date of the fraud having come to her knowledge. It is not alleged that any new matter was then discovered. The state of things which existed when the deed of sale was given continued up to the time when the other suits were finally decided. The suit to set this deed of sale aside was originally brought by Bijai himself as well as his wife. They do not seem to have thought that the deed of gift could be solely relied upon. Bijai brings the suit himself, and therefore when considering whether it is barred by the law of limitation, their Lordships have to see what was the state of Bijai's knowledge; because if all the facts were known to Bijai, and he was a man not incapable of having that knowledge and of allowing it to operate on his mind, the case would come within what is stated in this article. Much more than three years would have elapsed after the facts which are said to constitute the fraud were known to him, and so the period of three years had expired before the suit was brought. That would be sufficient to decide the suit.

Both the lower Courts seem to have treated this question in a manner which cannot be regarded as satisfactory. The District Judge having stated the previous proceedings, says: "Under these circumstances I think it but just that she"—that is, the present appellant—"should be allowed to count her limitation from the 31st of May, 1881, the date on which the District Judge decided her husband had been defrauded in the cases then before him." He takes no notice of the fact that Bijai was also a party to the suit, and that his knowledge was a material matter to be regarded, and he fixes, apparently in a somewhat arbitrary manner, on the 31st of May, 1881, the date of the decision of the District Judge in the former suits, as that from which the period of limitation would run. That

ground cannot be supported. The District Judge has not directed his mind to the real question, which is when the circumstances that are said to constitute the fraud became known to Bijai. Then the Judicial Commissioner deals with the case in a different way. He says the suit is essentially a suit for the possession of immovable property, and as such falls within the 12 years' limitation. Now he is clearly wrong there. It was not a suit for the possession of immovable property in the sense to which this limitation of 12 years is applicable. The immovable property could not have been recovered until the deed of sale had been set aside, and it was necessary to bring a suit to set aside the deed upon payment of what had been advanced, namely, the Rs. 1,25,000. Therefore there has been on the part of the lower Courts a misapprehension of the law of limitation in this case. Their Lordships are clearly of opinion that the suit falls within Art. 91 of the Act XV of 1877, and is therefore barred.

Upon the other question, which is the main question in the suit, whether upon the facts which have been proved there was a case entitling the appellant to have the deed of sale set aside, their Lordships have not had any matter laid before them which would lead them to the conclusion that the decision of the Judicial Commissioner that the deed ought not to be set aside should not be allowed to stand. They see no ground for thinking that on that matter he came to a wrong conclusion.

The result, therefore, is that their Lordships will humbly advise Her Majesty to dismiss the appeal, and to affirm the judgment of the Judicial Commissioner. The appellant will pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant: *Messrs T. L. Wilson & Co.*

Solicitors for the respondent: *Messrs. Lawford, Waterhouse & Lawford.*

21st July 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir J. Hannen, and the Right Hon. Sir Richard Couch.

On Appeal from the Court of the Judicial Commissioner of Coorg.

IN THE MATTER OF SOUTHEKAL KRISHNA RAO* } *Petitioner.*

Legal Practitioners Act (XVIII of 1879) ss. 14 and 40—Irregularity in procedure in dismissing a mukhtar.

A charge of unprofessional conduct brought against a practitioner, holding a certificate under Act XVIII of 1879, having been found to be established by a Subordinate Court, which also considered that he, in consequence, should be dismissed, and the same having been reported, in conformity with s. 14 of that Act, to the principal Court in the province, such dismissal was ordered. *Held*, that the practitioner could not be dismissed or suspended under that section, without his having been allowed, under s. 40, an opportunity of defending himself before that Court.

It is within the duties of a Court, informed of the misconduct of one of the practitioners before it, to take steps to have the matter adjudicated upon.

APPEAL from two orders (28th February, 1883, and 28th July, 1883) made by the Judicial Commissioner of Coorg.

The two orders against which this appeal was preferred were made by the Judicial Commissioner upon the report of the Assistant Commissioner. The first cancelled the certificate of the appellant, as a mukhtar, practising under Act XVIII of 1879, and directed that his name be struck off the roll of second grade pleaders. The second order confirmed the first.

The charge against Southekal Krishna Rao was stated by the Commissioner of

* I.L.R., 15 Calc., 152; 14 Cowell, 154.

Coorg (20th November, 1882), as follows, *viz.*, that he being engaged as a pleader by Ramasetty Nanjappah, on the prosecution of an appeal to the Judicial Commissioner, fraudulently and improperly represented to him in a telegram that his appeal had been filed and fixed for hearing on a certain date, which he well knew, or had reason to believe, was not the case; also that, until criminal proceedings were taken against him in the Court of the Magistrate of the district, he failed to account to the said Nanjappah for the money entrusted to him with the object of retaining an advocate for the said appeal; also, that he had falsely stated to the Magistrate that he had given Rs. 40 to a third person on that account.

These charges were, by order of the Commissioner, on the 14th December, 1882, enquired into by the Assistant Commissioner, who received as evidence the record of a case instituted by Nanjappah, relating to the detention of the money above-mentioned, in the Court of the District Magistrate, under s. 417 of the Indian Penal Code. These proceedings had resulted in the discharge of Southekal Krishna Rao, under s. 215 of the Code of Criminal Procedure.

The Assistant Commissioner found the charges proved, and his findings were, on the 15th February, 1883, submitted to the Judicial Commissioner, who thereupon made the order of the 28th February, 1883, the first of those now complained of. The Judicial Commissioner, however, afterwards, on 5th June, 1883, directed the Commissioner to examine certain witnesses on behalf of Southekal Krishna Rao. This was done, and the depositions were forwarded by the Commissioner on the 6th July, 1883, to the Judicial Commissioner, with the comment that whatever view might be taken concerning the alleged re-payment there was no denying the fact that Southekal Krishna Rao had kept his client for many months out of his money, and returned it only under stress of criminal proceedings, having by means of a false telegram made him believe that his appeal had been filed. The Judicial Commisioner on the 28th July following made the second of the orders now under appeal, confirming his previous order.

Special leave to appeal to Her Majesty in Council having been obtained on 26th November, 1886, Mr. *C. W. Arathoon*, for the appellant, argued that, with reference to s. 40 of Act XVIII of 1879, the Judicial Commissioner had not the power to suspend or dismiss a practitioner under s. 14, without allowing him an opportunity of defending himself before him—an opportunity not shown by the proceedings to have been given. The proceedings before the Commissioner, taken under the order of 5th June, 1883, did not remove the effect of this irregularity in the Judicial Commissioner's procedure. He added that the misconduct charged was not, even if proved, sufficiently aggravated to require, or justify, a sentence so severe as that which the appellant was undergoing.

After Mr. *Arathoon* had been heard their Lordships' judgment was delivered by

THE RIGHT HON. SIR J. HANNEN.

This is an appeal by one Krishna Rao against an order of the Acting Judicial Commissioner of Coorg, Mr. Plumer, by which he struck the name of the petitioner off the roll of second grade pleaders in the Courts of Coorg.

The facts out of which the appeal arises are as follows. One Nanjappah had instituted a suit in which he had been unsuccessful. He had appealed once, and he desired to appeal again. The present appellant, who was at that time a vakil, was going to Bangalore, and he was requested by Nanjappah to give instructions to a barrister of the name of Meenakshaya, at Bangalore, to take such steps as might be necessary for this appeal; and on the 27th or 29th of January, 1880, Nanjappah remitted to the appellant a sum of Rs. 80 for stamps and Court fees. It appears that the appellant did, in accordance with the directions he had received from Nanjappah, hand over the

papers relating to the case, and the Rs. 80, to Mr. Meenakshaya. Mr. Meenakshaya was at that time about to leave Bangalore for two or three days, and he took the papers with him. He appears to have left on the 1st of February. On the 2nd of February the appellant, either in consequence, as he says, of a telegram from Nanjappah, or of his own motion, went to the office of Meenakshaya and there saw one of his clerks. There is a question as to what information he received from that clerk with regard to the appeal. The appellant says that he was told in answer to his inquiry that the appeal might have been filed, by which their Lordships understand him to mean that as Mr. Meenakshaya was away, the clerks did not know what had been in fact done, but that it might have been filed by him before he left. The clerk, however, gives a different account of the transaction, and says that all that he said was that the appeal might be filed when Mr. Meenakshaya returned. Whichever of those two statements is correct it does not justify, literally, the telegram which the appellant sent to Nanjappah, because he telegraphed to him "Appeal filed Saturday; hearing not fixed." From his own point of view of the facts, it would appear that he assumed that the appeal had been filed, whereas, as he admits, all the information he received was that it might have been filed. That certainly is an inaccurate telegram. But the first question which underlies all these proceedings is whether or not it was a fraudulent statement by him that the appeal had been filed on Saturday. Now, as he had handed over the papers and the Rs. 80 to Mr. Meenakshaya, who had taken the papers out of town for the purpose of considering what should be done, it does not appear that there could have been any motive for the appellant's telegraphing falsely and fraudulently that the appeal had been filed, and it would appear more natural to come to the conclusion that there had been some misunderstanding on his part, or that he incautiously and improperly telegraphed as a fact that that had been done which the clerk had stated was probable. It has been suggested by the Commissioner, who has finally reported on the case, that he may have anticipated the events which did subsequently occur, namely, that Mr. Meenakshaya would return the money, and so he would have an opportunity of appropriating it, or some of it. That is taking a very hostile view of his conduct, and their Lordships are not prepared to say that the facts lead with any degree of certainty to so adverse a conclusion. But as a matter of fact the appellant did receive back from Mr. Meenakshaya the papers and Rs. 60, Mr. Meenakshaya retaining Rs. 20 as his fee for advising upon the case. The appellant did not, as he ought to have done, hand over that Rs. 60, or at any rate as much of it as he considered should be paid after deducting some reasonable sum for his own expenses. He did not in fact hand over any. In the following December, Mr. Hayes, a barrister, was instructed by Nanjappah to write to the petitioner asking him to render an account of the money which he had received back from Meenakshaya. The petitioner wrote to Mr. Hayes saying that he was entitled to retain Rs. 20. He also said: "After my return to this place Nanjappah never asked for the money. If he had done so I was ready to pay him Rs. 40, after deducting Rs. 20 which Mr. Meenakshaya had retained, and Rs. 20 for my travelling expenses. Such being the case, I was astonished to see your letter." He did not, however, remit the money to Nanjappah, but he alleges that on the following 28th of February, 1881, he paid a sum of Rs. 30 to Mr. Hayes, which, together with another sum of Rs. 10, which he had previously given him, made up a sum of Rs. 40, on account of this claim of Nanjappah; and by way of proving that, he produced a letter from Mr. Hayes which simply demands payment of Rs. 30, and upon which letter the appellant states that he made a memorandum of those two payments of Rs. 30 and Rs. 10, making up the Rs. 40

which he had expressed his willingness to pay in his letter to Mr. Hayes.

There is a dispute upon this, as upon almost every other fact of the case. Mr. Hayes denies that he received that money on account of Nanjappah; but it is quite certain that there were money transactions between Mr. Hayes and the appellant, and it is not impossible to believe that this sum of Rs. 40 was paid by the petitioner to Mr. Hayes on account of Nanjappah.

In that state of things Nanjappah instituted proceedings against the petitioner of a criminal nature. When those proceedings came on for hearing a compromise was arrived at by its being agreed that Nanjappah should receive the whole Rs. 80 back again. There is a question how that Rs. 80 was made up. The appellant says that half of it was paid by Mr. Hayes, the other half being furnished by him. Mr. Hayes, however, denies that he furnished anything, and represents that the whole of it was paid by the appellant under fear of the proceedings that had been taken against him. A compromise was effected by the receipt of the Rs. 80 by Nanjappah. But although the claim of Nanjappah was thus put an end to, proceedings were afterwards instituted—the proceedings which are now the subject of appeal before this Board—against the appellant in his character of pleader and officer of the Court. Those proceedings took place before Colonel Hill, who is the Commissioner of Coorg. It does not appear very clearly what led to the institution of those proceedings, but it is unnecessary to inquire into their origin, as if it became known to an officer presiding in a subordinate Court that one of the practitioners before that Court has been guilty of unprofessional conduct, it would be within the scope of his duties to take steps for the purpose of having that matter adjudicated upon. That would properly take place under the 14th section of the Legal Practitioners Act, No. XVIII of 1879, which provides that "if any such pleader practising in any Subordinate Court is charged in such Court or office with any such misconduct"—that is (referring back to the preceding section)—"in the discharge of his professional duty," then that certain steps shall be taken. The presiding officer is to send him a copy of the charge, and also a notice that on a day to be thereby appointed such charge will be taken into consideration. Ultimately it becomes the duty of such officer, if he finds the charge established, and considers that the pleader should be suspended or dismissed in consequence, to record his finding and the grounds thereof, and to report the same to the High Court, and the "High Court may acquit, suspend, or dismiss the pleader or mukhtar."

A report was made to Mr. Plumer, the Acting Judicial Commissioner, who in this respect represents the High Court. The Acting Judicial Commissioner has given the two orders which are the subject of appeal in this case. The first was on the 28th of February, 1883, when he makes the order with this preface: "In the matter of the recommendation made by the Commissioner of Coorg for the removal of the name of Southekal Krishna Rao from the roll of second grade pleaders for his having defrauded one Ramasetty Nanjappah of Mercara." He goes on to say that the record of the case before him showed clearly that Krishna Rao received Rs. 80, and that he fraudulently omitted to repay it, and also that he made a false statement that he had paid his client a portion of the money through Mr. Hayes. Then coupling that with alleged previous misconduct, he comes to the conclusion that he ought to be struck off the roll.

Up to that time it is to be observed that the petitioner had not been heard before Mr. Plumer. Petitioner remonstrated upon the order that had been made, and the result was another order of the 5th of June, 1885, that is, that evidence shall be adduced by the appellant, and evidence was in fact taken before Colonel Hill. Their Lordships are of opinion that the petitioner had the opportunity of adducing such evidence as

he might think fit, and that his complaint on that head is not well founded. But upon the evidence so obtained being remitted to the Judicial Commissioner, he makes this report or order: "I have gone very carefully again through all the papers connected with this case, and I have given them my best consideration. I regret that I am unable to modify the opinion expressed in my previous order or to alter the conclusion I arrived at." He therefore concludes. "I confirm my former order striking petitioner off the rolls."

This order was made without the petitioner's having had the opportunity of being heard before the Acting Judicial Commissioner after the evidence had been taken, and in that respect their Lordships are of opinion that there has been a plain irregularity, because in whatever way the proceedings may be instituted, they are subject to the provision of the 40th section of the Act referred to, by which it is enacted that, "notwithstanding anything hereinbefore contained, no pleader shall be suspended or dismissed under this Act unless he has been allowed an opportunity of defending himself before the authorities suspending or dismissing him." Now, the only authority which could suspend or dismiss him was the High Court, represented by the Acting Judicial Commissioner, Mr Plumer, before whom he never has had an opportunity of defending himself. Their Lordships are, therefore, of opinion that this order directing that he be struck off the rolls is in that respect irregular, and that it must be set aside, and the petitioner be restored to the roll.

It is unnecessary to give a definite opinion upon the merits of the case, but their Lordships consider that, if the charge had been established in a regular way, the offence, as alleged against the petitioner, was not of a character which called for his entire removal from the profession, but that a suspension for less time than that which he has in fact undergone would have been sufficient to meet the merits of the case.

Their Lordships will therefore humbly advise Her Majesty to set aside the order appealed from, and to order that the petitioner be restored to the roll.

Appeal allowed.

Solicitors for the Appellant: Messrs. *T. L. Wilson & Co.*

8th, 9th November, and 22nd December, 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

On Appeal from the High Court in Bengal.

RAIKISHORI DASI AND ANOTHER* } *Defendants,*

and

DEBENDRANATH SIRCAR AND OTHERS } *Plaintiffs.*

Hindu law, Will—Will, Construction of—Restrictions upon estate bequeathed, Effect of, if contrary to Hindu law—Restrictions separable from valid dispositions.

In the will of a Hindu restrictions contrary to law made by the will upon valid dispositions, if they are separable from the latter, need not be held to invalidate them.

Three documents, of which the second and third were executed by a testator after intervals of some years, together formed his will, containing a bequest of estate to his sons.

This was held valid by the High Court, although the testator in the later documents had endeavoured to impose restrictions upon the

* I.L.R., 15 Calc., 409, 15 Cowell 37.

estate contrary to law, and therefore inoperative; the principal of them being, (*a*) prohibition of actual possession, or alienation, by any son, of his share in the estate; and (*b*), direction that the whole estate should be managed in a common cutcherry, with religious trusts, the sons to get only the remaining amount of profit according to their respective shares in perpetuity.

At the same time the Court held a good provision for defraying the marriage expenses of sons from joint funds, with the direction in the will that until the youngest son should attain majority none of the sons should have a right to partition; any son who should separate from the others getting, up to the time of his attaining majority, merely maintenance, and not the profits accruing upon his share.

A gift over was that on the death of a son surviving sons should take his share proportionately to their own, and that if any of the sons so taking should die leaving sons, such sons should receive their proportionate parts of the deceased son's share: the first part of this provision was held good, not being invalidated by the second, which, as constituting a gift to an indefinite class, would not take effect.

The judgment of the High Court to the above effect was upheld by the Judicial Committee.

APPEAL from a decree (9th September 1884) of the High Court, reversing a decree (30th September 1882) of the Subordinate Judge of the Pabna District.

The appellant, Raikishori Dasi, one of the defendants in the suit, the other being a purchaser of part of the estate to which she alleged title, was the widow of Gobindnath Sircar, who died on the 8th May 1875, having been, in his childhood, adopted by Bishwanath Sircar, the testator, whose will was the subject of construction.

After the adoption, Bishwanath Sircar, having re-married, had a family of five sons, of whom three, along with the son of a fourth, were the respondents in this appeal. Bishwanath died on 10th December 1871, having during his life, *viz.*, on 21st January 1856, on 15th May 1862, and on 24th July 1870, executed the testamentary papers in question. The first, after naming the three sons, then the only sons born to the testator, and naming the adopted son, contained the following clause:—

"On my death my adopted son Gobindnath Sircar shall get a share of three annas, Brojendranath Sircar a share of five annas, Krishnendranath Siacar a share of four annas, and Jagadindranath Sircar a share of four annas, of all these properties, and of the properties which I may acquire in future. Again, if I get a son, then Gobindnath Sircar shall get a share of two annas ten gundas, Brojendranath Sircar a share of three annas fifteen gundas, Krishnendranath Sircar a share of three annas five gundas, Jagadindranath Sircar a share of three annas five gundas, and that son shall get a share of three annas five gundas. If besides one son I get more sons hereafter, then, with the exception of the *dalan* which I have demarcated and given in the share of Brojendranath, minor, as stated below, the adopted son, and sons born, *i.e.*, all my sons, shall be entitled in equal shares to all my properties, movable and immovable, and no one will be able to raise any objection thereto. If there be no sons born then the division will be according to the above shares."

A second clause provided for the payment of the debts to be paid by the sons in proportion to the share taken by each. A third clause named executors and managers of the family estate during the minority of the sons. Fourth and fifth clauses contained directions as to the apportionment of the family dwelling house. A sixth clause dealt with the expenses of religious ceremonies, and a seventh reserved rights of alteration.

On the 15th May 1862, Bishwanath Sircar executed another document which referred to the above, stating "all affairs are to be managed according to that will and this," and providing that until the youngest son should attain majority the names of those who were of full age should not be registered, nor should they be able to interfere with the property. His adopted son, his naib Krishna Kishore Doss, and his companion Iswar Chunder Chaki, were appointed executors. In the second clause he added:

"I have fixed a common cutcherry for the management of all family affairs. All affairs shall be managed by the joint amlas and managers, *i.e.*, of the sixteen annas, but the sons even on attaining majority and getting their names registered shall not be able to break down the common cutcherry; all the expenses for the performance of daily and periodical rites will be defrayed under the management of the amlas, and the sons shall get the remaining amount of profits in accordance with their respective shares

from generation to generation. Besides this, they shall not be able to break down the common cutcherry and bring the same into their own possession. If any of the amlas of the sixteen annas be guilty in any way, then the sons who may have attained majority and the managers shall dismiss that amla.....But they shall never be able to destroy the ijmali character of the thing."

On the 24th July 1870 Bishwanath executed a third document, mentioning the two previous documents, as to which it observed that it was necessary to alter and amend their contents. It stated the birth of two other sons, the respondents Jogendranath and Digindranath, and said that there were at that time six sons living, "and according to the arrangements made in the former wills the shares of all will be equal. I accordingly provide by this will that each son shall take a two annas thirteen gundas one kauri and one krant share in the estate."

A second clause included in such distribution properties purchased since the date of the last will. A third imposed restrictions on alienation, and directed that all sons should get the profits, "which will be left over and above that, according to the shares mentioned above, and they will not be able to be personally in possession." A fourth clause dealt with the expenditure for the daughters, and appointed their guardians.

An important part of the fifth clause was as follows :—

"My heirs shall enjoy the profits of my zemindari and other immovable properties according to the prescribed rules. If, God forbid, any of those sons die without sons, then none of his heirs shall get his share ; but my heirs, my remaining sons, or it they have sons, then those sons shall get it according to those shares. If any of these sons of mine becomes indebted, then that debt shall be realized from him, and these zemindaris, &c., of mine shall not either be sold by auction, or be liable for his debt ; because it is only for the purpose of carrying on their maintenance that I have fixed the share of the right of each of my sons, and besides this, they shall have no proprietary right or ownership whatever in those shares. As regards the rules which have been laid down for the sons who are to enjoy the profits of my properties, movable and immovable, if any son do not get sons but only daughters, then the sons born of the wombs of those daughters shall not be able to be heirs to and claimants of my movable and immovable properties, on the ground of the same being the properties of their maternal grandfather."

In the sixth clause the testator enjoined that if any of his sons should not have any sons or daughters—

"then his widow shall get for her life only a fair amount for her maintenance, and the expenses for pious acts, from the profits of her husband's share, but she shall not be entitled to the profits of the entire estate, or be competent to make sale or gift of anything, on the ground that it was the property left by her husband."

Jagadindranath died in 1874, and his widow in 1875. The adopted son, Gobindnath, died in 1875, leaving a widow Raikishori Dasi, the persent appellant. While he lived he managed the family estate, and for three years after his death the family remained together.

The sons had their names registered as proprietors of the whole estate under Act VII of 1876 (Bengal Land Registration Act). In 1876 Raikishori Dasi left the family dwelling ; and in what she was entitled to under the will she transferred a four-anna share to Syde Abdul Subhan Chowdhry.

The present suit was instituted by the four surviving sons of Bishwanath for a declaration that under the will, or wills, they were the owners of the property, and that Raikishori Dasi had no right to any of it, or to any possesion, and also that her conveyance of 1878 was void.

In defence, she alleged that the terms of the will were contrary to Hindu law, and that it was therefore inoperative and invalid ; that this suit for a declaratory decree was not maintainable, plaintiff having no possession ; that she had inherited her husband's share, and had made the transfer to the said Abdul Subhan, who was co-defendant, and supported her statement.

Upon issues framed accordingly, the Subordinate Judge was of opinion that the will had not been acted upon, and that its provisions were contrary to Hindu law, the corpus of the property not having been given by the testator to his sons, and the female heirs having

been excluded. Also, that the present suit for a declaratory decree was not maintainable. He, therefore, dismissed the suit.

Pending an appeal to the High Court, Brojendronath died, and his son was substituted in his place.

A Divisional Bench (TOTTENHAM and FIELD, JJ.) held, on the construction of the three testamentary instruments, that there was a good gift to the six sons of the testator's property in equal shares, and that in the second and third the testator had endeavoured to impose restrictions upon the proprietary interest conferred by the first, which restrictions were opposed to law, and must be regarded as invalid and inoperative.

In regard to the first document they said :—

"Now, there can be no doubt that if the devolution of the testator's property depended upon this instrument alone, it would be necessary to decide that all the sons took equal shares of the whole of the property, movable and immovable. We have, then, to consider how far these testamentary provisions have been altered, or modified, by the two subsequent wills."

The judgment then sets forth the principal directions in the second document, and adds :—

"The second paragraph sets forth that a common cutcherry has been established for the management of all the affairs connected with the property, which are to be managed by the joint amla and managers ; but that the sons, even on attaining majority and getting their names registered, shall not be able to 'break down the common cutcherry.' It is then directed that the expenses for the performance of the daily and periodical rites are to be defrayed under the management of the amla of the sixteen anna or whole of the estate, and that the sons shall get the remaining amount of profit 'according to their respective shares from generation to generation.' The will then declares that, besides this, they shall not be able to break down the common cutcherry and bring the same into their own possession. In our opinion this is a restriction upon partition, the right to which, according to the law administered in these provinces, must be regarded as an essential element of ownership. We think, therefore, that the restriction is void, and that the gift of the property in the shares specified in the first will cannot be affected thereby. The third clause provides for the defrayal of the expenses of the marriages of members of the family from joint funds, and directs that until the youngest son attains majority, none of the sons shall be able to separate, and if they do so, then any son who separates is to get merely maintenance and is not to be entitled to the profits accruing upon his share up to the time when he attains majority. This is, we think, a valid clause and can be enforced if occasion should arise. The remaining provisions of this will do not require notice."

Coming to the third document, the judgment gives the principal clauses, which are not repeated here, as they have been stated in the preceding part of this report, and considers especially the fifth clause, which is above set forth, beginning with the words "My heirs shall enjoy the profits." The judgment proceeds thus :—

"Now what we have to consider is whether the above provisions, *viz.*, that the sons shall get the shares of the profits, and shall not be able to be personally in possession, and shall not be able to make any gift or sale or any other kind of alienation, and the further declaration in the fifth paragraph, that it was only for the purpose of carrying on their maintenance that the testator had fixed the share of each of his sons, and besides this that they had no right or ownership whatever in those shares, so far altered or modified the disposition of the property contained in the first document of 21st January 1856 as to amount to a revocation of the absolute bequest contained in it. Upon the best consideration that we have been able to give to the arguments that have been addressed to us, we are of opinion that they do not. We think that the first provision as to the sons receiving the profits and not being able to get possession of their shares embodies a restriction which must be held to be invalid and inoperative. The true meaning of the original passage in the will is, that the sons shall not get possession of designated or specified shares, in other words, that there shall be no partition, and this is merely a repetition of the previous condition in the second will. Then the restriction upon alienation is also invalid, being opposed to the policy of the law. The passage in paragraph 5 taken with the context clearly has for its object the prevention of the property from being made liable for debts incurred by the sons, and this object is one which cannot be effectuated.

"The conclusion then at which we arrive upon the construction of these three testamentary instruments is, that there was a good gift to the six sons of the testator's property in equal shares ; and that in the second and third wills, the testator has endeavoured to impose restrictions upon the proprietary interest conferred by the first will, which restrictions are opposed to law and must therefore be regarded as invalid and inoperative.

"The next question with which we have to deal arises upon the construction of the fifth paragraph of the third will which provides as follows:—

"'If any of those sons die without sons, then none of his heirs shall get his share, but the rest of *my sons and heirs*, or if they have sons, then those sons shall get it according to those shares.' We may observe that here also there is an error in the translation. 'The rest of *my sons and heirs*' is an erroneous rendering of the original. 'The rest of my sons *being heirs* or *who are* heirs' is the proper meaning. It has been contended by the learned counsel Mr. *Evans* that the gift over created by these words is bad, inasmuch as it is a gift to an indefinite class. In support of this contention we have been referred to the case of *Soudamini Dasi* v. *Jogesh Chunder Dutt* (1), and we have been asked to apply the principle laid down in that case to the case which is now before us. We may observe that in the case of *Rai Bishen Chand* v. *Asmaida Koer*(2) decided by the Privy Council in March 1884, the principle of English law which was adopted and made applicable to Hindus in the case of *Soudamini Dasi* was considered and observed upon by their Lordships of Privy Council. The case of *Rai Bishen Chand* was no doubt a case not of a will but of a deed *inter vivos*, intended to have immediate operation; and as regards the applicability of the principle to Hindu wills, their Lordships decided nothing definitely. They did, however, refer to illustration (*b*) to s. 102 of the Succession Act (X) of 1865 as importing into India an English rule of construction which usually defeats the intention of the testator: and it would appear that the adoption of the English rule of construction did not recommend itself to their Lordships on that occasion as a sound principle applicable to the wills of Hindus. If we had to decide whether this principle ought to be adopted in this country we should perhaps think it necessary to refer the question to a Full Bench, having regard to the recent observations of the Privy Council in the case just referred to, and because we ourselves entertain some doubt as to whether this principle ought to be followed in construing the wills of Hindus. We think, however, that it is not necessary to decide this question on the present occasion. We have not here to deal with an intention to which in its entirety it is impossible to give effect, and in consequence of its being impossible to effectuate the whole intention, any attempt to give effect to a portion of it would practically amount to making a new Will for the testator by substituting another and a different intention, the existence of which is not to be gathered from the will. We think that in the present case there are two intentions wholly separable, the second not depending upon the first, and that it is possible to give effect to the first intention without entering into the question whether the second intention is one to which the law can or cannot allow effect. The will provides that if one of the sons die without sons, none of his heirs shall get his share; but *first*, that the rest of the testator's sons shall get that share, and *second*, that if any of those other sons have died leaving sons, the sons so left shall receive the share, that is, their proportion of the share, or, in other words, as we understand it, that the sons of the deceased sons shall for the purposes of the inheritance stand in the place of their fathers. Now, assuming for argument's sake that the sons of the deceased son constitute a class, some of whom may have been in existence at the time of the testator's death, while others may have been born subsequently, that this class therefore consists of some who may take and others who cannot take, and that the gift over to these sons of a son is in consequence invalid, we have to observe that this second case has not yet arisen. The case with which we have to deal is the case of one of the testator's sons dying and other sons surviving him. We may observe that as Jagadindranath died before Gobind's death and without male offspring, it is unnecessary to consider him in dealing with the question before us. Now it appears to us that the first intention, that is, the intention that if one of the testator's sons shall die, the other surviving sons shall receive his share, is an intention complete in itself, and one to which we can give effect, and that the validity of the gift over in this case is not affected by the further provision as to what is to be done if one of the sons predecease the son in respect of whose share the question arises, such son so predeceasing having left sons in respect of whose right the question of the validity of the second intention would have to be considered. This case has not arisen, and it is therefore unnecessary for us to decide whether the gift would in this case, be void as a gift to an indefinite class. We are, therefore, of opinion that we ought to give effect to the clear intention of the testator as to the share of a son dying going over to the other sons who survive him. We think, then, that according to the true construction of the will, upon the death of Gobindnath Sircar, the one-sixth share which he originally received under the provisions of the Will, together with the share which he obtained upon the death of Jagadindranath Sircar, went over under the provisions of paragraph 5 of the third will, to the four sons who are plaintiffs in this case, and that Raikishori Dasi, the widow, was not entitled to take anything by inheritance from her deceased husband Gobindnath Sircar.

"It has further been contended by the learned counsel for the respondent that the provisions contained in paragraph 11 of the third will are wholly void, and that in respect of the movable and other properties specified in this paragraph there is an intestacy, and that, in consequence, Raikishori Dasi is entitled to the share in such

(1) I.L.R., 2 Calc., 262.
(2) I.L.R., 6 All., 560; L.R., 11 I.A., 164.

property which her husband would have received according to Hindu law. We are of opinion that there has been in this paragraph of the will an attempt to tie up the property in perpetuity, that this attempt must fail, and that no effect can be given to these provisions of the will. But we do not think that the result will be that there is an intestacy in respect of these portions of the property. We think, as we have already said, that there has been a good gift of the whole of the property in paragraph 1 of the first will, and that the attempt to tie up the property failing, the original gift must prevail.

"The suit has been brought for confirmation of possession, and an attempt was made to show that Raikishori was in possession of a portion of the property, and it was therefore said that as regards this portion the plaintiff's suit could not succeed, because, being out of possession, they ought to have sued for possession and not merely for a declaratory decree. We have heard the evidence on this point, and we entertain no doubt that although Raikishori made certain attempts to obtain possession of a portion of the property, those attempts were not successful, and the real possession remained in the hands of the plaintiffs.

"The result will be that the decree of the Subordinate Judge must be set aside and the plaintiffs will have a decree construing the will in accordance with this judgment. The defendant Raikishori Dasi will be declared to have no interest in the property left by the testator Bishwanath Sircar, and the conveyance of the 9th Falgoon 1285 will be declared void and must be cancelled. And it may be well to observe that this conveyance being so cancelled must not be returned to the party by whom it was filed. The plaintiffs will have their costs in this Court and in the Court below.

Mr. *J. D. Mayne*, for the appellants, argued that the decree of the High Court must be reversed as erroneous. Upon the construction of the three documents he argued that the provisions of the second and third, directing what estates should be held by the sons, were inconsistent with, and in effect were a revocation of, the bequest conferring estates upon them in the first document. All the instruments must be read together, and the testator's whole intention regarded. This was expressed in the last which as a will was substituted for the first and second. If then this third will was, as he submitted it was, invalid on account of the attempt to create a perpetuity, and by reason of other provisions contrary to law, there was no operative bequest, and the result was an intestacy. The only estates bequeathed by the testator to his sons in the third will were invalidly bequeathed, for he coupled with the bequest invalid restrictions. The testator did not intend his sons to have the property without the restrictions imposed; and if the restrictions were removed the testator's intention could not be carried out. It was, therefore, necessary to hold the whole bequest invalid.

The provisions inserted by the testator in case any son should die without a son also were contrary to law. The whole scheme failing intestacy resulted; it not being permitted, or possible, to spell out a meaning that was legal, by disregarding the provisions that were illegal—see remarks as to this in the judgment in the *Tagore case* (1). Reference was made to *Sookmoy Chunder Dass* v. *Monohurri Dasi* (2); *Leake* v. *Robinson*(3); *Pearkes* v. *Moseley*(4); *Bramamayi Dasi* v. *Jogeschandra Dutt* (5); *Rai Bishenchand* v. *Asmaida Koer* (6).

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the respondents, argued that the judgment of the High Court was correct. There was in the first document, of which all the three constituted the will, an absolute gift of the corpus of the estate to the sons. This was capable of taking effect, and should be carried out. The illegal restrictions afterwards imposed from time to time as the testator, in after years, added them, with a view to keeping his estate together, might be regarded as wholly inoperative. They should have no effect to invalidate the previous legal disposition. They referred to *Soorjeemoney Dossee* v. *Denobundho Mullick* (7). With regard to the objection as to the

(1) 4 D. L. R., 103; 9 B. L. R., 377 (406); L. R., I. A., Sup. Vol., 47; 3 P. C. J., 82.
(2) L. R., 12 I. A., 103; I. L. R., 11 Calc., 684; and in the High Court I. L. R., 7 Calc., 269; 4 P. C. J., 639.
(3) 2 Mer., 363.
(4) 5 App. Ca. H. L., 715.
(5) 8 B. L. R., 400.
(6) L. R., 11 I. A., 164; I. L. R., 6 All., 560 4 P. C.J., 512.
(7) 9 Moore's I. A., 123; 1 P. C. J., 837.

gift over, they contended that it was good as to the sons in existence, and there was no reason why the latter part of the provision as to unborn sons should invalidate the former, when no difficulty had as yet arisen on account of the bequest including an indefinite class.

Reference was made to *Sonatun Bysack* v. *Juggutsoonderee Dossee*(1); *Kumar Tarakeswar Roy* v. *Kumar Shoshi Shikareswar*(2); *Ramlal Mookerjee* v. *The Secretary of State* (3); *Soudamini Dasee* v. *Jogesh Chunder Dutt*(4); *Kherodmoney Dassee* v. *Doorgamoney Dassee*(5); *Bhoobunmohini Debia* v. *Hurrish Chunder Choudhry*(6); *Bramamayi Dassee* v. *Jogeschunder Dutt*(7); *Callynath Nagh Choudhry* v. *Chundernath Nagh Choudhry*(8); *Ganendramohun Tagore v. Upendramohun Tagore* (*Tagore case*) (9); *Rai Bishen Chand* v. *Mussamut Asmaida Koer*(10); *Hari Dasi* v. *The Secretary of State*(11).

Mr. *J. D. Mayne* replied.

On a subsequent day (22nd December 1887) their Lordships' judgment was delivered by

THE RIGHT HON. SIR BARNES PEACOCK.

The respondents in this appeal were the plaintiffs in the action. They were four of the sons of Bishwanath Sircar. The first defendant, Raikishori Dasi, was the widow of the late Gobindnath Sircar, who was an adopted son of Bishwanath. The plaintiffs claimed to be entitled under the will of their father to succeed, upon the death of Gobindnath without male issue, to the share of the father's property, to which he had succeeded on his father's death. The widow contended that the will of the father was illegal and void, and, consequently, that upon the death of her husband, Gobindnath, she as his widow succeeded to his share of the property, and acting upon that view she, by deed, dated the 9th of Falgoon 1285, transferred a portion of the property to the defendant No. 2 (Syed Abdul Sobhan Chowdhry). The plaintiffs by their plaint prayed that after putting a true construction on the will of the late Bishwanath Sircar, the Court would be pleased to pass a decree declaring that defendant No. 1, that is to say the widow of Gobindnath, had no right to the property stated in the schedule marked (*ka*), and to declare the plaintiffs' right to the said property in accordance with the said will. They also prayed that after declaration of the plaintiffs' right, the Court would be pleased to pass a decree declaring that defendant No. 1 had no right to take possession of, or to transfer, any property stated in the said will, and that the registered kobala executed by defendant No. 1, dated 9th Falgoon 1285, was void.

The will was contained in three documents, which together formed the last will of the father Bishwanath. The first of these documents was dated January 1856; the second, May 1862; and the third, August 1870. The Subordinate Judge held that the will was void, and, consequently, that the widow succeeded to her husband's share. The High Court upon appeal reversed that decision, and held that the plaintiffs were entitled to it.

The will contained many provisions which could not legally be carried into effect, and which appeared to create a perpetuity, and consequently to render the will invalid.

At the close of the arguments their Lordships reserved judgment in order that they might carefully consider all the provisions of the three documents read

(1) 8 Moore's I. A., 66, 1 P. C. J., 721.
(2) L. R., 10 I A., 51., *nom. Tarakessur Roy* v. *Shosi Shikuressur Roy*, I. L. R., 9 Calc., 952; and in High Court, I. L. R., 6 Calc., 421; 4 P. C.J., 439.
(3) I. L. R., 7 Calc., 304; L. R., 8 I. A., 46; 4 P. C. J, 225.
(4) I. L. R, 2 Calc., 262.
(5) I. L. R., 4 Calc., 455
(6) I L. R., 4 Calc., 23, L. R., 5 I. A., 138; 3 P. C. J., 815.
(7) 8 B. L. R., 400.
(8) I. L R., 8 Calc., 378.
(9) 4 B. L R., 103; 9 B. L. R., 377; L. R., I. A., Sup. Vol., 47; 3 P. C. J., 82.
(10) I. L. R., 6 All., 560; L. R., 11 I. A., 160; 4 P. C. J., 512.
(11) I. L. R., 5 Calc., 228.

together. They have now done so, and although they cannot, after full consideration, say that the case is free from doubt, they are not prepared to hold that the High Court came to an erroneous conclusion, or to advise Her Majesty to reverse the judgment.

Their Lordships observe that the High Court has declared the deed of conveyance to be void, and that it be cancelled and retained in Court. It is not because a man conveys property to which he is not entitled that the conveyance is absolutely void or ought to be cancelled or retained by the Court. It was unnecessary to do more after declaring the plaintiffs' right than to declare that defendant No. I had no right to take possession of, or to transfer, any part of the property mentioned in the will, and that the deed passed no right in any part of such property to the defendant No. 2.

Their Lordships will humbly advise Her Majesty to affirm the decree, so far as it declares that the defendant No. 1, Raikishori Dasi, had no right or interest in the property mentioned in the schedule "*ka*" attached to the plaint, and that the plaintiffs are entitled to the same, but that instead of declaring that the conveyance executed by Raikishori Dasi in favour of defendant No. 2, Syed Abdul Sobhan, is void, and that the said conveyance be cancelled and retained in Court, it be declared that the said conveyance transferred no interest in the property to the defendant No. 2, and that in all other respects the decree of the High Court be affirmed. This modification of the decree of the High Court does not affect the merits of the case as regards the parties to this appeal, and accordingly the appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Wrentmore & Swinhoe.*

Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*

9th, 10th, 19th, 22nd, 23rd November, and 17th December 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

On Appeal from the Court of the Judicial Commissioner of Oudh.

SHANKAR BAKSH* ... *Plaintiff,*

and

DAYA SHANKER AND OTHERS } *Defendants.*

Civil Procedure Code (Act VIII of 1859), s. 114—Civil Procedure Code, 1882, s. 103—Identity of causes of action in two suits, notwithstanding difference of relief claimed.

To a suit, brought in 1883, for redemption of a mortgage made in 1853, of villages in Oudh, subsequently included in the mortgagee's talukdari estate and sanad, the defence was that the mortgagor, having brought a suit in 1864 to redeem, and not having appeared at the hearing, in person or by pleader, judgment was passed, the mortgagee having appeared to defend against the plaintiff under s. 114 of Act VIII of 1859.

Held, that, although the plaintiff, who had claimed in the prior suit the under-proprietary right in virtue of a sub-settlement, claimed in the present suit the superior proprietary right, the difference in the mode of relief claimed did not affect the identity of the cause of action, which was, in both cases, the refusal of the right to redeem; and that under s. 114 of the Act the judgment of 1864 was final.

APPEAL from a decree (3rd June 1885) of the Judicial Commissioner of Oudh, reversing a decree (7th April 1884) of the District Judge of Lucknow.

The question raised by this appeal were: First, whether or not a judgment given by a settlement Court on 12th July 1864, "on default," had been passed

* I. L. R., 15 Calc. 422; 15 Cowell, 66.

against the plaintiff by default, within the meaning of s. 114 of Act VIII of 1859, of the Civil Procedure Code, or the suit had been disposed of under s. 110 of the same Act; secondly, whether the cause of action, which was for the redemption of villages mortgaged by the plaintiff's ancestor to the defendant, was identical in both of two suits, the one suit having claimed possession of the mortgaged property in virtue of under-proprietary right upon sub-settlement, and the other suit having claimed possession of the same property in virtue of superior proprietary right.

The appellant, the plaintiff, talukdar of Pahu, claimed in the suit giving rise to this appeal, possession of villages Khanpur, Rajwara, and Sarai Mobarak, in the Unao district, by redemption of mortgage. The defendant, respondent, Daya Shankar, was also a talukdar, to whom the villages had been mortgaged in 1853 by the plaintiff's grandfather, Thakur Bhup Singh, for a term of three years, to secure an advance of Rs. 7,441 made to him. The villages were, after the annexation of Oudh in 1856, included in the defendant's talukdari estate, and in his sanad obtained after the settlement.

On the 23rd June 1864 the original mortgagor Bhup Singh sued to redeem, and, as by that time the villages had been included in the schedule attached to Daya Shankar's sanad, he refrained from claiming proprietary rights, but claimed possession as under-proprietor, holding sub-settlement in accordance with the provisions of the Government rules on the subject. He stated that Rs. 3,000 had been paid and that he was ready to pay the balance.

The suit having come before a Settlement Officer on 18th July 1868, and the plaintiff not then appearing in person or by pleader, the Court passed judgment "in default." An application to the Court to issue a fresh summons, under s. 110 of Act VIII of 1859, was rejected (13th August 1868), as also was a petition (15th September 1868), presented more than thirty days after the 18th July, to set aside the order of that date. An appeal against this rejection was rejected by the Commissioner who recorded the following (16th May 1871): "The lower Court is correct. The order of 13th August ought to have been appealed. The appellant is now without redress, but this is of the less consequence since the principle has not heretofore been recognized of a talukdar suing another talukdar for the redemption of a village in the sanad of the latter."

The present suit (6th September 1883) stated the mortgage, and the acquisition of an interest therein by defendants other than Daya Shankar (not material to this report), and that the plaintiff had, under the provisions of s. 83 of Act IV of 1882 (Transfer of Property) deposited the mortgage money in Court, and that on the 14th June 1883, which was the Khali Fasl of the month of Jeth, the defendant had refused to restore the property.

By his written statement the defendant alleged that the suit was barred by the proceedings of 1864, and the judgment of the Commissioner (16th May 1871). On issues raising this question, the District Judge, being of opinion that a decision on one grade of right, the practice of the settlement Courts having been to try each grade of right separately, was no bar to a suit claiming another's grade of right or to a decision thereupon, made a decree in favour of the plaintiff.

On appeal the Additional Judicial Commissioner held that the former suit brought in 1864 for the recovery of the mortgaged property was in all essentials the same as the present suit: that s. 6, Act I of 1869 did not confer a fresh cause of action on plaintiff, nor did it relieve him from the consequences of having permitted judgment to be given against him by default: and that it was difficult to see how the practice (alluded to by the District Judge) of the settlement Court could have been followed in suits for redemption of mortgaged property, in which a plaintiff would be bound to include in one suit whatever

rights he might have mortgaged under the same deed. The Judicial Commissioner, therefore, held that the suit was barred under the provisions of s. 114, Act VIII of 1859, and s. 103 of Act XIV of 1882. He reversed the decision of the district Judge, and gave the defendants the costs of both Courts.

On this appeal,—

Mr. *R. V. Doyne* and Mr. *J. H. A. Branson*, for the appellant contended that the proceedings in 1864 did not bar the present suit. The order of 12th July 1864 was not made under s. 114, but under s. 110; nor, even if it had been made under s. 114 would it have barred the present suit. Not until 1869, when Act I of 1869 (the Oudh Estates' Act), s. 6, came in aid, was it open to the plaintiff to sue for the proprietary right. After the settlement of Oudh he was not in a position to claim that right from the mortgagee in whose sanad, and in whose talukdari estate, were comprised the villages now claimed, until s. 6 of the above Act had authorized the claim. In 1864 the plaintiff was only in a position to claim that for which he had sued, *viz.*, that a sub-settlement should be made with him as under-proprietor (1). He referred to Acts XVI of 1865, XIII of 1866 and I of 1869 (1), and contended that the causes of action in 1864 and 1883 were not identical. He referred to *Shampersiad Roy Chowdhry* v. *Huropershad* (2), where the rule of *res judicata* was held only to apply to a case in which the question to be determined in a suit was the same that had been already heard and decided; and not to a case where new circumstances had intervened and altered the nature and character of the question to be determined.

For the respondents, Mr. *J. D. Mayne* and Mr. *C. W. Arathoon* argued that the order was made under s. 114, and fell within the provisions of that section, making it final. This ground of appeal had not been taken in the lower Court. The appellant had himself treated the order, in applications afterwards made, as having been passed under s. 114, and the Courts had dealt with it as an order under that section.

Sir B. Peacock referred to s. 6 of Act I of 1869, pointing out that the order of 1864 was made in a suit for the under-proprietary right. Whether that left open the claim now preferred was a point on which further argument might be heard.

Lord Fitzgerald said that their Lordships would hear one counsel on either side, on a subsequent day, on the question whether, at the time of the institution of the suit, the plaintiff had a right of redemption of mortgage not barred by the order of 12th July 1864, or by limitation.

On the 19th November, Mr. *R. V. Doyne*, with whom was Mr. *J. H. A. Branson*, for the appellant, and Mr. *J. D. Mayne*, with whom was Mr. *C. W. Arathoon*, for the respondents, were heard on the above question.

Mr. *R. V. Doyne* contended that, by the effect of the confiscation of the rights of proprietors in 1858, the original rights of the mortgagor had been swept away, and the restoration which followed had left no right in the mortgagor to redeem; the talukdari settlement having been made with the mortgagee, and having, as well as the sanad afterwards obtained, comprised the villages in suit. Section 6, however, of Act I of 1869 provided for the redemption of mortgages. Before that Act there did not exist the cause of action of which the identity with that now in suit had been assumed. Therefore the plaintiff was not debarred from suing by the order of 1864, which did not, and could not, deal with the

(1) Act I of 1869 (the Oudh Estates' Act), s. 6 enacted that nothing in ss. 3 and 4 of that Act (defining rights of talukdars), or in the orders of Government on the subject, or in any sanad, should be a bar to a suit for redemption where a mortgage, dated on or after 13th February 1844, fixed no term for redemption, or a term not expiring before 13th February 1856.

(2) 10 Moore's I. A., 203, 209; 2 P. C. J., 103.

cause of action now presented, nor was the suit barred by limitation.

The confiscated estates of the Oudh talukdars were restored to them unincumbered, save so far as the talukdar might have recognized any equitable charges in favor of others, and save so far as equities might have arisen against him out of his acts in obtaining the settlement and sanad. In this particular case there was no conduct on the part of the talukdar from which a trust, preserving the right to redeem, could be inferred. [LORD HOBHOUSE referred to the previous contract.] In support of the above proposition reference was made to *Shunkersahai* v. *Raja Kashipershad* (1); *Rani of Chittaree* v. *The Government of India* (2); *Nawab Malka Jahan Sahiba* v. *The Deputy Commissioner of Lucknow*(3); *Hurdea Baksh* v. *Jawahir Singh*(4); *Brij Inder Bahadur* v. *Janki Koer*(5); *Ramanund Koer* v. *Raghinath Koer*(6); *Jehan Kadr Bahadur* v. *Badsha Bahoo Sahiba*(7);.

[SIR B. PEACOCK referred to *Nelson* v. *Couch*(8), as showing that, to constitute a good defence of *res judicata*, the former suit should have been one in which the plaintiff might have recovered to the same extent what he seeks to recover in the second.]

Mr. *J. D. Mayne* contended that the right of the mortgator under the original contract, being to obtain a re-transfer upon payment of the mortgage money, did not fall within the proclamation of confiscation of 1858. He referred to its terms as printed at the end of the report of *Nawab Malka Jahan Sehiba* v. *The Deputy Commissioner of Lucknow*(9).

Also to the cases above cited, and to *Gauri Shankar* v. *The Raja of Bulrampore*(10).

Also to the Oudh Government orders, relating to this subject, that had under the Indian Councils' Act, 1861, 24 and 25 Vic., c. 67, s. 25, obtained the force of law; and to the Acts abovementioned. The effect of a usufructuary mortgage was explained in *Pattabhiramier* v. *Venkatarow Naicken*(11); and *Thumbasawmy Mudelly* v. *Mahomed Hossain Rowthen*(12).

Regulation XVII of 1806 was also referred to. The Acts of 1865, 1866 and 1869 showed that the mortgages executed before annexation were not regarded as extinguished. At all events, the plaintiff could not have had his rights altered or his position improved by s. 6 of Act I of 1869. The effect now sought to be attributed to the Act would be to negative the result of a decree made some years before its passing. Such a retrospective effect could not be attributed to it. In connection with this he cited *Gardner* v. *Lucas* (13) in regard to the non-retrospective construction put upon an Act. He relied on s. 114 of Act VIII, corresponding to s. 103 of the Code of Civil Procedure, and urged that it was impossible that the relation of mortgagor and mortgagee, having been swept away in 1858, had been restored in 1869 in the manner alleged.

Mr. *R. V. Doyne* replied.

On a subsequent day their Lordships' judgment was delivered by

THE RIGHT HON. SIR RICHARD COUCH.

On the 6th of December 1853 Bhup Singh, the grandfather of the appellant, describing himself as zamindar and talukdar of Pahu and Golaria, &c., by an agreement of that date, mortgaged three villages in pargana Maurawan, in Oudh, to the respondent Daya Shankar for three years for Rs. 7,441-6, the mortgagee to have the profits and produce and being put in possession. And the mortgagor stipulated that he would repay the mortgage money in Khali Fasl, and

(1) L. R. I. A, Sup Vol., 220; 3 P. C. J., 289.
(2) Ib, 237, 3 P. C J., 298.
(3) L. R, 6 I. A., 63.
(4) L. R., 4 I. A., 178.
(5) L. R, 5 I A, 1.
(6) L R., 9 I. A., 41; I. L. R., 8 Calc., 7. 69.
(7) L R., 12 I. A., 124; I. L. R, 12 Calc., 1.
(8) 15 C B. N. S., 99.
(9) L. R, 6 I A., 75.
(10) L. R., 6 I. A, 1, I. L. R., 4 Calc., 839.
(11) 13 Moore's I. A., 560.
(12) L. R., 2 I. A., 241.
(13) L. R., 3 App. Cas, H. L., 582.

redeem the mortgaged villages, and, "unless he shall have paid the mortgage money in full to the said mortgagee, he shall not redeem the villages; at the time the mortgage money shall be paid up by the declarant (mortgagor) he shall have the mortgaged villages released in Khali Fasl."

On the 6th September 1883 the appellant brought a suit in the Court of the District Judge of Lucknow against the respondent to redeem the mortgage. Other persons were made defendants as having become entitled to a half share in the right of the mortgagee, but the case may be treated as if Daya Shankar had remained sole mortgagee. The plaint stated the mortgage; that the three years expired on the 6th December 1856, and although the villages were included in the talukdari sanad of Daya Shankar, yet, under the terms of the mortgage deed and s. 6, Act I of 1869, the plaintiff was entitled to redeem; that under s. 83, Act IV of 1882, the plaintiff had deposited the mortgage money in Court, but on the 14th of June 1883, the Khali Fasl, the defendants refused to allow him to redeem the property. The written statement of Daya Shankar stated that "on the 23rd of June 1864 Bhup Singh, plaintiff's ancestor, filed against the defendant a regular suit for redemption of his property, and continually absented himself; on the death of Bhup Singh, which took place about the end of 1875, the plaintiff succeeded him, and he also failed to prosecute the case, so much so that on 18th July 1868 the claim was dismissed for want of prosecution, under s. 114, Act VIII of 1859, in the presence of defendant and absence of plaintiff." It was further stated that on 7th August 1868 the plaintiff filed an application for rehearing, which was rejected on the 13th August; that another application for rehearing was filed on 15th September 1868, which was also rejected on 17th March 1871; that an appeal was then preferred in the Court of the Commissioner, which was also rejected.

The sections of Act VIII of 1859, which was then in force, applicable to the dismissal of a suit, are 110, 114, and 119. Section 110 provides for the dismissal where neither party appears, and when a suit is dismissed under it the plaintiff is at liberty to bring a fresh suit, unless precluded by the rules for the limitation of actions, or if within thirty days he satisfies the Court that there was a sufficient excuse for his non-appearance the Court may issue a fresh summons upon the plaint already filed. Section 114 provides for cases where the defendant appears and the plaintiff does not appear, and then "the Court shall pass judgment against the plaintiff by default unless the defendant admits the claim," and it says that when judgment is passed against a plaintiff by default he shall be precluded from bringing a fresh suit in respect of the same cause of action.

Bhup Singh had, as was alleged, brought a suit in the Settlement Court on the 23rd June 1864, and the order, as it is called, of the 18th July 1868 appears to have been made in consequence of the Financial Commissioner, on the 29th of May 1868, calling the attention of the Settlement Officer to the provision in Act VIII of 1859, where the plaintiff does not attend to the process of the Court. The Settlement Officer appears upon that to have given notice to the parties, and the judgment says that "the 18th of June was fixed for the hearing, on which day plaintiff applied for a month's delay, it being the entering into engagements with tenants, and the defendant's agent agreeing to the delay, it was granted, and this day, the 18th of July, fixed for the hearing, but plaintiff is not present or represented by any accredited agent." At the foot of the judgment is the word "decree" and the signature of the Settlement Officer. There is also in the proceedings a paper in a tabular form, signed by the Settlement Officer, which seems to be the record of the decree. In a column headed "Particulars of Case" are the words "plaintiff's suit for redemption of entire village Khanpur by right of inheritance

and possession up to 1270 F. dismissed on default." The words "dismissed on default" were strongly relied upon before their Lordships as showing that the suit was dismissed under s. 110, but in another column it is stated that the decree was in favor of the defendants. The proceeding of the Settlement Court is recorded in such a loose way that no certain inference can be drawn from it as to the section under which the decree was made. The matter, however, did not rest there. On the 7th of August 1868 the plaintiff applied that the suit might be reinstituted under s. 110. This application was rejected on the 13th August. On the 15th September 1868 the plaintiff made an application to set aside the order of the 18th July. The order upon this application was not made until the 17th March 1871. The cause of this delay does not appear. The application was refused by the Settlement Court because it was not made within 30 days after the 18th July. The plaintiff then appealed to the Commissioner of the Rae Bareli division, who dismissed the appeal, saying that "the order of 13th August ought to have been appealed." The explanation of this will be found in s. 119. It has been seen that when an order is made under s. 110 there is no appeal; the plaintiff is at liberty to bring a fresh suit. But s. 119 provides that in all cases of judgment against a plaintiff by default (that is, cases under s. 114) he may apply within 30 days from the date of the judgment for an order to set it aside, and that in all cases in which the Court shall pass an order under that section for setting aside a judgment the order shall be final, but in all appealable cases in which the Court shall reject the application an appeal shall lie from the order of rejection to the tribunal to which the final decision in the suit would be appealable. Thus the plaintiff, by appealing against the order of the 17th March 1871, treated the application of 15th September 1868, as an application to set aside an order made under s. 114, and when the Commissioner said that the order of the 13th August ought to have been appealed he must have considered that the order of 18th July 1868 was made under that section. Indeed the objection that it was made under s. 110 does not seem to have been taken in the lower Courts. No issue was framed by the District Judge distinctly, if at all, raising it, and there is no notice of it in his judgment. The Appellate Court says the suit was dismissed under s. 114, and the whole of the judgment assumes that it was. Their Lordships are satisfied that the dismissal of the suit was under s. 114.

It is, therefore, necessary to decide whether the present suit is for the same cause of action as the former. The plaint in this suit has been stated. The suit in 1864 was begun by a petition to the Settlement Court, which then had the jurisdiction. It stated the claim thus: "Claim to order proprietary (sub-settlement) right by redemption of mortgage in respect of villages Khanpur, Rajwara, and Sarai Mobarak, which were mortgaged to defendant on the 4th Rabiul-awal 1270 H., in lieu of Rs. 7,441-6, with stipulation that whenever, after expiry of the period of three years, the mortgagor paid the mortgage money in full, he shall redeem the property. Accordingly he paid Rs. 3,000 out of the aforesaid amount on the 7th Ramzan 1273 H. He is ready to pay up the balance, Rs. 4,441-6, but the defendant does not act up to the terms of the morgage deed." The prayer was that the plaintiff might, on payment of Rs. 4,441-6 in cash, be put in possession of the mortgaged villages as under proprietor, holding sub-settlement in accordance with the provisions of the rules of the Government on the subject. The proceedings in the Settlement Court appear to have been in a different form from that now in use in the District Court, *viz.*, plaint and written statement, but no objection has been taken in the lower Courts that the suit in 1864 was not in proper form, or that it was then necessary to deposit the money. That has been made necessary by a subsequent

Act. That in the former suit the plaintiff asked for sub-proprietary right, and in the latter for the superior proprietary right, does not make any difference as regards the cause of action. It is not as the District Judge thought part of the cause of action. It is the manner in which the redemption of the mortgage was to be given. Various questions have been raised, and very fully argued, before their Lordships in order to show that the cause of action in the two suits is not the same, and that the present suit is for a new cause of action. Their Lordships have fully considered those arguments, and they are unable to come to the conclusion that the causes of action are not the same, and that the judgment of the Additional Judicial Commissioner, who held that the suit was barred under the provisions of s. 114, is wrong. They will, therefore, humbly advise Her Majesty to affirm his judgment, and to dismiss the appeal. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant: *Messrs. Watkins & Lattey.*

Solicitors for the respondents: *Messrs. T. L. Wilson & Co.*

23rd 24th and 25th November, 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

On Appeal from the High Court in Bengal.

BISHEN CHAND BASAWAT*... *Defendant*,

and

NADIR HOSSEIN ... *Plaintiff.*

Attachment—Civil Procedure Code, s. 266—property held by judgment-debtor in trust for a specific purpose—Attempt to attach surplus after fulfilment of trust.

Neither the whole corpus, nor any specific portion of the corpus, of an estate in the hands of a trustee who is a judgment-debtor is rendered liable to attachment in execution of the decree against him because a surplus of income is in his hands for his own benefit after due performance of the trusts; nor does such corpus, or any part of it, come, for that reason, within the meaning of s. 266 of the Code of Civil Procedure, which only authorizes the attachment of property over which the judgment-debtor has a disposing power, exerciseable for his own benefit.

Where a trust had been created for specific purposes, *viz.*, the performance of religious and other duties, and the trustee had duly appointed another trustee in his place, the latter being entitled to hold the trust estate: *Held*, that, a decree having been made against the trustee personally, the corpus of the trust estate could not be sold to satisfy the claim of the judgment-creditor, nor could any specific portion of the corpus of the estate be taken out of the hands of the trustee on the ground that there was, or might be, a margin of profit coming to him personally after the performance of the trusts. *Held*, also, that in a suit in which all the parties interested were not before the Court there could be no decision as to the extent of the trusts nor as to whether any surplus profits of the trust estates would, or would not, after the performance of the trusts, belong to the trustee personally.

APPEAL from a decree (28th May 1883) of a Divisional Bench of the High Court, reversing a decree (19th February 1881) of the Subordinate Judge of Moorshedabad.

The suit out of which this appeal arose was brought by one Saiyad Nadir Hossein, the present respondent, in accordance with s. 283 of the Civil Procedure, to establish his right as trustee to certain zemindaries in pergunnahs Bansdowl and Paltapur, in the Moorshedabad district, and to have set aside execution proceedings taken by Bishen Chand Basawat, the present appellant, against that property, including an order, made by a Court in execution, disallowing his claim to have it released from attachment.

The decree, in execution whereof the disputed attachment had been placed on the property, was against the estate of

* I. L. R., 15 Calc., 329; 15 Cowell, 1.

Mahomed Ali, deceased in 1868, who had been the predecessor of Saiyad Nadir Hossein, as trustee, in possession of the property.

The plaintiff's case was that the property was held by himself, and had been before held by Mahomed Ali, in trust for religious purposes; and, therefore, was not liable to be attached in satisfaction of a decree against the last trustee personally. The defence was that the trusts, even if validly created, which was denied, only extended to part of the proceeds of the estate held by Mahomed Ali; and that there was a residue of the property in the hands of the trustee which, after the trusts had been satisfied out of the other part, was liable to be attached in execution proceedings taken against the estate of Mahomed Ali.

The Subordinate Judge was of opinion that the property was held by Mahomed Ali for his own benefit, subject to certain trusts of a religious nature; and that this beneficial ownership was liable to be attached in his hands, and in the hands of his successor, for his personal debts. This decision was reversed by the High Court, which held that, although there was a margin of profit, after satisfying the trusts, which might be properly applicable to the claims of the execution creditor, still the property itself could not be attached to satisfy the debts of a former trustee.

No facts were in dispute, and the questions for decision in this appeal were of law.

At the hearing before the Subordinate Judge it appeared that the proprietary right was, in the year 1859, in Khairunnissa Khanum, a Mahomedan lady, who died in that year, having executed on 13th April, 1859, a wasiatnamah. By this document, after reciting that she had been accustomed to defray the taziadari, mujlis (meetings) and abdarkhana (water supply) expenses from the proceeds of the zemindaries in pergunnah Bansdowl, that she was anxious that these should be kept up in perpetuity, and that she had no confidence in her son Enayet Ali, and that it was necessary she should appoint a wasi (administrator) for the purpose of carrying out the important works of the taziadari, &c., she proceeded as follows:—

"I therefore appoint in respect of the whole and entire of these zemindaries, gardens, buildings, and my whole property, my grandson, Mirza Mahomed Ali Beg who is intelligent, fit, faithful, honest, a shrewd man of business, to be trustee, and deliver and entrust to him my property on the following terms: "That the said trustee shall, after my death, in accordance with the customs prevailing among those professing the Mahomedan faith and religion, cause the performance of, and provide for, all rites for the invocation of blessings, interments, and sepulture, hajj (pilgrimages), taziadari, mujlis, sepulchral expenses, &c., from the property above described, after paying the Government revenue to the Collectorate from the proceeds of the above pergunnah as per schedule below; and from whatever surplus shall remain he will draw as trustee's due a monthly sum of Rs. 40, and he will pay a monthly sum of Rs. 100, new coinage, to Mirza Enayet Ali Beg, my son, and of Rs. 60 to Mobaruckunnissa Khanum, my daughter, and pay for repairs of the buildings aforesaid. The rents of the gardens, &c., and the wages of servants and employes, gardener, &c., will be paid by the said trustee, and the said trustee will pay, and the zemindaries and property of me, declarant, will never be divided or partitioned by butwara between my heirs, and they will always remain in the hands and under the control of the aforesaid trustee, and the management thereof will remain with the said trustee; none of the heirs have or shall have, contrary to the terms of the trust, any power to cause a partition of my property: and the management and provision for all things above specified will be done by the said trustee, and the taking of accounts and entering into investigations and superintending all matters connected with the pergunnah aforesaid will be the work of the aforesaid trustee. In all these transactions none of my heirs shall exercise the least power, and they shall have no power to call any one to account; none of my heirs shall have any power to call for or take accounts from the trustee aforesaid. The whole of the yearly profits of the above estate in the hands of the said trustee will be expended by the said trustee in the manner provided above, and the said trustee will himself, mindful of the omnipresence (of God), discharge and perform all the duties entrusted to him; and the dishonesty of the said trustee, when complained of by any of my heirs before any authority for the time being, will be disallowed, and there will be no sort of dishonesty on the part of the said trustee."

Mahomed Ali, on 28th May, 1868, also executed a wasiatnamah, appointing

Saiyad Nadir Hossein to be wasi. The translation of it was as follows :—

"And for the purpose of keeping up and perpetuating all these things and the estate, that is to say, the taziadari, &c., of the said emambara and burial grounds, and all other necessary and proper affairs according to the provisions and conditions of the aforesaid wasiatnamah, I appoint my sister's son Nadir Hossein for the purpose of carrying on the duties specified in the former wasiatnamah, under which I have appointed him trustee for three years in my place, knowing him to be honest and faithful. The said trustee will, according to the conditions specified in the wasiatnamah of the late Khairunnissa Khanum Saheba and of this wasiatnamah, take care of, maintain and keep the whole of the property, necessaries for lighting, silver and gold articles of all sorts belonging to the emambara; and exercising all the powers which I had, he will collect the rents and proceeds from the gardens, and, levying month by month his rightful allowance as trustee, carry on all the duties; and for the conduct of all law suits which are now pending or may occur afterwards, he will appoint vakils and mukhtears and properly conduct them; and he will conduct all duties connected with the emambara and burial grounds, which are necessary and customary, month by month, and year by year; and except the power to improve, he will have no power to diminish the charge, and he will always make all proper arrangements with all servants belonging to the zemindaries, &c., appointed from before and now, and for the 5¼ annas share of pergunnah Paltapore in Zillah Malda, acquired by purchase, and which is also belonging to the emambara, and make intelligently all accounts, settlements of accounts, enquiries and investigations, and settlements of jummas; and the said trustee will have all the powers which I had except that of granting putnis and ijaras for appointment and dismissal of servants, and the conduct of all business, and he will act as he thinks best for the good and welfare of the emambara. And he is my relative, friend and well wisher, and besides the above Mussummat Bibi Pirun, Mussummat Bubri Khanum, Mussummat Bibi Supan Jan and Mussummat Imami Bibi and others are my *motha* wives (*i.e.*, wives by a second grade marriage); and as long as they behave properly and remain under his protection and guidance, he, the said trustee, will provide for them. And after my death, he will cause my body to be clothed and buried, and will always cause the performance (reading) of the *fatehas* for the invocation of blessings, pilgrimages, readings of the the Koran and the mujils for the salvation of myself and of the late Khairunnissa Khanum; and if necessity should, in his opinion, arise, he is empowered to appoint another trustee. No one has the power to interfere. Should in future anybody prefer any sort of claim, it will be held false, and will be condemned as such before the hakims for the time being. For which reason I execute this wasiatnamah while of sound mind and in my full senses, in the present assembly, that it may come of use in proper time, and that it may remain as a document to future times."

Mahomed Ali having died on the 21st May, 1868, those who had claims against his estate took proceedings against Nadir Hossein, disputing the effect of the second wasiatnamah. Again, in 1877, the present appellant attempted to enforce a decree against the estate of Mahomed Ali in the hands of Nadir Hossein. This failed, because the Court held that Nadir Hossein was not the legal representative of the judgment-debtor, and that assets of the latter could only be reached through legal process against his proper representatives. The present appellant having renewed his attempt in 1879 to attach the property left by Mahomed Ali, as being in the hands of the respondent partly for the benefit of Mahomed Ali's estate, the present suit resulted. The abovementioned judgment of the Subordinate Judge, stated more in detail, found that the first wasiatnamah was, in fact, executed by Khairunnissa, but not with knowledge of its nature. He held that it was not a deed converting the property into a religious endowment, but a will burthening the property, in the hands of the heirs, with certain charges for religious objects. As a will, he found that it was only valid to the extent of one-third of the property, being made without the consent of the heirs. He was of opinion that the second wasiat merely continued the trusts created by the former instrument, and that as regards any beneficiary interest then possessed by Mahomed Ali, it was void as against his creditors, he being then insolvent. The result of these findings was, that the larger part of the estate was the private property of Mahomed Ali, during his life, and after his death was assets in the hands of his heir for the payment of his debts.

This judgment was not maintained by the High Court (CUNNINGHAM and MACLEAN, JJ.) The Judges were of opinion

that it was not essential to decide whether the property became waqf or not, and whether Mahomed Ali had become mutawali or not, inasmuch as the trust implied that the trustee, for the time being, was entitled to hold the property subject to the performance of the duties charged upon it. There might have been in Mahomed Ali's time a margin of profit, and that margin might possibly have been attached in execution of a personal decree against the trustee. But that was not the question in hand, which was, whether Mahomed Ali's creditor was entitled to attach the property itself in the hands of the plaintiff. In regard to the appointment of the succeeding trustee by the document of 20th May, 1868, the Judges held it fairly within the power conferred by Khairunnissa's wasiatnamah. Their judgment concluded thus: "We find, therefore, that Mahomed Ali was competent to execute the deed of 20th May, 1868, that that deed vested the trust property in the plaintiff subject to the declared trusts. This finding disposes of the first defendant's case. If the trust deed be good, the plaintiff is entitled to hold the property subject to the charges of the trust, and to the claims of his creditors to any margin of profit, if there be one which can be shown to be his personal property. But the creditor of Mahomed Ali has, it appears to us, no right to attach the property in the hands of the present trustee in order to enforce a money decree against a former trustee which could never have been enforced, except against the margin of profit, which, after performance of the trusts, remained in his hands.

On this appeal,—

Mr. *R. V. Doyne*, and Mr. *J. D. Mayne*, for the appellant, argued that the legal effect of the first wasiatnamah was to confer, so far as Khairunnissa was entitled to confer it, the whole property upon Mahomed Ali as his own estate, subject to the performance of the trusts for religious objects. The second wasiatnamah, on the other hand, did not vest any in-interest in the respondent, but merely gave him the right of managing the estate for the purpose of paying out of the income sums required in respect of the religious duties imposed; and this caused the residue of the estate, beyond what was required for religious purposes, to pass to the heirs of Mahomed Ali on his death. Moreover, the second wasiatnamah, even if a transfer was attempted by it, could not pass any beneficial interest in the property, inasmuch as Mahomed Ali was insolvent at the date of it; and it was, therefore, void as against his creditors.

For another reason there was a personal interest in that part of the property which was not required for the expenditure on the objects of the trusts. This was that there was no complete appropriation of the property to religious objects by either the wasiatnamah of 1859 or that of 1868, neither of them having constituted the property to be waqf or strictly endowed for religious objects. Property might be either absolutely devoted to religious purposes, which was one mode of endowment, or it might be burdened in the hands of an owner with a trust for religious objects, which was another mode of providing for their performance, and this latter plan had been adopted here. The appropriation in order to constitute waqf must divest the private owner of all property in it. A mutawali was generally appointed. Here a wasi, or administrator, only was appointed. Waqf property might not be alienated; but where the whole of the profits of lands were not devoted to religious purposes, and were only heritable property burdened with a trust for such purposes, the profits might be alienated. In reference to this distinction were cited *Moohummud Sadik* v. *Moohummud Ali* (1), *Jewun Doss Sahoo* v. *Koobeerooddeen* (2), *Kumeez Fatima* v. *Saheba Jan*(3), *Futtoo Bibee* v. *Bhurrut Lall Bhukut*(4),

(1) 1 Sel. Rep., 17.
(2) 2 Moore's I A., 390; 1 P. C. J., 206.
(3) 8 W. R., 313.
(4) 10 W. R., 299.

Basoo Dhul v. *Kishenchunder Geer*(1), *Dalrymple* v. *Khoondkar Azeezul Islan* (2), *Khaja Surwar Hossein* v. *Khaja Syed Hossein*(3), *Mahomed Munnoo Chowdhree* v. *Hajra Bibee*(4). Also reference was made to Baillie's Mahomedan Law, Part II, Imameea, p. 211; the Tagore Law Lectures for 1874, pp. 463, 472 (mentioned by Mr. J. H. A. Branson); Macnaghten's Mahomedan Law, p. 62; Precedents, p. 327, case 8, p. 340.

In regard to the nature of the proof required, when a pardanashin is said to have alienated her property, was cited *Delroos Banoo Begum* v. *Ashgar Ally Khan*(5), afterwards affirmed on appeal (6).

In connection with the general proposition that under any system of law relating to religious trusts a surplus in the hands of the trustee, intended for his benefit, was available to satisfy decrees against him for his personal debts was cited *Aushotosh Dutt* v. *Doorgachurn Chatterjee*(7), where a surplus belonged to a joint Hindu family, of the family property, charged with expenses of daily worship.

On a question whether the right, title, and interest of Nadir Hossein had been attached, or the estate itself, reference was made to ss. 274, 278 and 287 of Act X 1877 and Act XIV of 1882. [SIR BARNES PEACOCK enquired what would have been the terms specifying the property to be sold if an application for sale had been filed.] The terms would have specified "all that remained after defraying the expenses of the trust." [LORD HOBHOUSE.—Would not that have involved proceedings in which all the parties interested must have been before the Court to ascertain the surplus and to have the trusts declared?] The argument was that, with, and subject to, certain definite trusts declared in the wasiatnamah, the property had vested in Mahomed Ali. The property, with these trusts annexed, could have been sold by him, and it therefore fell within s. 266.

Mr. *J. H. A. Branson*, for the respondent, was not called upon.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR BARNES PEACOCK.

In a suit filed in the Court of the Subordinate Judge the plaintiff prayed that an order passed in certain execution cases might be reversed and set aside.

The defendant, as the purchaser of a decree which had been made against Mahomed Ali, obtained an order in execution against the heirs, or persons alleged to be the heirs, of Mahomed Ali for the attachment of certain property which he alleged to be the assets of Mahomed Ali. The plaintiff objected to the attachment of the property, and the present suit was brought to set aside the order.

The facts of the case are these: A Mahomedan lady named Khairunnissa, who had an absolute interest in the property, executed a document called a will, or a deed, which is set out in the record. By that document she devised the property to her grandson, Mahomed Ali, upon trust for the performance of certain religious duties and ceremonies in accordance with the Mahomedan religion. A question was raised whether the trust so created amounted to what in Mahomedan law is called a waqf, or whether it was merely a trust for the performance of religious duties. The High Court held that it was at any rate a trust for the performance of religious duties, and that a trustee had been appointed for the performance of them by Khairunnissa, and that a subsequent trustee had been appointed by that trustee. It is unnecessary to specify the various religious duties for the performance of which this trust was created. Many of them, such as the

(1) 13 W. R., 200.
(2) S. D. A., 1858, p. 586.
(3) S. D. A., 1858, p. 1028.
(4) S. D. A., 1858, p. 1218.
(5) 15 B. L. R., 167.
(6) I. L. R., 3 Calc., 324.
(7) L. R., 6 I. A., 182; I. L. R., 5 Calc., 438, 4 P. C. J., 58.

taziadari and others, were specified in a schedule to the deed, with the expenses set opposite, amounting altogether to Rs. 1,412. There was also a sum to be paid to her son Mirza Enayet Ali Beg, Rs. 100 per mensem, or yearly Rs. 1,200, and to her daughter Mobaruckunnissa Khanum, Rs. 60 per mensem, or yearly Rs. 750. Those two legacies have lapsed by death. Then there is "trustee's allowance of Mirza Mahomed Ali Beg at Rs. 40 per mensem, or yearly Rs. 480"; and then there are other items for wages. At the end of the document, after specifying the trusts, it was declared that "the whole of the yearly profits of the above estate in the hands of the said trustee will be expended by the said trustee in the manner provided above, and the said trustee will himself, mindful of the omnipresence (of God), discharge and perform all the duties entrusted to him."

Khairunnissa died in the year 1859, leaving her son, Enayet Ali, who lived until the 5th of February, 1860, and her daughter, Mobaruckunnissa, who died on the 23rd of April, 1869. It was contended that, this document being the will of Khairunnissa, she could not dispose of more than one-third of her interest in the estate, and that the other two-thirds went to her heirs-at-law, her heirs-at-law, at the time of her death in 1859, being Enayet Ali, her son, and Mobaruckunnissa, her daughter. Their Lordships consider it unnecessary to decide whether the instrument was a will or a deed. Upon the death of Enayet Ali, Mahomed Ali, who had been appointed the trustee by Khairunnisa, was his heir at law. It appears that after the death of Khairunnissa, Enayet Ali made some claim, as heir, to his share of the property which he said his mother could not dispose of. Mahomed Ali, on the other hand, contended that the will of his grandmother was a valid one; that the whole of the property passed under that document to himself, and did not vest in his father; and that his grandmother had the right to dispose of the whole of the property. Mahomed Ali never claimed upon the death of Enayet to succeed to any portion of the property as having been undisposed of by his grandmother, but during the whole of his life treated the property of his grandmother as having been disposed of by her will for the purposes therein expressed. He could not therefore in his lifetime have claimed any portion of the estate as heir to his father Enayet. Mobaruckunnissa, as already observed, died on the 23rd of April, 1869, and neither she nor any of her heirs have ever claimed to be entitled to any portion of the property as not having been disposed of by Khairunnissa.

The defendant in the suit claimed under a purchase in execution of a decree against Mahomed Ali, dated in 1863, to have the whole of the property sold in execution of that decree against the heirs-at-law of Mahomed Ali, the trustee. The case came on to be heard before the Subordinate Judge, who was the Judge sitting in the Court of Execution, and after various proceedings and objections it was ordered that the property should be attached. It was objected that the judgment-creditor could not attach the whole property, and that he had not specified any particular portion of it. The Judge, speaking of the residuary interest of the deceased Mahomed Ali Beg as the property liable to be attached, said: "As there is yet time to ascertain the nature of interest under s. 287 of the Civil Procedure Code previous to the issue of the writ of proclamation, I think the claimant's objection on the score of the attachment being void for want of specification of the debtor's interest is untenable." He therefore disallowed the objection, and so in effect maintained the order which had been made for the attachment of the entire corpus of the estate.

One of the learned counsel for the appellant very properly admitted that no specific portion of corpus could be sold, but that the whole corpus of the estate was liable to be sold. The High Court held that the corpus of the estate was not liable to be sold, and they say: "Nor

is it essential to decide whether the property became what is known technically as waqf, and whether Mahomed Ali became mutawali, because the Subordinate Judge finds, and we think rightly, that the deed created a trust for certain specific purposes. This implies that the trustee for the time being is entitled to hold the property subject to the performance of the duties charged upon it. There may have been in Mahomed Ali's time a margin of profit, and that margin might possibly have been attached in execution of a personal decree against the trustee; but that is not the question now. The question is, whether Mahomed Ali's creditor is entitled to attach the property itself in the hands of the plaintiff."

If the whole property is to be sold, it must be taken out of the hands of the trustee altogether and put into the hands of a purchaser. That purchaser might be a Christian, he might be a Hindu, or he might be of any other religion. It surely cannot be contended that property, devised by a Mahomedan lady to a Mahomedan trustee with the object of providing for certain Mahomedan religious duties, could be taken out of the hands of that trustee and sold to a person of any other religion, and that the purchaser should become the trustee for the purpose of performing or seeing to the performance of those religious duties. If property is to be sold and alienated from the trustee whom this lady appointed, or the trustee who was subsequently appointed by him to succeed him as trustee, the purchaser, of whatever religion he might be, would have to see to the execution of the trusts. Is it possible that the law can be such that a Hindu might become the purchaser of the property for the purpose of seeing to the performance of certain religious duties under the Mahomedan law? For example, that a Hindu might be substituted for a Mahomedan trustee for the purpose of providing funds for the Mohurrum, and taking care that it should be duly and properly performed, when it is well known what disputes and bitter feeling frequently exist between Hindus and Mahomedans at the time of the Mohurrum. The High Court says: "If there was a margin of profit, that margin of profit might possibly have been attached." Their Lordships cannot in this suit, in which all parties interested are not before it, decide as to the extent of the religious trusts, or whether any surplus profit after the performance of those trusts would belong to Mahomed Ali or the trustee substituted by him. The corpus of the estate cannot be sold, nor can any specific portion of the corpus of the estate be taken out of the hands of the trustee because there may be a margin of profit coming to him after the performance of all the religious duties.

According to s. 266 of the Civil Procedure Code, Act X of 1877, which was the Code in force at the time when these execution proceedings were going on, the following property is liable to attachment and sale in execution of a decree, namely, lands, houses, or other buildings; goods, money, bank notes; and so on. Then "shares in the capital or joint stock of any railway company or other public company or corporation; and, except as hereinafter mentioned, all other saleable property, movable or immovable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power, which he may exercise for his own benefit, and whether the same be held in the name of the judgment-debtor, or by another person in trust for him or on his behalf." If there was any surplus in the hands of the trustee for the benefit of the judgment-debtor it would not entitle the judgment-creditor to attach and sell the whole or any specific portion of the corpus of the estate. He could only attach that property over which the judgment-debtor had a disposing power, which he might exercise for his own benefit, "whether the same was held in the name of the judgment-debtor, or by another person in trust for him." Mahomed Ali, just before his death, executed a deed, which is to be found on the record, and he says: "I appoint my sister's son, Nadir Hossein"—who is the

present plaintiff—"for the purpose of carrying on the duties specified in the former wasiatnamah, under which I have appointed him trustee for three years in my place, knowing him to be honest and faithful. The said trustee will, according to the conditions specified in the wasiatnamah of the late Khairunnissa Khanum Saheba, and of this wasiatnamah, take care of, maintain, and keep, the whole of the property, necessaries for lighting, silver and gold articles of all sorts belonging to the emambara"—and all the other religious duties. He is to be the trustee for carrying out the religious ceremonies which had been appointed by Khairunnissa under the wasiatnamah. It was contended that, if this was not a waqf, the trustee appointed by Khairunnissa had no power to appoint a new trustee. But even if Mahomed Ali could not appoint a trustee in his place, no one has ever objected to Saiyad Nadir Hossein as the trustee. If there had been any objection that he was illegally substituted as trustee, an application might have been made by any person interested in the performance of the trusts to have him removed, and a new trustee appointed by the Court under the Code of 1877. But Saiyad Nadir Hossein was in possession as trustee, and no person interested in the performance of the religious duties had ever objected. Even if there had been an objection, that would not have converted the corpus of the property held in trust into Mahomed Ali's own private property, liable to be attached for his private debts. By s. 280 of the Code of Civil Procedure, Act No. X of 1877, it is enacted that :—"If upon the investigation the Court is satisfied that for the reasons stated"—that is upon the investigation of the claim of an objector—"in the claim or objection such property was not when attached in the possession of the judgment-debtor, or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that being in the possession of the judgment-debtor at such time, it was so in his possession not on his own account, or his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall pass an order releasing the property wholly, or to such extent as it thinks fit, from attachment." Section 281 enacts "that if the Court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor as his own property, and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupation of a tenant, or other person paying rent to him, the Court shall disallow the claim."

Their Lordships are of opinion that the order for the attachment of the corpus of the estate was erroneous, and that a proclamation could not have been lawfully issued for the sale of any portion of the property attached.

Their Lordships are of opinion that the judgment of the High Court was right, and they will therefore humbly advise Her Majesty to dismiss this appeal and to affirm that judgment. The cost of the appeal must be paid by the appellant.

Appeal dismissed.

Solicitors for the Appellant : *Messrs. Barrow & Rogers.*

Solicitors for the Respondent : *Messrs. Lambert, Petch & Shakespear.*

30th November, and 5th and 7th December 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

On Appeal from the High Court in Bengal.

KALI PERSHAD AND OTHERS* ... } *Plaintiffs,*

and

ANAND ROY AND OTHERS ... } *Defendants.*

Ghatwali tenure—Ghatwali tenure in Bhagulpore—Ghatwal's right of alienation—Sale of ghatwal's estate in execution of decree against him.

Ghatwali tenures are rendered by their origin and incidents distinct in some particulars from other inheritances, and to them the law of the Mitakshara, to its full extent, is not entirely applicable; yielding, in their case, to a custom, though only to the extent of the custom proved.

On a question whether the sale of a ghatwali tenure in the Kharagpore zemindari, in Bhagulpore, in execution of a decree against the ghatwal, had transferred the inheritance as against the ghatwal's son: *Held*, in regard to a proved custom, that the ghatwali was not inalienable, but might be aliened by the ghatwal, or sold in execution of a decree against him, if such alienation was assented to by the zemindar, this power of alienation not being limited to the life-interest of the ghatwal for the time being, but forming part of his right and title to the ghatwali.

APPEAL from a decree (21st April 1884) of the High Court (1), reversing a decree (13th February 1882) of the Subordinate Judge of Bhagulpore.

The question on this appeal was whether the sale of a ghatwali tenure in execution of a decree against the ghatwal operated to transfer to the purchaser the whole interests therein, or only the interest of the ghatwal, judgment-debtor, for life, as against his son.

In the suit out of which this appeal arose the plaintiffs claimed a ghatwali mehal, named Kharna, in the zemindari of Kharagpore, zillah Bhagulpore, of which Raja Lilanand Singh was zemindar, consisting of twenty-two mouzahs.

The grounds of the claim were the right of Tekait Kali Pershad Singh, the first plaintiff, as the son of Tekait Meghraj Singh, formerly ghatwal of Kharna, to the ancestral estate. This was under the Mitakshara, by which it was alleged that the family was governed, coupled with, and modified by, a custom giving the ghatwali to the eldest son alone. Kali Pershad, as it was claimed by him and others making title through him, on his birth in 1833, acquired an interest jointly with his father who was then in possession and who died in 1871.

Meghraj in 1858 borrowed money of Alam Roy, the father of the first defendant, who in execution of a decree for the debt caused to be attached and sold in execution, on 13th August 1868, Meghraj's interest as ghatwal of Kharna. Kali Pershad alleged that he, by inheritance, had obtained a right to the permanently-assessed ghatwali of Kharna, which was an istemrari mokurari tenure, under a custom of impartibility and primogeniture; no more than his father's life-interest having passed to the purchasers at the sale of 1868.

The defence, so far as is material to this report, was that Meghraj had the full proprietary right in Kharna, sufficient to enable him to sell, or transfer, the whole estate, and not merely a life-interest.

Acquiescence on the part of the son was also set up; and it was alleged that his interest, he being bound by his father's debt, was sold at the execution sale. Also, that the mehal had been

* 15 Cowell's I. A., 18; 15 Calc., 471.

(1) See *Anand Rai* v. *Kali Prosunno Singh* I. L. R., 10 Calc. 677.

purchased subject to a zur-i-peshgi lease, forming a mortgage for Rs. 4,923, executed by Meghraj, and notified at the sale, which mortgage the defendants had paid off, and had thus gained a lien against the plaintiffs.

The issues now material raised questions as to what was the tenure and the custom of succession; also, whether the ghatwal holding possession had the sole right of transfer, and whether the son had any interest in the ghatwali during his father's possession of it.

At the hearing before the Subordinate Judge, Hafiz Abdul Karim, Khan Bahadur, it appeared that mehal Kharna, with three other mehals—Patharkara, Kalsakra, and Chundwara—were granted in 1780 by the then zemindar of Kharagpore to Ajit Singh, the ancestor of the plaintiff, to hold on the condition of his rendering service as a ghatwal. The original sanad was not forthcoming, but the nature of the ghatwali tenures of Kharagpore was stated in a judgment of the Judicial Committee in *Lilanand Singh* v. *The Government* (1), which related to mehal Dhamsain, situate in the same zemindari. In that case the Government sought to maintain the claim to resume the ghatwali tenure on the ground that under the prevailing system of administering the country ghatwali services were no longer necessary. This claim of the Government was held untenable, the right of resumption no more existing in regard to ghatwali tenures than others, merely because the services formerly required were required no longer. The order of Her Majesty in Council was taken as governing the case of other mehals affected by similar incidents, among which was included mehal Kharna.

Subsequently, the zemindar endeavoured to resume the ghatwali tenures. His suit in respect of mehal Kharna was dismissed, and no settlement was made between him and the ghatwal, who accordingly continued to hold under his ancient right. The decision in the dispute as to the respective rights of the zemindar and the ghatwal, was given in the suit relating to mehal Kakwara, *Lilanand Singh* v. *Thakoor Munoorunjun Singh*(2), in which case it was decided that the ghatwali tenures were not granted as remuneration to hired servants, resumable upon the services not being required, but were granted, and were held, upon grants at a fixed rent, subject to certain services to be rendered by the grantee; and that so long as the holders of these grants were able and willing to perform the services, the tenures could not be determined, whether the services were actually required or not. The tenure in that case was held to be hereditary, a usage to that effect being coupled with the terms of the original grant. This decision in reference to mehal Kakwara was taken by the High Court as an example for the case of mehal Kharna in an appeal, decided on the 29th June 1865, *viz.*, *Meghraj Singh* v. *Lilanand Singh*, which was not on the record of this appeal, (though its effect was stated by the Subordinate Judge in his judgment) and was not reported.

The judgment of the Subordinate Judge related to two principal matters, one being the incidents of the tenure, and the other the rights of the parties therein. With regard to the incidents of the tenure, he held that the ghatwali tenure of mehal Kharna was an ancestral estate, held at a perpetually assessed jumma by the father of the plaintiff, joined to which was also the condition of the performance of service, and that so long as he was ready to serve, the zemindar had no power either to dispossess him or to enhance the rent, and that no alteration in this had occurred. He also held that the tenure was indivisible apparently, as an incident of the tenure rather than as a custom in the family of the tenant; also that it was transferable subject to the approval of the zemindar, but that no such practice, or usage, as that the holder should have

(1) 6 Moore's I. A., 101; 1 P. C. J., 505.

(2) L. R. Sup. Vol., I. A., 181; 13 B. L. R., 124, in which the judgment of the High Court reported 3 W. R., 84, was affirmed; 3 P. C. J., 238.

absolute power to alienate as an incident of his ghatwali tenure, had been proved.

In reference to the rights of the present parties in the tenure in question, the Subordinate Judge held—first, that it was not disputed that the family of Meghraj Singh was governed by the law of the Mitakshara; secondly, that, though the possession of the ghatwal for the time being was exclusive, he had no right, after the birth of a son, to alienate without the consent of that son; thirdly, that the debt was Meghraj's own, incurred by himself, and the suit, and decree therein, were against him alone; fourthly, as the result of the above, that only Meghraj's right and interest in the mehal for his own life had passed at the sale in question.

Having regard to these points, the Subordinate Judge held that the share of Meghraj, the judgment-debtor, being in the Judge's opinion only one-third of the ghatwali, was all that had passed to the purchaser; and that the appellants were entitled to recover the remaining two-thirds, subject to payment by them of two-thirds of the money advanced on the zur-i peshgi lease. With regard to mesne profits, the appellants were referred to another suit, as they had not claimed them in this.

Both parties appealed from this decree, the defendants contending that the ghatwal had, as an incident of his tenure, full power of alienation, notwithstanding the existence of a son. The plaintiffs, on the other hand, in their memorandum, contended that, upon the finding of the Court below as to the facts, the whole estate should have been decreed to them with possession as from the date of the death of Meghraj, the father.

The High Court (TOTTENHAM and NORRIS, JJ.) in its judgment(1) did not dissent from any of the findings of the lower Court as regards the sale, or as regards the law and usages governing the plaintiffs' family. They disposed of the question whether the ghatwali tenure was in its nature alienable. They held that it was alienable if the zemindar consented to the alienation, and that this consent might be implied. The rules of descent declared by the Mitakshara were not applicable. The suit was by the High Court dismissed with costs. The judgment, having been reported at length, need not be here further stated.

On this appeal,—

Mr. *T. H. Cowie, Q.C.*, and Mr. *H. Cowell*, for the appellants, argued that the estate that was alienated w[illegible]ly the right, title, and interest of the then ghatwal in mehal Kharna. The zemindar's approval was an essential condition to a transfer of the ghatwali, and such a restriction limited the right of the ghatwal to alienate. In the appeal, relating to mehal Kakwara—*Lilanand Singh* v. *Thakoor Munoorunjun Singh*(2)—the decision was that the ghatwali was not granted merely by way of wages to an hereditary servant, but to be held as upon a grant at a fixed rent, subject to certain services; and whether the latter were required or not, the tenure could not be brought to an end so long as the holder was able and willing to perform them. The tenure was held to be hereditary, a usage being coupled with the terms of the original grant. The decision in reference to mehal Kakwara had been held by the High Court applicable to the case of mehal Kharna in *Meghraj Singh* v. *Raja Lilanand Singh* (not reported) on the 29th June 1865. In *Harlal Singh* v. *Jorawun Singh*(3) a ghatwali in zilla Birbhum was held not divisible on the death of a ghatwal among his heirs, but to devolve upon the eldest son. Reference was made also on this point to *Teetoo Koonwuree* v. *Surwan Singh*(4); and *Sartuk Chunder Dey* v. *Bhagtu Barut Chunder Singh*(5).

As to the disallowance of resumption

(1) I. L. R., 10 Calc., 680.

(2) L. R., Sup. Vol., I. A., 181; 13 B. L. R., 124; 3 P. C. J., 238.

(3) 6 Sel. Rep., S. D. A. 169: In ed. of 1873, p. 204.

(4) S. D A., 1853, 765.

(5) S. D. A, 1853, 900.

by the zemindar, reference was made to *Kolodeep Narain Singh* v. *Mahadeo Singh* (1); *Lilanand Singh* v. *Thakoor Munoorunjun Singh*(2); and *Nilmoni Singh* v. *Bakra Nath Singh*(3). In regard to the general effect of the Mitkshara rule of inheritance, *Chowdhry Chintamun Singh* v. *Nowlukka Kuuwari*(4) and *Raja Rup Singh* v. *Rani Baisni*(5) were referred to.

It was not contended that the ghatwali tenure was inalienable because it was impartible, impartible estates not being inalienable merely on account of their impartibility—see *Udaya Aditya Deb* v. *Jadub Lall Aditya Deb*(6). But it was contended that, as the estate was impartible, the judgment-debtor's interest therein could not, under any circumstances, have been represented by one-third or any other share; and as to Meghraj's interest, his proprietary right was that of a member of a joint family in the joint family estate, coupled with and controlled by the right, which was a customary one, of exclusive possession during his life. It was this right alone which passed at the sale.

It was further contended that only the right, title, and interest of Meghraj Singh in mehal Kharna were expressed by the sale certificate to have been sold, as well as by the execution proceeding to have been attached. Thus the right, title, and interest were limited to the right of possession during his life. Whether the Mitakshara law was referred to, or the nature of the tenure only was considered, the interest of the son was not transferred. On the death of the father the son succeeded, and held the tenure, subject to readiness on his part to perform the services now in fact no longer required. This impartible tenure also was alienable only with the consent of the zemindar, even for the life-interest to which the right of the ghatwal extended. The zemindar had the right to resume if the conditions of the tenure were broken and his consent to an alienation, whether express or implied, did not operate to extend the ghatwal's power to transfer; but, in effect, to limit it. Reference was made to *Kustoora Koomaree* v. *Benode Ram Sein*(1), in which it was held that these tenures were not liable to attachment in execution of decree; and in regard to what passed upon sales of family estate in execution generally, *Ramnaram Singh* v. *Pertum Singh*(2) and *Simbhunath Pande* v. *Golab Singh*(3) were cited.

Mr. *R. V. Doyne* for the respondents was not called upon.

Their Lordships' judgment, on a subsequent day (7th December), was delivered by

THE RIGHT HON. LORD FITZGERALD.

The appellant, Tekait Kali Pershad Singh son of Tekait Meghraj Singh, deceased, instituted this suit on the 7th of April 1881 against Dhanraj Roy, son of Alam Roy, deceased, and several others, to recover possession of the ghatwali mehal Kharna, comprising 22 mouzahs out of the mehals Kharagpore, which he alleges to be his ancestral ghatwali right.

The plaint, *inter alia*, alleged that the family of the plaintiff was governed by the Mitakshara law, but subject to a family custom that the eldest son became the malik without dividing with the other brothers, who are entitled to maintenance only; that the Tekait Meghraj was in possession, and that plaintiff No. 1, his eldest son, was born in Aughran 1241, and thereupon acquired a right with his father in the mehal; that Tekait Meghraj, without the consent of the plaintiff No. 1,

(1) B. L. R., Sup. Vol., 559; 6 W. R., 199, affirmed 11 B. L. R., 71; 14 Moore's I. A., 247; 2 P. C. J., 734.

(2) L. R., Sup. Vol., I. A., 181; 13 B. L. R., 124; 3 P. C. J., 238.

(3) L. R., 9 I. A., 104; I. L. R., 9 Calc., 187; 4 P. C. J., 335.

(4) L. R., 2 I. A., 263; I. L. R., 1 Calc., 153; 3 P. C. J., 537.

(5) L. R., 11 I. A., 149; I. L. R., 7 All., 1; 4 P. C. J., 533.

(6) L. R., 8 I. A., 248; I. L. R., 8 Calc., 199; 4 P. C. J., 290.

(1) 4 W. R., Mis., 5.

(2) 20 W. R., 189.

(3) L. R., 14 I. A., 77; I. L. R., 14 Calc., 572; *Ante* page 5.

who had then attained his majority, under the bond dated the 26th Cheyt 1265, borrowed the sum of Rs. 1,300 from Alam Roy, ancestor of the defendants Nos. 1, 2, and 3; that the aforesaid Alam Roy, on the basis of that bond, obtained a money decree against Meghraj without making the plaintiff No. 1 a defendant, on the 18th July 1862; that on the sale in execution of that decree he got only the right and share of the said Tekait in the ghatwali mehal of mouzah Kharna sold by auction, and he purchased them himself at a reduced price, that is, for the sum of Rs. 3,525 on the 13th July 1868; that Tekait Meghraj died in the month of Bhadon 1278 Fusli (that is, August 1871); that the plaintiff, agreeably to the usage of the family, governed by the Mitakshara law, acquired the right of direct possession in respect of the whole of mehal Kharna aforesaid, since the death of the said Tekait. The defendants in their written statement, denying most of the allegations in the plaint, specially contended that the plaintiff had not any joint estate with his father, who was the sole proprietor; that the restrictions on the Mitakshara law did not affect the estate or the sale in question, and that the particular nature of the ghatwali tenure which was based on actual service is contrary to the joint right of the sons according to the Mitakshara law. The defendants further relied on their title under the execution sale, and as to the allegation of the plaintiff that the property was sold for a trifling sum, they pointed out that it was sold subject to a zur-i-peshgi lease, which is in effect a mortgage for Rs. 4,923, which the purchasers had to redeem; that incumbrance had been created by Meghraj.

There were thirteen issues, but for the purposes of the present appeal it is only necessary to refer to one question, *viz.*: What did the defendants purchase, and what right did they obtain in mehal Kharna as purchasers under the sale in execution of the decree?

The decision of the Subordinate Judge of Bhagulpore was given on the 13th February 1882. It occupies 23 large and closely printed pages of the Record. It exhibits great care and research, and is very full and very learned, but as it has been read at full length in the discussion at the bar, it is not necessary to observe upon its reasoning. The decision of the Subordinate Judge is: That the claim of the plaintiffs in respect of two-thirds share of mehal Kharna be decreed; that the plaintiffs do get possession of the aforesaid two-thirds share on payment of two-thirds of the amount covered by the previous mortgage, amounting to Rs. 3,282, and it is peculiar in this respect that it is inconsistent with the case of the plaintiff, and equally so with the defence. If the plaintiff was entitled to relief on the case he has made, it was by a decree for the possession of the whole of the mehal Kharna.

Both parties were dissatisfied, and both parties appealed to the High Court. The decision of the High Court was given on the appeal of the defendants on the 21st of April 1884, and was, that the plaintiffs' suit be dismissed with costs.

The High Court justly criticises the inconsistencies of the cases of both parties on the pleadings, and the peculiarity of the decision of the Subordinate Judge, and adds: "The tenure being undoubtedly a ghatwali, the lower Court, we think, made a mistake in attempting to apply to the case the rules of the Mitakshara law." Their Lordships read this observation as confined to the Mitaskshara rule by which a son when born takes a share equally with his father. The High Court then proceeds: "We concur with the counsel for the appellants in this contention that, in dealing with a ghatwali, the Court must have regard to the nature of the tenure itself, and to the rules of law laid down in regard to such tenures, and not to any particular school of law, or to the customs of particular families. The incidents of a ghatwali tenure are the same, whether the ghatwal be a Hindu or a Mussulman, or a follower of any other system of religion; and the same ghatwali might be held successively by

persons governed as to other property by totally different rules of law. A ghatwali is created for a specific purpose, and has its own particular incidents." The High Court, continuing its reasons, adds: "The real and only material questions for us to decide are, first, whether the sale of this ghatwali in execution of a decree against the ghatwal was invalid and liable to be set aside by reason of the tenure being in its nature inalienable; and, second, if the alienation was bad, are the present plaintiffs entitled to recover the property? The second question also involves one of limitation." Their Lordships will deal with the first question alone.

The High Court, after considering the authorities which it deemed to be applicable, and pointing out the difference between the two classes of cases where the ghatwal is appointed by and holds direct under the Government and protected by Ordinances as in the Birbhum cases, and where he is appointed by and holds under the zemindar who retained in his hands the power of appointing and the power of dismissing the ghatwal in case of non-performance of his duties, goes on to say: "We think we must hold upon the authority of the cases, and upon the evidence of many such transfers having been effected and unquestioned, as well as in consideration of the long silence of the present plaintiff No. 1, and the silence, too, of his father while he lived, that a Kharagpore ghatwali is transferable if the zemindar assents and accepts the transference; and in the present case, we think the lower Court was justified in holding that the zemindar in making no objection within twelve years of the sale acquiesced in it, and that the transfer was therefore one which the Court ought to recognise. And looking to the fact that the purpose for which the Kharagpore ghatwalis were created no longer exists, we should greatly regret being compelled to come to the contrary conclusion. We accordingly decide the first question in favour of the defendants, appellants, and hold that the sale was not invalid by reason of the inalienability of the ghatwali tenure." The plaintiffs appeal against that decision.

Their Lordships are of opinion that the doctrines of the Mitakshara, which govern in some districts the Hindu law of inheritance, are not to their full extent applicable to a ghatwali tenure. By the general Hindu law of inheritance, where the Mitakshara does not prevail, the heirs are generally selected because of their capability to exercise certain religious rites for the benefit of the deceased. Where, however, the Mitakshara governs, each son immediately on his birth takes a share equal to his father in the ancestral immovable estate. Having regard to the origin and nature of ghatwali tenures and their purposes and incidents as established by decided cases, most of which have been referred to in the course of the argument, it is admitted that such a tenure is in some particulars distinct from, and cannot be governed by, either the general objects of Hindu inheritance as above stated, or by the before-quoted rule of the Mitakshara.

It is admitted that a ghatwali estate is impartible—that is to say, not subject to partition; that the eldest son succeeds to the whole to the exclusion of his brothers. These are propositions that seem to exclude the application of the Mitakshara rule, that the sons on birth each take an equal estate with the father, and are entitled to partition. The allegation, too, that the estate is not in the whole or in part alienable, or, if alienable, is only so for the life of the alienor, must largely depend on local and family custom, and such custom, if proved to exist, may supersede the general law, though in other respects the general law may govern the relations of parties outside that custom. Thus the rules of the Mitakshara yield to a well established custom, though only to the extent of that custom.

The question then which their Lordships have to consider and decide is whether the sale and transfer of a zemindari ghatwali in Kharagpore under a decree is invalid by reason of the tenure

being in its nature inalienable?

The evidence establishes a number of instances in which there have been unquestioned transfers and sales applicable to mehals in Kharagpore, and some to portions of the same estate which the plaintiff describes as part of his ancestral, inalienable, ghatwali right. This custom of alienation has been proved in fact by oral and documentary evidence to the satisfaction of the Subordinate Judge and of the High Court, and their Lordships see no reason to doubt the correctness of the conclusion in that respect of the two Courts.

It seems to their Lordships that the true view to take is that such a tenure in Kharagpore is not inalienable, and may be transferred by the ghatwal or sold in execution of a decree against him if such transfer or sale is assented to by the zemindar.

The plaintiff was of full age at the time of the sale. He does not appear to have made any objection to the sale or transfer, or to have taken any action during the period of twelve years that intervened between the sale and the institution of this suit, or during the period of ten years that elapsed between the death of Meghraj in 1871 and the 12th April 1881, when the suit was instituted. The zemindar made no objection, expressed no disapproval, was not asked to interfere, and did not interfere. It may reasonably be inferred that the zemindar and the officers of his zemindari were brought constantly into intercourse with the purchasers during their possession of twelve years after the sale, and could not have been in ignorance of the sale.

Their Lordships are of opinion that the Subordinate Court was justified in assuming under the circumstances the acquiescence of the zemindar in the sale and transfer under the decree, and that conclusion in fact has been approved and adopted by the High Court. Their Lordships do not deem it to be necessary to criticise the various decisions which have been brought so fully under their notice, and are of opinion that the High Court was correct in its conclusion that a Kharagpore ghatwali is transferable if the zemindar assents and accepts the transference.

There remains only to be noticed the argument that, though the ghatwal might aliene, it could only be for the life of the alienor. It seems to their Lordships that there is no foundation for this argument. When once it is established that the ghatwal had the power of alienation, as before stated, that power forms an integral portion of his right and interest in the ghatwâli, and there is no evidence whatever to limit it to an alienation for his own life and no longer. In this respect the present case so far differs from *Dindyal's case* (1), and some other decisions of this Board that followed, as to render them wholly inapplicable.

Their Lordships are of opinion that the judgment of the High Court should be affirmed and this appeal dismissed, and will so humbly advise Her Majesty. The appellants must pay to the respondents the costs of this appeal.

Appeal dismissed.

Solicitors for the appellants: *Messrs. Barrow & Rogers.*

Solicitors for the respondents: *Messrs. T. L. Wilson & Co.*

(1) L. R., 4 I. A., 247; I. L. R., 3 Calc. 198; 3 P. C. J., 730.

2nd December, 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Fitzgerald, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

On Appeal from the High Court in Bengal.

PARMESWAR PERTAB SINGH AND OTHERS* ... } *Defendants,*

and

PADMANAND SINGH AND ANOTHER ... } *Plaintiffs.*

Lease, Construction of—Construction of pottah as to duration—Use of the word "mokurari."

A ghatwali estate having been sold for arrears of revenue, the purchaser brought suits to set aside under-tenures, and in so doing sued a tenant who alleged himself to be a ghatwal. The latter compromised the suit, receiving a mokurari pottah not containing any words importing an hereditary interest.

Held, that the above circumstances were no ground for declining to give effect to the pottah as it stood, the word "mokurari" not importing inheritance.

APPEAL from a decree (19th May 1885) of a Divisional Bench of the High Court, affirming a decree (31st December 1883) of the Subordinate Judge of Bhagulpur.

The suit out of which this appeal arose was brought by the respondents, who were zemindars of Kharagpur in the Bhagulpur district, to recover possession of a mouzah of which a mokurari lease had been made in 1853 to one Teknarain Singh. He died in 1881, and this suit was brought against his sons, who were in possession, and who alleged that the tenancy was hereditary.

The second Subordinate Judge of Bhagulpur, holding that, upon the terms of the pottah of 1853, it was one only for the life of Teknarain Singh, decreed the claim in favor of the plaintiffs.

On appeal a Divisional Bench of the High Court (TOTTENHAM and AGNEW. JJ.) gave judgment as follows:—

"There are no words whatever in this pottah which would import any hereditary interest; and it has been held frequently that the word "mokurari" alone does not import anything more than fixed rent.

"It has been urged upon us on behalf of the appellant that we must look to the circumstances of the case, and not only to the document. The circumstances set up for the defence were, that the mouzah in question was formerly a ghatwali tenure. Therefore by its nature it was in fact a hereditary tenure, and the ghatwals or their descendants could not be ejected.

"The ghatwali estate was sold for arrears of Government revenue in 1838, and was purchased by the present plaintiff's predecessor. The purchaser brought suits to set aside encumbrances, and, amongst others, the ghatwals were sued. Teknarain appears to have been one of those tenants who were sued for the setting aside of his tenure. He pleaded that he was a ghatwal. The suit, however, was to set aside the sunnud on which his title was based, and there was no admission, nor was there any finding that Teknarain was a ghatwal at all. It appears that he compromised the suit, and permitted a decree against him on the condition of receiving the lease which is now in question.

"The learned Advocate-General has contended that if this compromise was brought about through ignorance, on the part of Teknarain, of his position under the law, it should not be held to bind him; and it is argued that, at any rate, the tenure having been held by him and his predecessors for a long series of years, it is not likely that he would, without consideration, consent to give up his position altogether and take a lease for his own life.

(1) I. L. R., 3 Calc., 324.

"We cannot, however, say that Teknarain was ignorant of his position under the law. He well knew what his position was, for he set up a ghatwali title in the very suit in which he entered into this compromise. It is quite possible that he felt that his case was a precarious one, and that it would be better than having a decree ousting him from this tenure, to enter into a compromise by which he could secure his tenancy for his own life.

"We think, therefore, that we must hold that the lower Court put a right construction upon this pottah, and that there are no circumstances which would warrant the Court to decline to give effect to that document as it stands.

"This being so, the suit was rightly decreed."

For the appellants, Mr. *J. D. Mayne* submitted that there was nothing in the terms of the lease inconsistent with a permanent tenure, and that the lease and compromise must be construed with reference to the asserted ghatwali tenure.

Mr. *C. W. Arathoon*, for the respondents, was not called upon.

SIR BARNES PEACOCK delivered their Lordships' judgment to the effect that they concurred in the construction put upon the pottah by the High Court.

Appeal dismissed with costs.

Solicitors for the Appellant: *Messrs. Barrow & Rogers.*

Solicitors for the Respondent: *Messrs. T. L. Wilson & Co.*

3rd December 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Fitzgerald, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

On Appeal from the High Court for the North-Western Provinces.

NAWAB AZIN-UL-ABDIN KHAN* ... } *Plaintiff*,

and

MUHAMMAD ASGHAR ALI KHAN AND OTHERS ... } *Defendants.*

Sale in execution of decree—Effect of reversal of decree upon sale in execution—Sale to bona fide *purchaser, not a party to the decree, distinguished from sale to decree-holder.*

A sale, having duly taken place in execution of a decree in force at the time, cannot afterwards be set aside as against a *bona fide* purchaser, not a party to the decree, on the ground that, on further proceedings, the decree has been, subsequently to the sale, reversed by an appellate Court.

A suit was brought by a judgment-debtor to set aside sales of his property in execution of the decree against him in force at the time of the sales, but afterwards so modified, as the result of an appeal to Her Majesty in Council, that, as it finally stood, it would have been satisfied without the sales in question having taken place. He sued both those who were purchasers at some of the sales, being also holders of the decree to satisfy which the sales took place, and those who were *bona fide* purchasers at other sales, under the same decree, who were no parties to it.

Held that, as against the latter purchasers, whose position was different from that of the decree-holding purchasers, the suit must be dismissed.

APPEAL from two decrees (11th June, 1883) of the High Court, reversing a decree (16th March, 1882) of the Subordinate Judge of Moradabad.

The question raised in this appeal was whether or not several auction sales of property formerly belonging to the ap-

* Cowell's Ind. Ap., 12; 10 All., 166.

pellant, who was judgment-debtor under the decree in satisfaction of which the sales took place, were to be set aside, on the ground that this decree had been, subsequently to the sales, so far modified by an appellate Court as to make what had been realized at a prior sale of the appellant's property sufficient to cover the amount finally decreed.

The sales were in execution of an *ex parte* decree (8th April, 1874) obtained by three of the defendants in the present suit for possession of shares in zemindari lands and houses, and for mesne profits and payment of a dower-debt, also for money due on a promissory note, the whole aggregating in value more than a lakh of rupees.

An appeal having been rejected by the High Court (26th August, 1875) on the ground that there could be no appeal from such an *ex part* decree, an appeal to Her Majesty in Council(1) (22nd November, 1878) resulted in a remand, followed by a decree of the High Court (1st March, 1880) disallowing part of the claim, on grounds, thus expressed in the judgment, having reference to jurisdiction, which affected the right to recover the dower-debt, and upon the promissory note:

"The cause of action cannot be held to have arisen in the district of Moradabad, for the lady was a resident of Jaipur and died there, and the plaintiffs are residents of the foreign State of Jaipur, and the defendant dwells in the foreign State of Jaipur, and has no connection with Moradabad.

"Equally, the Court will not have jurisdiction to try the claim for the dower-debt: this item is claimed as part of the assets left by the lady and divisible among the heirs. As already stated, the lady died at Jaipur and had no connection with the district of Moradabad, and her marriage, and presumably the contract for dower, took place at Rampur."

By the decree (1st March, 1880) which followed this judgment, the former decree (8th April, 1874) was confirmed as to the estates in land and as to the mesne profits for Rs. 3,746 only, with Rs. 4,908 for costs.

Meanwhile, the holders of the decree of 1874 had, in that year, obtained orders for sale in execution of it and brought to sale some of the judgment-debtor's property.

The first sale was on the 17th November, 1874, and comprised a house known as Diwan Kaumal's in Moradabad, for Rs. 5,050, the purchaser being Ashgar Ali Khan, one of the present respondents.

This property was not included in the present claim, the plaintiff explaining that this sale might stand good as satisfying what was due under the decree of the 1st March, 1880. Of those sales which the present suit (22nd February, 1881) sought to have set aside, the first was a sale (21st November, 1874) of twelve and a half biswas owned by the plaintiff, appellant, in mauza Alata for Rs. 8,575. The second was a sale (20th November, 1875) of his right, title, and interest in other villages which had realized Rs. 18,900 and Rs. 12,000. Another was a sale (15th November, 1876) of the Bank Kothi in Meerut cantonment. At these sales the decree-holders had purchased some of the property, and they, or purchasers from them, were originally the only defendants. But by an order of the Court of first instance (17th January, 1882) the respondents, Har Sarup, Pershadi Lal, and Jeo Ram, purchasers at the auction-sales, who were not parties to the decree of 8th April, 1874, were made defendants.

Issues having raised the question (among others) whether the sales could be set aside on the ground of the subsequent modification of the decree, the Subordinate Judge held that the plaintiff was entitled to have them set aside both as against the decree-holders who had brought the property to sale in satisfaction of their decree and had purchased at the sales, and as against the purchasers who were no parties to the decree.

(1) *Sahibzada Zein-ul-abdin Khan* v. *Sahibzada Ahmed Raza Khan*, L. R. 5 I. A. 233.

The latter only were the appellants in the appeal to the High Court which followed, and a Divisional Bench (Straight and Oldfield, JJ.) reversed the above judgment as against them, on the ground that the sales, as against *bona fide* purchasers, not parties to the decree subsequently modified, were not rendered invalid by the modification taking place (1).

On this appeal,

Mr. *T. H. Cowie, Q. C.*, and Mr. *C. W. Arathoon*, appeared for the appellant.

Mr. *R. V. Doyne* and Mr. *W. A. Raikes*, appeared for the respondents.

For the appellants it was argued that the judgment of the first Court had been so far correct that all the sales subsequent to that which had realized enough to satisfy the decree as finally made should be set aside; and that the modification of the decree of the 8th April, 1874, which had taken place on the ground of the absence of jurisdiction, showed that sales realizing amounts in excess of what was ultimately allowed by the decree of 1st March, 1880 were unauthorized.

Reference was made to *Jadunath Kundu Chowdhry* v. *Brajanath Kundu*(2), *Kanhaye Singh* v. *Oomadhar Bhatt*(3), *Abdool Hye* v. *Nawab Raj*(4).

Counsel for the respondents were not called upon.

The judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK.

In this case the plaintiff sued several defendants, claiming to set aside certain auction sales which had taken place under a decree of the Subordinate Judge of Moradabad, and for an order that the plaintiffs be put into absolute possession of the properties which were sold and are mentioned in the schedule to the plaint. In the schedule the properties and the purchasers thereof are separately described, and the action may be treated not as a joint action as regards all the property, but as an action against the several defendants as regards the properties of which they were severally purchasers.

Some of the defendants were the decree-holders, and some were persons who came in under them; but all the defendants who are in that position may for the purpose of this judgment be classed under the head of the decree-holders. Others of the defendants were not decree-holders, but merely purchasers under the execution and strangers to the decree upon which the execution issued. The circumstances are peculiar. The plaintiffs in the suit in which the execution was issued sued the present appellant in the Court of the Subordinate Judge of Moradabad to recover certain landed property situate in that district, and also mesne profits in respect of that property. They also sued for a large amount in respect of promissory notes which were alleged to be due from the present appellant to the plaintiffs in that suit, and a large amount alleged to be due from the appellant as dower to their mother, whom they represented. The defendant in that suit—the present appellant—objected that there was no jurisdiction on the part of the Subordinate Judge to try the suit, inasmuch as he, the then defendant, was not a resident in the district of Moradabad, but a resident in foreign territory, namely, Jaipur. But the Subordinate Judge decided that he had jurisdiction and gave a decree against him, not only for the lands which were situate in the district, and the mesne profits of those lands, but also for the amount which was claimed to be due on the promissory notes and on account of the dower.

That case was appealed to the High Court, but that Court dismissed the appeal upon the ground that the case was not appealable. An appeal was then preferred to Her Majesty in Council against that decision of the High Court, and Her Majesty in Council reversed the decision of the High Court and remanded the case to be tried upon the merits. The High Court,

(1) Weekly Notes, 1883, p 158.
(2) 6 B L R., Appendix 90.
(3) 21 W R. 291.
(4) B. L. R. Sup. Vol. 911, (F.B.)

when they tried the case upon the merits, reversed the decision of the Subordinate Judge as regards the amount decreed by the Subordinate Judge in respect of the dower and of the promissory notes, but affirmed his judgment as to the land which was situate within his jurisdiction, and the mesne profits in respect of that land. But before the judgment of the Privy Council, and before the decree of the High Court which reversed a part of the original judgment of the Subordinate Judge, the plaintiffs in that suit, who are now some of the defendants, executed their decree, and several sales took place under that execution. Under the first sale a certain amount was realized which would have been sufficient to cover the amount finally allowed by the decree of the High Court upon appeal. A second sale took place under which one of the defendants, Asghar Ali, purchased *bonâ fide*, he not being a party to the original decree.

The plaintiff brought his suit on the 22nd of February, 1881, not only against the decree-holders who had purchased under the execution, but as against the *bonâ fide* purchaser who was no party to the decree.

Pending the suit certain other defendants were added, as appears at page 2 of the record. The entry on the record is as follows:—"According to the order dated 17th January, 1882, Har Sarup, Parshadi Lal, and Jiwa Ram, auction-purchasers, were joined as defendants." The three defendants who were then joined were no parties to the decree, so that there are two sets of defendants in the suit: the decree-holders who purchased under their own execution; Asghar Ali, who purchased a portion of the property of the plaintiff, being a *bona fide* purchaser and stranger to the decree; and the three other defendants, who were alleged to be auction-purchasers under the decree and who were no parties to it.

The plaintiff claimed that "the auction sales of the disputed property detailed in the plaint, held on 20th November, 1874, 20th November, 1875, and 15th November, 1876, be declared null and void, and the sale deed in favour of Shaukat Husain Khan, dated 2nd November, 1880, so far as it appertains to the plaintiff's claim, be set aside." Thus he claimed to set aside all the auction sales, not only as against the decree-holders who had purchased, but as against *bonâ fide* purchasers who were no parties to the decree. Secondly, he claimed that "plaintiff be put in absolute possession of the undermentioned property of the value of Rs. 21,450 after dispossession of the defendants."

Amongst other issues, one was whether the auction sale and the purchase, having been made *bonâ fide*, could be invalidated or set aside by the modification of the decree, and whether the limitation law barred the claim.

It appears to their Lordships that there is a great distinction between the decree-holders who came in and purchased under their own decree, which was afterwards reversed on appeal, and the *bonâ fide* purchasers who came in and bought at the sale in execution of the decree to which they were no parties, and at a time when that decree was a valid decree, and when the order for the sale was a valid order.

A great distinction has been made between the case of *bonâ fide* purchasers who are no parties to a decree at a sale under execution and the decree-holders themselves. In Bacon's Abridgment, Title "Error," it is laid down, citing old authorities, that "if a man recovers damages, and hath execution by *fieri facias*, and upon the *fieri facias* the sheriff sells to a stranger a term for years, and after the judgment is reversed, the party shall be restored only to the money for which the term was sold, and not to the term itself, because the sheriff had sold it by the command of the writ of *fieri facias*." There are decisions to a similar effect in the High Court at Calcutta. They are collected in a note in Broughton, in his book on the Code of Civil Procedure, fourth edition, note to s. 246, Act VIII of 1859. So in this case, those *bona fide*

purchasers, who were no parties to the decree which was then valid and in force, had nothing to do further than to look to the decree and to the order of sale.

The Subordinate Judge held that the defendants were bound to restore the property; not only the decree-holders who had purchased, but the defendants who had purchased *bona fide*, not being parties to the decree. In his judgment he says:—"The limitation period of one year has nothing to do with this case. The cause of action having accrued to plaintiff on the 1st March, 1880, the date when the decision was modified, and as he instituted the claim on 22nd February, 1881, it is on no account considered beyond time." Therefore he held that the suit was not barred, but that the plaintiff had a right to recover, not only as against the decree-holders, but as against the *bona fide* purchasers, who were no parties to the decree under which they purchased, and he decreed the plaintiff's suit. The defendant Asghar Ali and the three added defendants, none of whom was a party to the decree in execution of which the sales were effected, appealed to the High Court.

When the case came before the High Court they reversed that decision. They passed two decrees, one as regards the three appellants who were the added defendants, and the other as against Asghar Ali; but they are both in similar words. They said:—"Both appeals must be decreed with costs, and the decision of the Subordinate Judge being reversed, the plaintiff's claim will stand dismissed." According to the strict grammatical construction of the decrees the plaintiff's claim was dismissed, not only as regards the defendants who had appealed, but as regards the others who had not appealed. The decrees must, however, be construed as applicable only to the defendants who had appealed and whose appeals were decreed, and not to the defendants who had not appealed, and who were not before the Court and had not objected to the decision of the Subordinate Judge.

Their Lordships therefore will humbly advise Her Majesty that the decrees of the High Court ought to be treated as decrees against the plaintiff only so far as his suit related to the defendants who had appealed to the Court, and that being so treated, they ought to be affirmed; and that the decree of the Subordinate Judge should be reversed so far only as it related to the plaintiff's claim against those defendants. Their Lordships also think that the appellant must pay the costs of the respondents in this appeal.

Their Lordships wish it to be distinctly understood that in affirming the decrees of the High Court they treat them merely as decrees in favour of the defendants who were appellants to the High Court.

Appeal dismissed.

Solicitors for the appellant—Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents—Messrs. *Oehme and Summerhaye.*

13th and 14th December 1887.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

On Appeal from the High Court for the North-Western Provinces.

THAKRO AND OTHERS* ... *Defendants,*

and

GANGA PRASAD ... *Plaintiff.*

Shares in village held by wife of former proprietor—Stridhan—Mitakshara—Mutation of names in the settlement record.

A share in a pattidari village given by a Hindu proprietor to his wife may become her stridhan, within the contemplation of the Mitakshara, section 11, cl. 1, enabling her to make a valid gift of it.

* 15 Cowell's Ind. Ap, 29; 10 All., 197.

A transfer from a husband of a share in a village was not formally carried out, otherwise than by its being evidenced by mutation of names in the settlement record; and a son, claiming as his father's heir, alleged that his mother's name was only used *benami* by the father.

Held, that a finding that such mutation was not for the purpose of putting the property into the name of the wife, *benami* for the husband, but for her own benefit, was substantially correct.

APPEAL from a decree (23rd January, 1883) of the High Court, reversing a decree (15th July, 1880) of the Subordinate Judge of Aligarh.

The question on this appeal was whether a widow, whose deceased husband had been in his lifetime a lambardar and pattidar in the pattidari village of Shahpur Thator, tahsil Iglas, in the Aligarh district, was herself the owner of shares in the village, recorded in her name in the settlement record, or that husband had been, till his death, the actual proprietor, holding them in the name of his wife. He had gradually acquired all the shares in the mauza, which originally consisted of three thokes, and on his application, by petition filed in 1862, all the shares were entered in the name of his wife.

This petition stated that he, Ganesh Singh in partnership with his wife, Musammat Thakro, was a share-holder of mauza Shahpur Thator, and applied for the strking out of his name as a sharer in that mauza, and the name of Thakro alone should be entered as the proprietor of all the shares, as the administration paper was then being written. Whether the *dakhil kharij* that followed represented a merely nominal, or an actual, transaction was the question in this suit; which was brought by Ganga Prasad, the son of Ganesh Singh, who died on the 12th October, 1872, leaving Thakro, his widow, by whom he had one son, the said Ganga Prasad, and two daughters. He also left another son Dipchand, by another wife, a minor when this suit was brought. He made a will, it was said, five days before his death, leaving all his estate to his sons in equal parts. Upon the assumption that the name of Thakro was entered "*ism-farzi*" in respect of this mauza, Ganga Prasad would have had only a moiety. But he claimed to have inherited the whole mauza, alleging that Ganesh Sing had, by effecting mutation of names, as above stated, exempted it from the operation of his will. The plaint stated that Ganesh Singh acquired the whole of the mauza by taking mortgages of shares of other share-holders, and by purchases, partly in his own name, and partly in Thakro's name; and that in 1862 he caused her name to be recorded as owner of the entire property, although the mauza remained in his possession. That after Ganesh's death in 1872, the mauza remained under the plaintiff's management. Also that the deed of gift executed by Thakro on the 6th May, 1878, in favour of her daughters, was false in describing the mauza as her acquired property and *stridhan*.

The defence insisted on Thakro's having had a beneficial ownership. The defendants' written statement was that Ganesh Singh "had given away his entire share consisting of 679 bighas 2 biswas in the disputed village to his wife Thakro, before the birth of the plaintiff, and put her in proprietary possession. The Musammat herself purchased 636 bighas 13 biswas of the mauza, and thus under two different titles she had been in possession of the entire village for more than 12 years."

On issues framed to question the point, the Subordinate Judge, Saiyad Farid-ud-din Ahmad Khan Bahadur, found that the whole of the shares were the property of Thakro, and up to the date of the deed of gift by her, had remained in her possession. The first of the three thokes of which the mauza at one time consisted was bought in 1845 in the names of the father and brother respectively of Ganesh Singh, who afterwards obtained *dakhil kharij* in his own name. The second *thoke* was let in farm, as a settlement operation, to Ganesh Singh about 1847; and he, in 1848, bought up the rights of the proprietors in his own name. In the

same year, the rights of other proprietors of shares were bought at auction in the name of Thakro to the extent of 205 bighas 4 biswas. The shares in the third thoke were taken in mortgage in 1847, in the name of Thakro as mortgagee, and afterwards in the same year Ganesh Singh bought up the rights, subject to such mortgage, of seven proprietors, to the extent of 276 bighas 1½ biswas, at a sale in execution of decree. The Subordinate Judge also held that the mauza had become Thakro's stridhan, or separate property, and, as such, was transferable by gift. He also, having fixed an issue to this effect, "if the mauza be held to have been owned by Ganesh Singh, is the plaintiff entitled to sue for sole possession thereof, when the other son, Dip Chand, is alive:" held, on this issue, that the plaintiff could not, consistently with claiming an exclusive title, rely on an exclusive title through Ganesh Singh; inasmuch as the fact, if true, that the mauza remained Ganesh's property till his death, would have brought in Dip Chand as entitled to one-half.

The plaintiff appealed to the High Court denying that Thakro had any "exclusive property, or transferable right, in the mauza;" and he again asserted his sole right of inheritance.

The High Court (Straight and Tyrrel, JJ.) held that the plaintiff had made good his appeal "on the ground that the record of his mother's name was of the commonplace *ism-farzi* character and that she consequently, and in fact, never had any possession of the property in any way adverse to Ganesh Singh, its owner, or to the plaintiff, who, with his half-brother, Dip Chand, was his heir."

The High Court, thereupon, decreed that the plaintiff should recover possession of the whole of the property, in which he was declared to be only entitled to a half share, the right of the donee from Thakro being declared null and void, and it being further declared that the decree should not affect the rights and interests of the minor son, Dip Chand.

On this appeal,—

Mr. *J. Graham, Q C.*, and Mr. *H. Cowell*, for the appellants, contended that the beneficial ownership of Thakro had been proved; and that her gift was valid, as having been made of her stridhan. The decree of the High Court was erroneous. Dip Chand's interest, if he had any, could not be protected in the way attempted by the decree, which, on the face of it showed that the case sought to be made out was an inconsistent one. They relied on prior representations made by the plaintiff himself, and on the evidence generally, as showing that the name of Thakro had not been used merely for that of her husband, but as indicating a real ownership.

Mr. *J. D. Mayne*, and Mr. *J. G. Witt*, for the respondent, relied on the evidence as to the actual management of the land comprised in the shares. This had been throughout in the hands, first of Ganesh Singh, and then of his son Ganga Prasad. Thakro had been proprietor in name only; and the judgment of the High Court was right.

The cases referred to on both sides were *Nawab Azimut Ali* v. *Hurdwaree Mull*(1) *Uman Parshad* v. *Gondharp Singh*(2), *Sreeman Chunder Dey* v. *Gopaul Chunder Chuckerbutty*(3), *Gopeekrist Gossain* v. *Gungapersaud Gossain*(4).

Counsel for the appellants, were not called upon to reply.

The judgment of their Lordships was delivered by

THE RIGHT HON. SIR BARNES PEACOCK.

This is an appeal by Musammat Thakro and other ladies against Ganga Prasad, the respondent. The appeal is from a decree of the High Court of the North-Western Provinces at Allahabad. The suit was brought by Ganga Prasad against Musammat Thakro, his mother, and the other ladies, who were the daughters of Musammat Thakro, in

(1) 13 Moore's I A., 395; 2 P. C. J., 571,
(2) L. R., 14 I. A., 127; I. L. R., 15 Calc., 20.
(3) 11 Moore's I. A. 28; 2 P. C. J., 215.
(4) 6 Moore's I. A. 53; 1 P. C. J., 493.

whose favour the mother had executed a deed of conveyance. The plaintiff alleged that his father, Ganesh Singh, "had a large property; that he, on different occasions, by mortgage and private and public purchase, having obtained mauza Shahpur Thator in his own name, as well as in the name of Musammat Thakro, plaintiff's mother, himself remained in possession thereof. Subsequently, in 1862 and 1863, the name of the said Musammat was recorded in respect of the entire property in the said mauza, though the said Ganesh Singh continued in possession of it." He then alleged that on the 12th October, 1872, Ganesh Singh, executed a will, and "on the 17th October, 1872, died, and that Musammat Thakro, plaintiff's mother, continued to live with him (plaintiff), and the village in dispute, like other paternal estates, remained under the management of the plaintiff." Then he proceeded as follows:—"On the 6th May, 1878, the said Musammat Thakro executed a false deed of gift"—by which he meant a deed of gift which she had not the power to execute—"of the said mauza in favour of her two daughters, Musammat Radha and Bhawani, describing the said mauza to be her acquired property and *stridhan*, and thus effected the plaintiff's dispossession ever since the Musammat began to live separate, which is the time when the cause of action arose. The village in dispute being the acquired property of the plaintiff's father, who had simply on account of affection caused the name of Musammat Thakro to be entered, the latter was not, under the Hindu law, competent to transfer the property to her daughters. The plaintiff is, in every way, entitled to get the property. The plaintiff therefore seeks for the following reliefs: (1) that the plaintiff's right may be declared in respect of the disputed property, and the deed of gift executed on the 6th May 1878, by Musammat Thakro, defendant, in favour of Musammats Bhawani and Radha, be declared invalid, void, and inoperative, as far as the plaintiff's right is concerned; (2) that both the last mentioned defendants may be dispossessed of the disputed mauza, and their right as donees declared null and void."

A written statement was put in on behalf of the ladies, and the case being tried by the Subordinate Judge, he raised several issues, the principal one of which was the fourth: "Whether Shahpur, the village in dispute, is wholly or partly the personal property of Ganesh Singh; and he alone remained in possession as long as he lived, and since his death, the plaintiff remained in possession thereof till the date of the accrual of the cause of action, and is therefore entitled to possession thereof; or the village in question is wholly or partly the personal property of Musammat Thakro, the widow of Ganesh Singh, deceased, who has been in possession thereof for more than 12 years, and the defendants are in possession from the date of gift, and the plaintiff's claim is therefore barred by lapse of time and he has no right in the property in dispute." Upon that the Subordinate Judge says:—"Just as the defendants have not proved their assertion, so the plaintiff also has not proved that Ganesh Singh fictitiously transferred that amount of land of the village of Shahpur Thator which was in his name to Musammat Thakro." The question really was whether, when the mutation of names was made from the name of Ganesh into the name of his wife, it was his intention to transfer the property into the name of his wife *benami* for him. The Subordinate Judge upon this point says:—"In short, a careful consideration of all the oral and documentary evidence and presumptions and probabilities clearly leads the Court to infer that the whole of the village in dispute is the property of Musammat Thakro, and is not the estate left by Ganesh Singh, and that up to the date of the deed of gift in question it remained in her possession." The Subordinate Judge therefore found in substance that the mutation of names in 1862 was not for the purpose of putting the property into the name of the wife *benami* for the husband, but for her own benefit.

Upon appeal to the High Court that Court came to a different conclusion. They held that the property was put by the husband into the name of the wife to hold it *benami* for him, and that consequently the property remained the property of the husband, and that the wife had no power to assign it to her two daughters, although it stood in her name.

A considerable part of this property, as shown by the Subordinate Judge in his judgment, was purchased in the name of Ganesh, the husband, and certain other parts in the name of the wife. The wife gave evidence that that portion of the property which was purchased in her name was purchased for her benefit and with her own money. It is unnecessary to decide whether the part of the property which was purchased in the name of the wife was purchased with her money or with that of her husband, because even if the property which was purchased in the name of the wife was the property of the husband, as well as that which was purchased in his own name, the question still remains whether when the husband allowed the mutation of names from his name into the name of his wife, he intended that mutation to operate for his own benefit or for hers.

The wife in her evidence in the cause stated that in the year 1847, when the husband was about to marry a second wife, that portion of the property which had been purchased in the name of the husband was made over to her in consideration of his being about to marry a second wife, and that afterwards the other portions of the property were bought in her name, so as to make the whole her property.

In the Mitakshara, section 11, clause 1, speaking of the nature of *stridhan*, it is thus stated: "What was given to a woman by the father, the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, as also any other separate acquisition, is denominated a woman's property." It is not unusual for a husband, upon his being about to marry a second wife, to make a present to his first wife, and if he does so, the property so presented becomes her *stridhan* according to the doctrine above laid down. The wife says that in the year 1847, when the husband was about to marry a second wife, he did make her a present of the property which had been purchased in his own name. Although the High Court has found that there was no actual proof of that fact, it is not improbable that the husband, when about to marry a second wife, should have stated to his first wife that he would appropriate that part of the property which he had purchased in his own name as a present to her in consideration of his being about to marry the second wife. The statement of the wife is corroborated by the fact that in the year 1862 he caused the property to be changed from his own name into that of his wife. On the 4th March, 1862, he says:—"In partnership with my wife, Musammat Thakro, I am the lambardar and a shareholder of mauza Shahpur Bhatai, pargana Gori. Now, of my own free will, I pray that my name as sharer in the said mauza be expunged, and that of the said Musammat alone be entered as proprietor of both the shares, as the village administration paper is being written now. I have no longer any claim." If when he was about to marry the second wife he told his first wife that he would make her a present of the property and did not carry out the gift by an actual deed, and in 1862 caused a mutation of names declaring that he had then no longer any claim to the property, that would not show that he was causing the mutation in order that the wife might hold it *benami* for him. There was a complete mutation of names from the husband of all that he possessed in the village of Shahpur into the name of the wife. The subsequent purchases were made in the name of the wife. If he intended the subsequent purchases, though made with his own money, to be made in the name of his wife, the probability is that he intended the whole of Shahpur to be vested in her

as her *stridhan*. The plaintiff claims it as his own property. It is to be remarked that by the second wife his father had another son, Dip Chand. If the property had been transferred in 1862 into the name of Thakro, *benami* for the father, it would have remained the father's property, and being the father's property would have descended to his two sons. But the plaintiff does not claim it as being the property of the two sons. He claims it as his own property, and as having been put into his mother's name in order that he might become entitled to the benefit of it; not that it was put into his mother's name in order that it might be held by the mother *benami* for the benefit of the father.

Several documents were put in. There is a copy of a petition "by Ganga Prasad against Musammat Thakro his mother, and Musammats Radha and Bhawani, his sisters." That was dated in 1878, after the mother had executed the conveyance in favour of her daughters. In paragraph 3 he says:—"The appellant's father caused the name of Musammat Thakro, mother of the appellant, to be entered in respect of the property through some policy. The name of the appellant's mother was entered simply with a view that the children born of the other wife of the appellant's father might not get a share in this property, and that the appellant alone might get it." The father, when he made this transfer of Shahpur into the name of the mother, did not appear to have had any creditors or any particular reason for putting this portion of his property into the name of the mother instead of allowing it to remain in his own name, unless it was for the purpose of giving the mother a benefit. If he had intended to put the property into the hands of the mother in order to conceal it from his creditors, and to make it appear that it was his wife's property instead of his own, the probability is that he would have done the same with regard to his other property, and not only in respect of this particular village.

The representation on the part of the plaintiff shows that whatever the object of his father in making the mutation was, it was not to put the property into the hands of the mother to hold it *benami* for the father. If he had put it into her hands with that object, the two sons would have become entitled to it; but the case of the plaintiff is that the object of the father in putting it into the name of the mother was that the issue of the second wife should have no share in it.

Further, a petition of guardianship was put in evidence. It was an application by Ganga Prasad, the plaintiff. He there says:—"My father, Ganesh Singh, died in October, 1872, leaving two sons, *i e.*, myself and Dip Chand, a minor"—that is, the son of the second wife—"who is now 2½ years old, as his heirs, and we two sons of the deceased are owners in equal shares of the property left by him." If the property remained the father's, Shahpur, as well as all the other properties, would have been the joint property of the two sons, Dip Chand and himself; but in a schedule to the petition particularising the property which his father left, he excluded Shahpur. That was either a gross fraud upon his brother, whose guardian and trustee he then was, with the intention of causing it to be believed that Shahpur, which was held, as he alleged, by his mother for the benefit of his father, was not the property of his father, or he must have believed at the time that the property was put into the hands of the mother, not *benami* for the father, but for some other purpose. He afterwards filed a list of the property left by his father, in which Shahpur is excluded, which shows that there was no mistake in the omission of Shahpur. In both these documents Shahpur is excluded as property left by the father, which if left by the father would have belonged to himself and his brother. In his evidence, he says:—"I know and consider Shahpur Bhatai to be my own share and not that of Dip Chand." In the face of these statements he cannot now contend that the property was held by his mother *benami* for his father. He contended at

one time that the property was put into his mother's name *benami* for himself. If that were so, it was for him to prove the fact, which he was unable to do.

Looking at the conduct of the plaintiff and at the representations which he made, which would have been grossly fraudulent if the property had been in the mother's name *benami* for the father, their Lordships have come to the conclusion that the case of the plaintiff is not made out, *viz.*, that the property was put into the hands of the mother *benami* for the father. Their Lordships do not believe that it was put into the hands of the mother for the purpose of giving the plaintiff the sole interest in the property, or that it was put into the hands of the mother *benami* for the father.

Under these circumstances their Lordships think that the High Court came to an erroneous conclusion in reversing the judgment of the Subordinate Judge upon the fourth issue, in which he found, upon the evidence and upon the statements of the plaintiff, that the property was the property of Thakro and not the property of the plaintiff. The plaintiff even in his plaint does not state that the property was that of himself and Dip Chand, but claimed it as his own property. Dip Chand was no party to the suit, as he ought to have been if the property was that of the father.

Their Lordships will therefore humbly advise Her Majesty that the decree of the High Court be reversed and the decree of the Subordinate Judge affirmed, and that the respondent be ordered to pay the costs of the appeal to the High Court. The respondent must also pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants: *Messrs. Ford, Ranken Ford,* and *Ford.*

Solicitors for the respondent: *Messrs. Pritchard and Sons.*

5th, 6th, 7th, and 8th December 1887 and 21st January 1888.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

On Appeal from the High Court for the North-Western Provinces.

RANI SARTAJ KUARI AND ANOTHER* ... } *Defendants,*

and

RANI DEORAJ KUARI, MOTHER AND GUARDIAN OF LAL NARINDAR BAHADUR PAL ... } *Plaintiff.*

Custom—Impartible estate—Right of possessor of impartible estate to alienate.

There is no such co-parcenary in an estate impartible by custom, as, under the law of the Mitakshara governing the descent of ordinary property, attaches to a son on his birth.

The son's right at birth, under the Mitakshara, is so connected with the right to share in, and to obtain partition of, the estate, that it does not exist independently of the latter right.

Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom.

In regard to a *raj* estate in Gorakhpur, by custom impartible and descending by primogeniture, the family being in other respects governed by the Mitakshara law, the present Raja's alienation of part of that estate was alleged by his son to be invalid as against him.

Held that if there had been no custom of impartibility, the Raja's power over the estate would have been restricted by the law declared in Mitakshara, ch. I, s. 1, v. 27; and the gift would have been void. But, there being the above custom, the question was how far the general law was superseded, and whether the right of the son to control the father's act in this respect was beyond the custom.

Held that in regard to impartible estate, the son's right at birth did not exist where there was no right on his part to partition; also that inalienability depended on custom or on the nature of the tenure. In this case the evidence did not establish that by custom the estate was inalienable.

* 15 Cowell's Ind. Ap. 51; 10 All. 272.

APPEAL from a decree (4th May, 1883) of the High Court affirming a decree (2nd October, 1880) of the Subordinate Judge of Gorakhpur.

The question was of the validity of a gift of seventeen villages in Gorakhpur, forming part of the hereditary and impartible raj estate in the possession of the Raja of Mahauli. It was in favour of a younger wife, and was disputed by the Raja's eldest son, still a minor, represented by his mother and guardian.

The instrument which the son sought to have declared void was dated the 18th February, 1871.

It recited that Raja Bhawani Ghulam Pal was the proprietor of a number of villages in the pargana of Mahauli, constituting his raj estate, which had been settled with him for the revenue; and that he was, with regard to the nature of the Raj and riasat, and also with regard to the custom and usage of the family and of the country, the sole permanent proprietor having full power to transfer the estate. The instrument then declared that the Raja thereby made a gift to his wife, Rani Sartaj Kuari, of the seventeen villages described therein, forming part of his "ilaka," and had put her into possession, she having full proprietary rights therein and being entitled to obtain *dakhil kharij*.

The plaintiff's ground of claim was that, by Hindu law and usage, the Raja had no power to alienate any part of the raj estate. The Raja denied this, alleging in his defence a right to make any transfer; adding that, in consequence of the separation of members of the family, and for other reasons, transfers of every description had been made of the raj estate from of old.

The judgment of the Court of first instance was against the validity of the alienation.

On appeal the High Court (Straight, J., and Tyrell, J.) gave judgment as follows:

"The case is one of considerable moment, not only from the value of the property in suit, but the importance of the legal questions involved as to the precise character of the property of the raj and the power of the Raja in regard to it. Before addressing ourselves to the points raised for our determination, a few words may be conveniently devoted to recording the history of this Mahauli raj. The estates, which are considerable, lie in the parganas of Tanda and Akbarpur, Fyzabad, in the province of Oudh, and Mahauli and Rasulpur, in the district of Basti, in these Provinces. It would appear that some 300 years ago two brothers, by name Alakdoe and Tilakdoe, Surajbansi Rajputs, hailing, so they alleged, from Kumaun, invaded the locality in which the property above mentioned is situate, and, killing one Kaulbil, the then Rajbhar, appropriated his lands and made them the nucleus of the present raj. Subsequently, for services rendered or for some other reason, they obtained from one of the Delhi Emperors the title of "Pal," which has now for a long course of years attached to the family. Originally the dwelling-house of the Raja was in the village of Mahauli, but it was afterwards removed to Mahson, where it now is situated. The seventeen villages to which the deed of gift in favour of Rani Sartaj Kuari relates are nearly all situated in Mahson, and are estimated, in round figures, to be worth some five lakhs of rupees and form, so the plaintiff alleges, the most valuable part of the raj properties. The names of the several Rajas who have preceded the present incumbent in their order are, as far as we have been able to ascertain them:—(1) Dip, (2) Jaswant, (3) Kalandar, (4) Bakhtawar, (5) Sarfarz, (6) Shamshere, and (7) Mardan, father of the defendant Ghulam and grandfather of the plaintiff. Of the above, with the exception of Kalandar, who is said to have been selected in preference to his elder brother Zorawar, though the evidence as to this is of the vaguest and most unsatisfactory kind, succession to the *gaddi* has been ruled by primogeniture.

"We now revert to the contentions

urged by the appellants' counsel in support of the appeal. Briefly they are—1st, that the plaintiff has no title to come into Court during his father's lifetime, for he is neither a co-proprietor nor a reversioner; 2nd, that if he has a right to institute a suit, it rests with him to establish the inalienability of the raj, and that under any circumstances the defendants have conclusively proved the competence of the Raja to make the gift impeached. The first question involves the consideration of many points of no slight difficulty and complexity, and their examination has been not a little perplexed by a perusal of the numerous authorities to which we were referred in the course of the arguments at the hearing of the appeal. Putting aside the suggestion of custom or usage made in the plaint, which we do not feel called upon to discuss, the position asserted by the plaintiff apparently resolves itself into this:—'The estate now in possession of my father is ancestral; he and I are members of a joint Hindu family, ordinarily subject to the law of the Mitakshara. If I survive him, I must under that law succeed to the estate. Although it is admittedly impartible in the sense that I cannot demand partition thereof, or have joint enjoyment of the income derived therefrom, yet I have, so to speak, a limited proprietorship therein in the shape of rights to maintenance and succession by survivorship.' In other words, the plaintiff claims that, except in so far as from the nature of the estate they are inapplicable, his case must be determined according to the principles of the Hindu law which govern families and their property. As a matter of first impression, it appears to us that this contention is based on grounds of justice and good sense, but it will be convenient at once to see how far authority supports it."

The judgment of the High Court then quoted passages from several judgments of the Judicial Committee, of which the effect is given by their Lordships in their judgment. They are therefore here omitted. The cases referred to by the Judges of the High Court were *Katama Natchiar* v. *The Raja of Shivagunga*(1); *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*(2); *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankandora*(3); *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*(4); *Periasami* v. *Periasami*(5); *Doorga Persad Singh* v. *Doorga Konwari*(6).

To the Judges of the High Court it seemed that the principles laid down by the Judicial Committee established that a raj, or impartible zamindari, might be a portion of a joint family estate; and that, in the absence of a custom to the contrary, succession to it would be regulated by the ordinary rules of Hindu law. And they added: "The conclusion to be deduced, as it appears to us, from the observations of their Lordships is that where there is no local, or family custom overriding the general law, the succession to a raj, or impartible zamindari, according to Hindu law, goes by primogeniture. There is one other decision of the Privy Council—*Doorga Persad Singh* v. *Doorga Konwari*(6), in which the passage from the Shivagunga case is quoted with approval, and where the following material remarks to the question under our consideration occur:—"The impartibility of the property does not destroy its nature as joint family property, or render it a separate estate of the last holder, so as to destroy the right of another member of the joint family to succeed to it upon his death, in preference to those who would be his heirs if the property were separate." In this connection we may also refer to the judgment reported in 13 Moore's Indian Appeals, page 333, in the course of which it is observed:—"It is therefore clear that the mere impartibility of the estate is not sufficient to make the succession to it

(1) 9 Moore's I. A. 543 at pp. 588, 592; 2 P. C. J., 25.
(2) 12 Moore's I. A. 523; 2 P. C. J. 467.
(3) 13 Moore's I. A. 333; 2 P. C. J., 516.
(4) 14 Moore's I A. 570; 3 P. C. J., 108.
(5) L. R. 5 I. A. 61; 3 P. C. J., 795.
(6) I. L. R. 4 Calc. 201; L. R. 5 I. A., 149.

follow the course of succession to separate estate." So in *Periasami* v. *Periasami*(1), it is said :—" He would, therefore, necessarily be joint in that estate, so far as was consistent with its impartible character, with his two younger brothers; the latter taking such right and interests in respect of maintenance and possible rights of succession as belong to the junior members of a raj or other impartible estate descendible to a single heir. Hence there can be no doubt that the estate, though impartible, was up to the year 1829 in a sense the joint property of the joint family of the three brothers."

" We have thought it right to quote at this length from these Privy Council rulings, because the counsel for the appellants greatly pressed upon us a case to be found at page 523 of the 12th Vol. of Moore's Indian Appeals, which is known as the Tipperah case, and particularly the following passage on page 540 :—'Still, when a raj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction also involving a contradiction, to call this separate ownership, though coming by inheritance, at one sole and joint ownership, and so to constitute a joint ownership without the common incidents of co-parcenership." With deference, we can only remark that we find ourselves wholly unable to reconcile this view of the matter with the opinions expressed in the other judgments of their Lordships from which we have quoted, and by which in every aspect of the question before us we prefer to be guided. An impartible raj or zamindari must, it seems to us, be one of two things—either a separate estate conferring independent and absolute proprietary powers and carrying its own special rules of succession, or a joint ancestral estate pertaining and belonging to a joint undivided family. Because it is impartible it is not necessarily separate, for its impartibility does not 'destroy its nature as joint family property,' nor does it 'make the succession follow the succession of separate estates.' If, then, it can be considered joint property, is it to be so merely in name ? It must be conceded that the complete rights of ordinary coparcenership in the other members of the family to the extent of joint enjoyment and the capacity to demand partition are merged in, or, perhaps, to use a more correct term, subordinated to the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co-ownership. This is matter, however, more pertinent to the second question we shall presently have to consider. As to the first—namely, the competency of the plaintiff to maintain this suit—we think that, in the absence of any custom to the contrary, he and his father being Hindus and members of a joint Hindu family, and, as such, subject to the law of the Mitakshara, the estate pertaining to the raj of Mahauli must be regarded as joint family property, in which he has an immediate present interest and a right of succession as eldest son. In this view of the matter the first contention urged for the appellant fails.

" In support of his second point—namely, that the onus was on the plaintiff to establish the inalienability of the raj—the counsel for the appellant referred us to *Raja Udaya Aditya Deb* v. *Jadub Lal Aditya Deb* (1). We have very carefully perused that ruling of their Lordships of the Privy Council, as also the judgment of the High Court of Calcutta, from whose decision the appeal was preferred, and it seems to us sufficient to say that the property to which the litigation related was situated in Lower Bengal, where the parties would be subject to the Dayabhaga and not the Mitakshara. Under the general law, therefore, by which they were governed,

(1) L. R. 5 I. A. 61.

(1) L. R. 8 I. A. 248 ; I L. R. 8 Calc. 199.

the Raja had power to make alienations, and it was for those who denied his right to do so to establish a custom of inalienability that would override the general law. In the case before us, however, the Mitakshara is the law of the parties; and if we have correctly held that the Mahauli Raj estate is joint family property, then, save for urgent or necessary expenses of the family, no one member, even though he stands in the position of father or manager, can alienate it or any part of it without the consent of all. Such at least is the view of the Hindu law that has been always recognised by this Court in a long and, as far as we know, unbroken series of decisions from which we should hesitate to depart. It cannot be pretended that an absolute gift of seventeen of the best and most valuable villages of the raj to a junior wife is within the exception. On the contrary, to recognise such a power in a Hindu father would defeat the first principles of the Hindu law of inheritance and render the continuance of the joint family system impossible. We put it to the counsel for the appellant in the course of his argument, that if he carried it to its logical conclusion, a Raja might dissipate the whole of his ancestral estate, and of his own free will extinguish the raj; and he frankly admitted that he did not shrink from going that length. If for a moment we can entertain questions of policy, we doubt the expediency or propriety of allowing any such doctrine to go abroad. Looking at the matter in its practical aspect, and having regard to the origin and growth of these small powers or principalities, which are not without purpose or usefulness, we are not prepared to admit, at any rate so far as the law governing these Provinces is concerned, except where it is clearly overridden by well-recognised family custom, any such absolute disposing power in one member of a joint family over an estate which has some of the incidents at least of joint family property. For to do so would involve the inconsistency that while the Raja, or incumbent for the time being, in no way controls the succession after him, he may nevertheless effectually deprive his successor of anything to succeed to. Until corrected by higher authority, we must hold that the law of the Mitakshara is applicable to the present case, and that the defendant Raja, and the minor plaintiff, being members of a joint Hindu family, and the estate of the raj being joint ancestral property, the alienation impeached by this suit, not having been made for necessary purposes, is void and must be set aside.

"It only remains for us now to deal with the third contention put forward by the appellant's counsel, namely that a custom has always existed in the Mahauli raj whereby the Raja for the time being can make alienations of the character challenged in this suit, and that this has been done over a long course of years. They contended that the custom has been well established by their evidence; that some of these witnesses are alienees in possession of parts of the estate conferred on them under the operation of this custom by former Rajas; that no evidence was offered on the other side to contradict or qualify this testimony; and that it is not shown that objection was ever taken to any act of alienation previous to that which is the subject of this action."

In regard to the evidence relating to custom, the Judges said—

"We have to determine whether this evidence sufficiently shows (1) that previous Rajas had, by custom and usage, the absolute uncontrolled powers over the estate claimed by the defendants; (2) that they exercised such powers; (3) that they exercised them in the way and to the extent of the present alienation; and (4) that this custom is not only ancient and certain, but is also reasonable in itself as well as invariable and uncontradicted in its application;" and they concluded thus:—

"Having carefully considered this testimony, we cannot find that it establishes the fact, much less the custom, of any alienation so large in its scope, and

so absolute in its character, as that made by the present Raja in favour, exclusively and for ever, of his younger Rani. We are told of settlements on cadets of the Raja's house (*Babuai*): of pious and charitable gifts (*birt*, *shankalap*, and *muafi*), and of life allowances for maintenance or education of young Babus. We hear nothing of such an alienation as is challenged on behalf of the Raja apparent in this action, nor do we find anything to show assertion by any Raja, prior to the father of the plaintiff, of a right or title to permanently transfer the estate attaching to the raj. It remains to see how the documentary evidence helps the defendants' case. It is sufficient to say that it does not carry it a step beyond the point reached by the oral testimony. It indicates transfers by Rajas of certain bighas in mauzas by way of religious and charitable grants 'under the usual *birt* conditions and limitation:' transfers of waste land to Ranis and others to bring into cultivation on a muafi tenure; and gifts of parts of mauzas or of an entire mauza to 'Babus' in virtue of their *Babuai* right. There are two cases, only that wear an apparently different aspect. These are the alleged 'gifts' to the prostitute Musammat Roshan and to Rani Taliwand Kuari. The latter extended to three mauzas only, and the deed of gift has not been produced. We have noticed above the circumstances which favour the theory that it was not and absolute and perpetual conveyance of this property to the Rani, the donee, but partook rather of the character of a life settlement on her and *Babuai* for the sons she had borne to the Raja, donor; but even if it were, one such exceptional instance would be wholly inadequate to establish the custom prayed in aid by the defendants.

"As to the prostitute's gift that conveyed to her 'the muafii rights and interests' in one village only, mauza Koharwa, as her '*birt* property,' for which she paid malikana to the Raja, it is needless to point out that this differed *toto cœlo* from the assignment in perpetuity under the deed which is assailed in the present litigation. We are of opinion, for the foregoing reasons, that this appeal fails and should be dismissed with costs, and we order accordingly."

On this appeal,—

Mr. *R. V. Doyne*, for the appellants, argued that the judgment of the High Court was erroneous, and that the gift made by the Raja was valid. The plaintiff could not allege that he had an estate in the nature of a share in joint family property, the raj estate being impartible, and the plaintiff being, at most, entitled to maintenance. Also, on the evidence, it was clear that so much of the estate had been alienated from time to time, without objection made by any son or other expectant heir, that the proof of the custom affirming the right to alienate outweighed that of a custom to the contrary. It should, therefore, have been held that the Raja had power to alienate, and was not controlled in the exercise of such power by his son. No interest in impartible estate attached to a son at birth. The right in the case of impartible estate did not, whatever the son's rights were, commence at his birth, as in the case of ordinary estates under the Mitakshara, and there remained no reason for distinguishing such a case as the present from those already disposed of, by the Bengal High Court, in favour of the liberty of alienation. It had not been proved that custom prohibited such an alienation as had been made; on the contrary, the estate was shown to have been reduced in this way to less than it formerly was. Reference was made to *Raja Ramnarain Singh* v. *Pertum Singh* (1), *Maharani Hiranath Koer* v. *Baboo Ram Narayan Sing*(2), *Thakoor Kopilnath Sahai Deo* v. *The Government*(3), which cases it was contended were distinguishable from the present, as they related to ancestral estate not diminished

(1) 11 B. L. R. 397.
(2) 9 B L. R. 274.
(3) 13 B. L. R. 445.

by alienation. *Raja Udaya Aditya Deb* v. *Jadub Lal Aditya Deb*(1). *Stree Raja Yanumula Venkayamah* v. *Stree Raja Yanumula Boochia Vankondara*(2), *Neelkristo Deb Burmono* v. *Beerchunder Thakoor*(3). There was no ground for applying the Mitakshara rule as to sons controlling their father's alienation to an impartible raj estate, large portions of which had been subjected to customary alienation.

Mr. *F. H. Jeune* and Mr. *Reginald C. Saunders*, for the respondent, argued, in support of the judgment of the High Court, that the Raja's alienation was invalid. The raj estate was by custom impartible and descended to the eldest son; but the custom prevailed only to this extent; and no right of alienation, save to make such usual gifts as were made by way of *birt*, or for pious purposes, or other objects, such as maintenance of dependents, or moderate grants incidental to the Raja's position, had been shown to exist by custom. The gifts in question did not answer that description. Although by custom the right of succession belonged only to one member of the family at a time, the other members might in their turn succeed, and were also entitled to be maintained out of the income of the estate. Thus there was a joint interest in the estate, although there was no right to demand a partition. The custom regulating the inheritance only to a certain extent, the law of the Mitakshara, as a necessary result, prevailed as to all other rights.

It was not contended that the raj estate was inalienable only because it was impartible, but it was argued that it was inalienable in the absence of any proved custom of alienation, the ancient Hindu raj not admitting, save in the above exceptional cases, and for reasons of necessity, such as the general law regarded, alienation of the family estate. Although it was impartible, it was not separate estate; and in a qualified, if not in the full, sense it was joint family estate. In place of the ordinary right of partition there stood the special rule of inheritance, but beyond this customary rule, there was a community of interest derived from the general law; and the estate remained that of a joint family, in which each member, being entitled to interest from his birth, and to his turn of succession, had a joint interest. The question in this appeal, in effect, resolved itself into whether the burden of proving the custom, sufficiently to displace the Mitakshara law, had been discharged or not. They contended that to prove this custom of alienation was a burden cast upon those who supported it, and that it had not been discharged.

Reference was made to *Katama Natchiar* v. *The Raja of Shivagunga*(4), *Sri Rajah Yenumula Gavuridevamma Garu* v. *Sri Raja Yenumula Ramandora Garu*(5), *Neelkisto Deb Burmono* v. *Beerchunder Thakoor*(6), *Stree Raja Yanumula Venkayamah* v. *Stree Raja Yanumula Boochia Vankondora*(7).

The cases from the Bengal Law Reports cited in the argument for the appellants were also referred to.

Mr. *R. V. Doyne*, for the appellants, was not called upon to reply.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR RICHARD COUCH.

The question in this appeal is whether a gift of seventeen villages made by the appellant Raja Bhawani Ghulam Pal, on the 18th February, 1887, to the appellant, Rani Sartaj Kuari, his younger wife, is valid. The suit was brought by the respondent, as mother and guardian of Lal Narindar Bahadur Pal, the minor son of Bhawani Ghulam Pal, against the appellants. The plaint stated that the estate of Mahauli had been in the plaintiff's family for a very long time, and,

(1) L. R., 8 I. A., 248; I. L. R. 8 Calc. 199.
(2) 13 Moore's I. A. 333; 2 P. C. J., 546.
(3) 12 Moore's I. A. 523; 2 P. C. J., 467.
(4) 9 Moore's I. A. at p. 588; 2 P. C. J., 25.
(5) 6 Mad. H. C. 93.
(6) 12 Moore's I. A. 523; 2 P. C. J., 467.
(7) 13 Moore's I. A., 333; 2 P. C. J., 546.

according to the custom of the country and its neighbourhood and the provisions of Hindu law, the eldest son of the Raja succeeds to the estate; that since the establishment of the raj up to the time of bringing the suit, according to the provisions of Hindu law and the prescriptive and recognised usage, the successor of the Raja and occupant of the *gaddi* had had no other right under any circumstances except to enjoy possession of the estate during his lifetime, and use its income in maintaining his own respectability and dignity of the estate and in support of the members of the family, leaving the whole estate at the time of his death to his successor. The plaint then stated the gift and prayed for a decree for establishment and declaration of the plaintiff's right by voidance of the deed of gift. The written statements of the defendants alleged that Bhawani Ghulam Pal was proprietor of the estate and authorized to make any transfer, and it would be proved on inquiry that, on account of the separation of the family and other reasons, transfers of every description had been made in the family from of old, without any objection or obstruction being offered.

The history of the family is given in the judgment of the High Court. The estates, which are considerable, lie in the parganas of Tanda and Akbarpur, Fyzabad, in the province of Oudh, and Mahauli and Rasalpur in the district of Basti, in the North-Western Provinces. It would appear that, some 300 years ago, two brothers, named Alakdeo and Telakdeo, Surajbansi Rajputs, coming, as they alleged, from Kumaon, invaded the locality in which the property is situated, and killing one Kaulbil, the then Rajbhar, appropriated his lands and made them the nucleus of the present raj. Subsequently, for services rendered or for some other reason, they obtained from one of the Delhi Emperors the title of "Pal," which has now for a long course of years been attached to the family. It was admitted that the raj or estate was impartible; that there was in the family the custom of primogeniture; and that the family was governed by the law of the Mitakshara. The evidence as to the size of the estate originally was very vague, some witnesses saying it contained 600 or 700 villages and others 1,300. At the time of the gift in question it did not contain more than 100. The estate had been thus reduced by gifts by successive Rajas to younger members of the family, who were called Babus, for maintenance, and to Brahmins for religious or charitable purposes. The former classes of gifts were called "birt" and the latter "shankalp." The former were stated by the witnesses to have been of considerable extent, some being of 50 or more villages. It did not appear that a Raja had ever made an alienation by way of sale of any part of the estate. The Subordinate Judge framed the following issue:—

"Is the defendant competent to execute the deed of gift during his lifetime in favour of his second wife according to the family custom and Hindu law? Is the deed of gift legal? Has the plaintiff no right, according to Hindu law, to get it cancelled? Is the plaintiff alone competent to sue in the presence of other rightful heirs, and is the plaintiff's claim legal or not?" The Subordinate Judge decided that the deed of gift was invalid and made a decree for the plaintiff. He appears to have held that, the estate being impartible, it must also be inalienable, unless it was proved that the custom of making transfers had been prevalent in the family, and that the defendant had failed to prove this.

The defendants appealed to the High Court. That Court held that, in the absence of any custom to the contrary, the plaintiff and his father being Hindus and members of a joint Hindu family, and as such subject to the law of the Mitakshara, the estate pertaining to the raj of Mahauli must be regarded as joint family property in which he had an immediate present interest and a right of succession as eldest son. And they said that "they were not prepared to admit, at any rate so far as the law governing

these (the North-West) Provinces is concerned, except where it is clearly overridden by well-recognised family custom an absolute disposing power in one member of a joint family over an estate which has some of the incidents at least of joint family property," and that the defendant Raja and the minor plaintiff, being members of a joint Hindu family, and the estate of the raj being joint ancestral property, and the law of the Mitakshara being applicable, the gift, not having been made for necessary purposes, was void and must be set aside. Accordingly the appeal was dismissed with costs.

A similar view of the law was taken by the High Court at Calcutta in *Raja Ramnarain Singh* v. *Pertum Singh*(1).

The great distinction between the doctrine of the Mitakshara in regard to heritage and that of the Dayabhaga, the law in Bengal, is found in ch. 1, sec. 1, v. 27, where it is said that property in the paternal or ancestral estate is by birth, and the father is subject to the control of his sons and the rest in regard to the immoveable estate, whether acquired by himself or inherited from his father or other predecessor. In this case, if there were no family custom, the Raja's power over the estate would be governed by this law, and the gift in question would be void. But, as was said by this Committee in the Tipperah case, 12 Moore I. A. 542, "where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom." It is admitted that the raj is impartible, and that there is a custom of succession by primogeniture. The question how far the general law of the Mitakshara is superseded and whether the right of the son to control the father is beyond the custom is one of some difficulty.

The Judges of the High Court have quoted in support of their view passages from several judgments of this Committee. In all of them the question was as to the succession to the property on the death of the Raja or zamindar, and it was held that, for the purpose of determining who was entitled to succeed, the estate must be considered as the joint property of the family. The saying in the *Shivaganga* case(2) "the zamindari, though impartible, was part of the common family property," must be understood with reference to the question which was then before their Lordships. The question of the right of an eldest son or other son to control the father did not arise in that case. In *Doorga Pershad Singh* v. *Doorga Kunwari*(3) it is evident from what is quoted by the High Court that this question was not considered. In *Periasami* v. *Periasami*(4) the language is more guarded. It is said that the estate, though impartible, was up to the year 1829 in a sense the joint property of the joint family of the three brothers. The sense is shown by the previous sentence to be the younger brothers "taking such right and interests in respect of maintenance and possible rights of succession as belong to the junior members of a raj or other impartible estate descendible to a single heir." In *Raja Yanumula Venkayamah* v. *Raja Yanumula Boochia Vankondora*(5), which was quoted in the argument for the respondent for a passage in the judgment at p. 339, where the estate is spoken of as being part of the common family property, though impartible, the question in the suit being in regard to the succession, their Lordships at p. 340, after noticing evidence of the grants of portions of the estate, say: "These grants by way of maintenance are in the ordinary course of what is done by a person in the enjoyment of a raj or impartible estate in favour of the junior members of the family, who but for the impartibility of the estate would be co-parceners with him." This is a clear opinion that, though an impartible estate may be for some purposes spoken of as joint family property, the co-parcenary

(1) 11 B. L. R., 397.

(2) 9 Moore's I. A., at p. 593; 2 P. C. J., 25.
(3) I. L. R 4. Calc., 201.
(4) L. R. 5 I. A., 61; 3 P. C. J., 597.
(5) 13 Moore's I. A. 333; 2 P. C. J., 546.

in it which under the Mitakshara law is created by birth does not exist.

And in *Baboo Beer Pertab Sahee* v. *Maharaja Rajender Pertab Sahee*(1), the case of the zamindari of Hansapore in Behar, where the Mitakshara law prevails, an impartible raj, which by family usage and custom descended according to the rule of primogeniture, subject to the burthen of making Babuana allowances to the junior members of the family for maintenance, the question was whether the Raja had power to make a testamentary disposition of the raj to one member of his family to the prejudice of his other male descendants and co-heirs, their Lordships held that the foundation of the supposed restriction on the power of the father to make a will was the community of interest which the members of the family acquired by birth, and said "*cessante ratione legis cessat et ipsa lex.*"

The reason for the restraint upon alienation under the law of the Mitakshara is inconsistent with the custom of impartibility and succession according to primogeniture. The inability of the father to make an alienation arises from the proprietary right of the sons. "Among unseparated kinsmen, the consent of all is indispensably requisite, because no one is fully empowered to make an alienation, since the estate is in common." (Mitakshara, ch. 1, s. 1., v. 30).

The argument in support of the view of the High Court appears to be that although the sons do not take an interest by birth, so as to enable them to hold the estate or to have a partition, they have, as members of a joint family, some interest which is sufficient to enable them to prevent an alienation. The learned Judges of the High Court say: * "It must be conceded that the complete rights of ordinary co-parcenership in the other members of the family, to the extent of joint enjoyment and the capacity to demand partition, are merged in, or perhaps, to use a more correct term, subordinated to the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co-ownership."

In the case in the 11th Bengal L. R. 397, it seems to have been considered that the son was a co-sharer with the father. It is said (p. 405) in the judgment: "It appears to me, then, on the facts with which we have to deal, that we must take the property which is the subject of suit to have been ancestral property, which descended with the joint family in the ordinary way, subject to the effect of an established custom in regard to its partibility amongst the existing joint members of the family, and in this view of the facts it is evident that the father had no power against his son, who was unquestionably joint with him as regards this property, to alienate or incumber the estate excepting upon a justification of a family necessity." Both Courts appear to have thought that, in order to prevent alienation by the father, there must be a co-ownership in the son or sons.

The property in the paternal or ancestral estate acquired by birth under the Mitakshara law is, in their Lordships' opinion, so connected with the right to a partition that it does not exist where there is no right to it. In the Hansapore case there was a right to have Babuana allowances as there is in this case, but that was not thought to create a community of interest which would be a restraint upon alienation. By the custom or usage the eldest son succeeds to the whole estate on the death of the father, as he would if the property were held in severalty. It is difficult to reconcile this mode of succession with the rights of a joint family, and to hold that there is a joint ownership, which is a restraint upon alienation. It is not so difficult where the holder of the estate has no son, and it is necessary to decide who is to succeed. In Bengal there is joint family property, but where property is held by the father

(1) 12 Moore's I. A., 1; 2 P. C. J., 457.

as its head, his issue have no legal claim upon him or the property except for their maintenance. He can dispose of it as he pleases, and they cannot require a partition. The sons have not ownership while the father is alive and free from defect. Upon his death the property in the sons arises, and with it the right to a partition: Dayabhaga, ch. 1. In the case of the raj of Patcum in Chota Nagpore, which was admitted to be an impartible raj, and one in which the custom of primogeniture existed, it was held by the High Court at Calcutta(1) that it was necessary for the plaintiff to show that there was some custom which would prevent the operation of the general law, empowering alienation, and that proof of a custom that the estate descended to the eldest son to the exclusion of the other sons was not sufficient. On an appeal from this judgment this Committee was of opinion that it should be affirmed(2). *In Narain Khootia* v. *Lokenath Khootia* (3) it was held by the same High Court that the fact that the raj of Chota Nagpore is impartible does not prevent the Maharaja for the time being from making grants of portions of it in perpetuity. And it is stated in the judgment that the family is governed by the law of the Mitakshara. It had been previously held by the same Court in a case in 13 Bengal L. R. 445, where the plaintiff alleged that the descent of the estate was governed by Mitakshara law, and that by the usage and custom of the family the estate was impartible and descendible according to the law of primogeniture on the male heirs of the original grantee, the estate was not on the case stated shown to be inalienable. Their Lordships think this is the correct view.

If, as their Lordships are of opinion, the eldest son, where the Mitakshara law prevails and there is the custom of primogeniture, does not become a co-sharer with his father in the estate, the inalienability of the estate depends upon custom, which must be proved, or, it may be in some cases, upon the nature of the tenure. The Subordinate Judge and the High Court thought that the onus was upon the defendants (the appellants) to prove that by custom the estate was alienable, and they have found that the custom was not proved. Their Lordships have not to consider whether these concurrent findings should be questioned. They have to see whether it is proved that there is a custom of inalienability. The fact that there is no evidence of a sale of any portion of the estate is in the plaintiff's favour, but this is not sufficient. The absence of evidence of an alienation without any evidence of facts which would make it probable that an alienation would have been made cannot be accepted as proof of a custom of inalienability. For the foregoing reasons, their Lordships are of opinion that the plaintiff has failed to show that the gift ought to be declared to be invalid, and they will humbly advice Her Majesty to reverse the decrees of the lower Courts, and to decree that the suit be dismissed with costs in both these Courts. The respondent will pay the costs of this appeal.

Solicitors for the Appellants: *Messrs. Ford, Ranken Ford*, and *Ford*.

Solicitors for the Respondents: *Messrs. Bird* and *Moore*,

(1) I. L. R. 5 Calc. 113.
(2) L R. 8 I. A. 248; 4 P. C J. 290.
(3) I. L. R. 7. Calc. 461.

20th, 24th, 25th and 26th January and 10th March 1888.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Watson, the Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

Three appeals and a cross-appeal from the Court of the Judicial Commissioner of Oudh.

MAHARANI INDAR KUNWAR AND UDIT NARAYAN* ... } *Defendants,*

and

MAHARANI JAIPAL KUNWAR ... } *Plaintiff.*

Will, Construction of—Oudh Estates Act (I of 1869), ss. 8, 13 and 22—Unregistered will of talukdar—Meaning of "Maharani Sahiba" as applied to wife or wives—Decree for maintenance to widow under the will on which her suit was based, though her claim was for a different relief—Costs.

A talukdar, who died childless, but leaving two widows, bequeathed, by an unregistered will, to the "Maharani Sahiba" his entire estate, and gave a power to the same to adopt a son to him; also providing maintenance for both his widows after such adoption.

Held, that, to determine whether the will referred, in such bequest and power, only to the elder or to both of the testator's wives, extrinsic evidence of his intention was not admissible; but that the true construction was that which would indicate a reasonable and probable intention consistent with his views, as evidenced by his conduct, and his will generally. *Abbott* v. *Middleton* (1) referred to and followed.

As his views appeared to favour single heirship, and the whole state of things, as well as the language of the will, pointed to the owner of the estate being one, and the donee of the power to adopt being one: *Held*, that accordingly the words "Maharani Sahiba" were not here used as a collective term for both widows, but signified only the elder, although, when qualified, as they were in another part of the will, they might include both

Held, also, that as, if there had been no will, the junior widow would have succeeded to an estate expectant on the determination of the life-estate of the senior, but subject to be defeated by an adoption by the latter, this was an interest bringing her within the meaning of s. 13, para. 1 of Act I of 1869; so that maintenance bequeathed to her by the will was payable, notwithstanding its not having been registered (as that section required in other cases) as well out of the talukdari as out of the non-talukdari estate of the testator.

Held, also, that this had been rightly decreed to her, as she had sued upon the will, although her direct claim in her plaint was not for this, but to share the estate equally with the senior widow, a claim which was dismissed. *Held*, also, that the difficulty of construction having been caused by the testator himself, and in regard to the circumstances and position of the parties, costs should come out of the estate.

THREE appeals and cross-appeal, consolidated and heard as one, from a decree (27th March 1886) of the Judicial Commissioner of Oudh, reversing a decree (3rd October 1884) of the District Judge of Fyzabad.

These appeals arose out of a suit (3rd December 1883) relating to the will of the late Maharaja Sir Digbijai Singh, K.C.S.I., talukdar of Balrampur, who died on 27th May 1882, leaving two widows, of whom the senior adopted a son to him in 1883. This suit was brought by the junior widow, now respondent in appeals preferred by the defendants, against the senior widow and adopted son, claiming joint proprietary possession of a moiety of the late Maharaja's moveable and immoveable estate under his will, which was not registered within the thirteenth section of the Oudh Estates Act I of 1869, governing so much of the testator's estate as was talukdari. The principal questions on those appeals were: (1) The effect of ss. 13 and 22 of the above Act in regard to the junior widow's taking any benefit under a will not registered as the Act required; and (2) the construction of the will in regard to the use of the words "Maharani Sahiba," *viz.*, whether

* 15 Cowell's Ind. Ap. 127; 15 Calc., 725.
(1) 7 H. L. C., 389.

by them the late Maharaja indicated the junior widow, as included in that expression, or the senior widow alone. The Courts below differed as to the latter question, the first Court holding that the junior widow had no right to more than the maintenance allowance given her by the will, while the Judicial Commissioner held that her right to the beneficial enjoyment of her husband's estate was equal to that of the senior widow. When leave to appeal to Her Majesty was granted an order was made in execution by the Judicial Commissioner (22nd June 1886), which came before their Lordships in *Maharani Indar Kunwar* v. *Maharani Jaipal Kunwar*(1).

The late Maharaja, whose property, on account of his loyalty as talukdar of Balrampur, was exempted from the confiscation of March 1858, caused his name to be entered in lists II and V (2) of the lists prepared in accordance with s. 8 of the Oudh Estates Act, 1869, and it so remained during his life. He married his senior wife, Maharani Indar Kunwar, in 1860, and the Maharani Jaipal Kunwar, his second wife, in 1877; but had no issue.

The Maharaja's will on the 15th March 1878 was executed and attested in the manner prescribed by s. 19 of Act I of 1869, more than three months before his death, and was deposited in the Registration Office of Lucknow, under s. 42 of the Registration Act, III of 1877. This deposit was made under the belief that it was a registration within the meaning of Act I of 1869, s. 13 (3). The will was written in the Hindee character by a servant, Ram Shunker, deceased in 1882, in the same year as the Maharaja. The will, as translated by the Judicial Commissioner, omitting the preamble, and certain charitable and religious bequests, was as follows :—

"At this time, that is to say up to the date of the writing of this document, I have no issue by my Khas Mahal; but, by the mercy or Almighty God, I am not yet without hope. If, by the favour of Almighty God, issue should be born of my Khas Mahal, whether it be of the senior or of the junior Maharani Sahiba, then let it be owner of the entire riasat and of all the property, moveable and immoveable, like myself, without the writing of any will. Perchance at some time I may lose hope of issue by my Khas Mahal; then in that case I have power to adopt whom I please; and having executed a deed in due form I will cause it to be verified by the Government, and let that adopted son, as if he were an actual son, be the owner after me of the entire riasat like myself; provided that after the adoption no issue be born of my Khas Mahal, for in that case let the issue of my Khas Mahal be considered the owner of the riasat and of all the assets, moveable and immoveable, and let the adopted son have nothing to do with it, only let that adopted son be held entitled to receive food and raiment by way of maintenance during his life; and let not the amount of this maintenance exceed six thousand (6,000) rupees yearly. Should I have no issue by my Khas Mahal, and in my lifetime find no opportunity to adopt, then in that case, without alienating moveable assets, let the Maharani Sahiba after me be during her/their lifetime the owner of the entire riasat and of the property moveable and immoveable. There is to the Maharani Sahiba full authority to select, and within two years to

(1) L. R., 14 I. A., 1; I. L. R., 14 Calc., 290; 4 P. C. J. 757.

(2) List II is of the talukdars whose estates, according to the custom of the family, on or before the 13th day of February 1856, ordinarily devolved upon a single heir.

List V is of the grantees to whom sanads or grants have been or may be given or made by the British Government, up to the date fixed for the closing of such list, declaring that the succession to the estates comprised in such sanads or grants shall thereafter be regulated by the rule of primogeniture.

(3) Act I of 1869, s. 13, provides that "no talukdar or grantee, and no heir or legatee of a talukdar or grantee, shall have power to give or bequeath his estate, or any portion thereof, or any interest therein, to any person not being either (*a*) a person who, under the provisions of this Act, or under the ordinary law to which persons of the donor's or testator's tribe and religion are subject, would have succeeded to such estate, or to a portion thereof, or to an interest therein, if such talukdar or grantee, heir or legatee, had died intestate; or (*b*) a younger son of the talukdar or grantee, heir or legatee, in case the name of such talukdar or grantee appears in the third or fifth of the lists mentioned in s. 8, except by an instrument of gift, or a will executed and attested not less than three months before the death of the donor or testator, in manner herein provided in the case of a gift or will, as the case may be, and registered within one month from the date of its execution."

adopt, according to the custom of the family, and according to the Hindu law, such minor male child of my family as $\frac{\text{she}}{\text{they}}$ may think fit. Should (God forbid) the said adopted son die in his minority, then again there is authority to the Maharani Sahiba to make a second adoption according to the above conditions; and let that adopted son be, in place of an actual son, the owner of the entire riasat and the assets, moveable and immoveable, seated on the throne like myself. No one else can have any sort of claim; but may Government have a care that, in accordance with the above detail and decision, a son be adopted by the Maharani Sahiba within two years. Should, peradventure, the Maharani Sahiba die without adopting any son, or should that adopted son die in his minority, or without issue and intestate, then in that case let that person of my family be owner of my riasat and of all and several moveable and immoveable property, who may be lawfully held entitled according to the custom of the riasat. It will be proper for Government, during the minority of the heir, to manage, as Court of Wards, all the assets of the riasat, with such advice and arrangement that the opinion of the District Officer and the Maharani Sahiba and some Agent who is fit and a well-wisher of the riasat be associated therewith, in order that the settlement of the riasat and welfare of the ryots may prosper. Let the minor heir be well educated and let the necessary expenses of the riasat be met as may on occasion be expedient. Besides the expenses of the riasat let the two Maharani Sahiba receive for their personal expenses from the money of the riasat according to the subjoined detail, fifty-five thousand rupees a year, and let the two Maharani Sahiba spend this as each may please. This is the detail—the Bari Maharani Sahiba thirty thousand (30,000) rupees, and the Choti Maharani Sahiba twenty-five thousand (25,000) rupees. Let the rest of the cash assets, and the moveable property, remain in the treasury of the riasat, under the care of the Guardian of the Court of Wards; and on the heir attaining his majority let him make over to the said heir all the cash assets of the riasat, and the property, moveable and immoveable, and let that heir be like myself, the owner of the entire riasat, seated on the throne It will be proper for my representatives to maintain for ever according to the instructions, and to provide according to the subjoined detail for such expenditure as is prescribed, on account of the alms-house, and dispensary, and school, and worship at the Shrine of Bijulipur, and the marriage of maidens of the Janwar-lineage, and may Government always take care that this endowment subsists; let it never be discontinued."

The parties accepted this translation as correct, except where the words $\frac{\text{"her"}}{\text{"their"}}$ and $\frac{\text{"she"}}{\text{"they"}}$ appear. The senior widow contended in her appeal that they should have been "her" and "she" only. After the death of the Maharaja the senior widow obtained an order for "dakhil kharij," or mutation of names, in the Revenue Register at the Collectorate, in her favour, as being entitled to the property under the will. She obtained a certificate also under Act XXVII of 1860 to collect the debts. And on the 8th November 1883 she publicly adopted the minor Udit Narain Singh, the son of Guman Singh, who already, on the previous 26th October, had executed a deed by which he made a gift of his son for the purpose of his being so adopted under s. 22, clause 8 of Act I of 1869. By that deed Guman agreed that the senior widow should retain control of the estate, and should have the power, if need should arise, of ejecting his son, and of adopting some one else in his place.

On the 5th December 1883 the senior widow executed a deed acknowledging the adoption, and registered it. It stated: "The said adopted son will be the proprietor of the said estate and property, both moveable and immoveable, like a real son." On the 28th March, however, she executed another document stating that the adopted son would only succeed to the Bulrampur estate after her death; and on the 8th April 1884 Guman Singh executed a deed acknowledging that what was stated in the last document, in regard to the succession, was correct.

Meanwhile, the Junior widow filed her plaint, stating that her husband had bequeathed to his wives, both of them, the proprietary right for life in the entire estate, giving permission to them both to adopt; that, therefore, the adoption was illegal; and that the plaintiff was entitled to (*a*) partition of the moveables into two equal shares, and delivery to herself of one share; (*b*) joint proprietary possession in equal shares of the immoveable property; and (*c*) mesne profits of the latter share from the date of the Maharaja's death. The written statement of the senior widow relied on the non-registration of the will, and an

exclusive bequest to herself. She alleged that the power to adopt was to her alone, the Maharaja having, as he was competent to do in regard to the general estate, barred the operation of the ordinary Hindu law by his will; and that under the Oudh Estates Act I of 1869 the plaintiff could not claim to inherit any part of the taluk dari. The defendant Udit Narain Singh, through his guardian *ad litem* the other defendant, repeated the above defence, adding that, even if the action of the late Maharaja in barring the operation of the ordinary Hindu law could be disregarded, still the plaintiff's claim, so far as it was based upon Hindu law, must fail by reason of the fact that by the immemorial custom of the family none of the family property was partible; also that the plaintiff was not competent to challenge the validity of his—Udit Narain Singh's—adoption, nor could his status, or his rights to the property, be matter for adjudication in this suit; and that he had been validly adopted.

The District Judge fixed issues raising the main questions, whether the junior widow was entitled to the moiety claimed by her upon the construction of the will and in regard to non-registration, and also whether the adoption of Udit Narain by the senior widow was invalid on account of its having been effected by her alone.

In his judgment he stated that it was admitted by both parties, and accorded with the decision in *Abdul Razzak* v. *Amir Haidar*(1) that the will had not been registered as s. 13 required, the mere deposit at the registration office not having been sufficient. In regard to the effect of non-registration he held that the junior Maharani was a person who would have succeeded to an interest in the Maharaja's estate if he had died intestate, referring also on this point to the last mentioned case, and to *Ajudhia Baksh* v. *Rukmin Kunwar*(2). Going through the will, he remarked that the testator appeared to have sought to render it easy of construction, and that it was not going too far to say that if he had directed the servant, Ram Shunker, to write of the senior widow as "Bari Maharani," this suit would not have been occasioned by the parties attempting to establish their own meaning for the words "Maharani Sahiba."

As to the meaning of those words, he had regard to the ordinary notions of Hindus in respect of the following, *viz.*, that the widow is considered half of the husband bodily; that if he dies, leaving more than one widow, they share his property, though it is considered as vesting in one individual; and that, in the Sanskrit texts, widows are spoken of, in the singular number, as one person. He referred to Macnaghten's Hindu Law, Chap. II. Inheritance; Viramitrodaya, Chap. III, part 1; Colebrooke's Dayabhaga, Chap. XI. But he was of opinion that other considerations outweighed the effect of these. Admitting extrinsic evidence to remove what he considered to be a latent ambiguity, there being two persons, in fact, to whom the description applied, he held that it applied to the senior widow alone.

He accordingly decreed to the junior widow the annuity of Rs. 25,000 from the date of the adoption, and dismissed the residue of her claim against both defendants.

An appeal to the Judicial Commissioner against this judgment and decree was made by both parties, the appeal of the senior Maharani and of the adopted son Udit Narain being limited to the award of the annuity which they contended had not been asked for by the respondent in the suit, and if asked for could not have been granted to her by reason of ss. 13 and 24 of Act I of 1869.

On the 30th June 1885 the Judicial Commissioner, under s. 566 of the Code of Civil Procedure, remitted the case for the trial of certain additional issues which he thought necessary, directing the District Judge to take such further evidence as might be required, and he

(1) L. R., 11 I. A., 121; I. L. R., 10 Calc., 976; 4 P. C. J. 555.

(2) L. R., 11 I. A., 1; I. L. R., 10 Calc., 482; 3 P. C. J., 497.

allowed the junior widow to be heard in support of her claim as based upon Hindu law.

These issues, in effect, were as to what part of the property in suit was governed by the provisions of Act I of 1869; whether the claim had reference to Hindu law; and whether the rights of the adopted son could be disposed of in this suit.

The District Judge returned a statement of the talukdari estate, and a further judgment that the claim was governed by family custom and by the will, with reference to the provisions of Act I of 1869; and that the rights of the adopted son could not be determined in this suit, they existing both as against the senior and the junior widow, the latter being only competent to dispute the validity of the adoption so far as to show that it was not in accordance with the will.

The above judgment and decree were reversed by the Judicial Commissioner, who found that the Maharaja, when he used the words "Maharani Sahiba" in his will, used them as a Hindu would use them in the general sense of the word "wife," and as including both his wives. It appeared to the Judicial Commissioner that the only contingency on which the junior widow would become entitled to the allowance of Rs. 25,000 was the Government's complying with the Maharaja's wish that it should take over the management of the estate on the adoption of a son.

After giving the meaning of "Maharani," the judgement continued thus:

"In the opening of the third part of the will the change from Khas Mahal to Maharani Sahiba comes in, and from the way in which it is made it is plain that the Maharaja uses the words as an Englishman would have used the words 'my widow.' Should I have no issue by my Khas Mahal, and in my 'lifetime find no opportunity to adopt, then in that case . . . let the Maharani Sahiba after me be, &c.' And in the language of the Shastras the word 'wife' (widow) designates the class. Thus we read in the Mitakshara (passage omitted in Colebrooke's translation, on which subject see note in Mayne, s. 468; the text is given in 3 Madras H. C. at page 451). 'There (in that order) the first to inherit is the wife (patni); is she who is made by marriage . . . . . singular number, because the clause is denoted.' And in the Viramitrodaya (Chapter III Part I, s. 2) we read: 'The singular number (in the term 'patni' in Yajnavalkya's text, s. 1) implies the class.' And again (*ibid*, s. 10): 'The wives of the same class with the husband shall take the estate, dividing it amongst themselves.' Hence the singular number in the term 'wife' is to be taken to be used with the intention of designating the 'class.'

"It seems to be impossible to read the letters addressed by the Maharaja to his two wives without feeling that, although he treated the senior Maharani with respect, his fondness was greater for his younger wife, and that the Maharaja, when making his will, was favourably disposed towards the junior Maharani is evident from the provision which he made for her maintenance in the fifth part of his will. Few were better acquainted with the provisions of Act I of 1869 than the Maharaja, and the last clause of s. 25 of that Act provides that, 'in the case of a junior widow of the deceased, the maximum amount of the annuity shall be one-half of the maximum amount to which a senior widow of the deceased would be entitled under the former part of this section.' The Maharaja, however, when alloting the Rs. 55,000, which he assigned to 'the two Maharani Sahiba,' gave the junior Maharani only Rs. 5,000 less than to the senior Mahrani. He gave the senior Maharani Rs. 30,000, and the junior Maharani Rs. 25,000. Under the Hindu law a widow to whom a power to adopt has been given cannot be compelled to execute that power —*Bamun Das Mukarjea* v. *Musammat Tarinee*(1) and *Uma Sunduri Debi* v. *Sourobini Debie*(2); and the Maharaja showed by appeal to Government to see his wishes carried out, that he felt the precariousness of his position in this respect. On the theory of the respondents, if the senior Maharani had died without adopting, the junior Maharani could not have adopted; and the Maharaja died testate, having provided by his will (fourth part) that if the Maharani Sahiba died without adopting, the next heir, according to the custom of the family, should take the estate. Even if the senior Maharani did adopt, it was by no means certain—the event has shown it to have been improbable—that Government would comply with the Maharaja's wishes, and take over the estate on the adoption of a son, the only contingency on the occurrence of which the junior Maharani would become entitled to her allowance of Rs. 25,000 a year. In no case was it likely that for at least two years would even this remote contingency occur.

"Is it then conceivable that the Maharaja, with his evident wish to treat his younger wife favourably, would have executed a will which, if

(1) 7 Moore's I. A., 169 at 190; 1 P. C. J. 169.
(2) I. L. R., 7 Calc., 288, 9 C. L. R., 83.

the contention of the respondents regarding its meaning be correct, would have left the junior Maharani—certainly for two years, probably for ever—to the pittance, not exceeding Rs. 3,000 a year which the provisions of s. 26, Act I of 1869, would procure for her? To me this seems inconceivable; and in face of the fact that when the Maharaja (in the fifth part of his will) was allotting his widows' allowances he allotted to the junior Maharani Rs. 25,000 per annum, I find it impossible to hold that this was the Maharaja's meaning. The only construction of the will which makes it consistent throughout is, as it seems to me, that which supposes the Maharaja's intentions to have been that, till the event contemplated by the fifth part of the will, both the widows should enjoy the estate.

"The securing a male heir by adoption on failure of actual issue is the central idea of the Maharaja's will. At the time of the execution of the will the age of the Maharaja was about 60, and (assuming their ages to be correctly stated in their Mukhtarnamahs filed in this suit) the ages of the Maharanis were,—senior Maharani 41, junior Maharani 19. The Maharaja had not then met with the accident which ended in his death, and probably looked forward to another ten or fifteen years of life. By that time his elder widow would have become old and his younger widow would have reached mature age. The Maharaja was most careful to provide for all possible contingencies in his will, and one cannot suppose that these contingencies did not strike him. Is it conceivable that, with two persons capable (the one on failure of the other) of performing his wishes as to the adoption, the Maharaja would have excluded one of those persons, and so reduced the chances of his wishes being fulfilled? And yet that is what we must suppose if we hold that the words 'Maharani Sahiba' in the third part of the will denote the senior Maharani only. If, on the other hand, we read the words Maharani Sahiba as meaning 'my wife (widow) in the ordinary Hindu sense of the words, *i.e.*, as comprising the class, there is no difficulty at all, and the will is consistent throughout.

"It has been said the Maharaja was careful to explain that by Khas Mahal he meant both ladies; why then, if by Maharani Sahiba he also meant both ladies, was he not equally careful to protect his meaning as regards the words 'Maharani Sahiba'? The answer is obvious The words 'Khas Mahal,' 'Chief Consort,' left unexplained, might, contrary to the Maharaja's intentions, have not unnaturally been restricted to the senior Maharani. As regards the words 'Maharani Sahiba,' a term common to both the ladies, there was no such danger, and no explanation was therefore needed."

Regarding the adoption, the Judicial Commissioner was of opinion that the junior widow could dispute it, but only so far as to show that the adoption was not in accordance with the Maharaja's will. His judgment continued thus:—

"I am of opinion that the plaintiff is not competent to challenge the validity of the adoption, so far as the fact that it was effected without her consent is concerned, but that it is open to her to show, if she can, that it was otherwise invalid. I think that the plaintiff is not competent to challenge the validity of the adoption on the ground that she did not consent to it, because adoption is a religious ceremony, and the senior widow is therefore the proper person to perform it."

"The point as regards co-widows, and their powers in the matter of adoption, seems never to have been directly raised in the Courts of the North-Western Provinces, Bengal, or Madras; but as regards the right of the elder widow to precede the younger in the performance of religious duties, we have authority in the text books current in those provinces. Thus we read in Jagannath's Digest of Hindu Law, translated by Colebrooke (Edition Madras, 1874, Vol. II, page 124)—'Yajnyawalkya: If there be several wives of his own class, such duties are lawfully performed by no other than the eldest. Chandeswara and Vijnyaneswara: If the first married wife be alive she must be preferred in all matters relating to religion. Vishnu: If many wives of his own class be living with the eldest alone should the husband conduct business relating to acts of religion, even though his younger wives be dearer to him.'

"The point as regards co-widows has been raised in Bombay in the case of *Rakhmabai* v. *Radhabai*(1). Messrs. West and Buhler give (3rd Edition, Vol. I, page 412) the following *bywashtha*: '*Question.*—A deceased man has left two widows. . . . . The property of the deceased has passed into the hands of the elder widow. Can the younger widow claim a share of the property? and who has the right to adopt a son? *Answer.*—The younger can claim a share. The right of adoption belongs to the elder.' And again, in Vol II, page 977, Messrs. West and Buhler gave the following *placita* of the Shastras: 'The eldest of several widows has the right to adopt. On the death or disqualification the right passes to the next widow in order of marriage' 'A man having directed an adoption, the elder widow may adopt against the wish of the junior.' And this view was the view taken by the High Court of Bombay in *Rakhmabai* v. *Radhabai*(1)"

On the question whether the adoption of Udit Narain was duly effected, the judgment was as follows:—

"That the boy was a fit subject for adoption is not now denied. That the ceremonies of the adoption were not duly performed is *prima facie*

(1) 5 Bom. H. C., 181.

in the last decree improbable; and it has, I consider, been established by the defendants by good and sufficient evidence (which is entirely uncontradicted) that all was rightly done. The evidence of Pandit Jugal Kishore is particularly clear as to the unconditional gift and acceptance of the boy, according to the forms of Shastras, as a son to the Maharaja. And this being so, in my opinion *factum valet*."

The result of his judgment was thus stated:—

"I have now to find the relief to which the plaintiff is entitled. I consider that from the date of the Maharaja's death until such time as the Government shall see fit to take action in the terms of the fifth part of the Maharaja's will, under the provisions of s. 162 of the 'Oudh Land Revenue Act, 1876, the plaintiff is entitled to equal beneficial enjoyment with the senior Maharani—see *Bhagwandeen Doobey* v. *Mayna Baee*(1) and *Jijoyiamba Baya Saiba* v. *Kamakshi Bayi Saiba*, and *Bayi Saiba* v. *Jijoyiamba Bayi Saiba* (2)—of the estate, but I am unable to hold that she is entitled to a partition of the moveables. The moveables must, I consider, follow the Raj, which is impartible. It may be said, 'but in the will (third part), although the Maharaja carefully forbids the alienation of the immoveable property, he makes no such provisions as regards the immoveable property.' This is true, but the Maharaja was no doubt sensible of the difficulties in the way of forbidding the alienation of the moveables These largely consist of elephants, horses and cattle, and to have barred their alienation would have caused great practical inconvenience. That the Maharaja did not contemplate a dissipation of the moveables of the estate is plain from the fact that he provides in the fifth part of his will for their being taken over by the Court of Wards. I consider that her position as the elder widow gives the senior Maharani, as in the case of coparceners, a preferable claim to the care and management of the joint property. I think further that, under all the circumstances of the case, the costs of this litigation should be taxed as between solicitors and client, and be charged against the estate. The respondent's objection is decreed and the decree of the District Judge of Fyzabad, awarding the plaintiff Rs 25,000 per annum, is set aside.

From this decree all parties appealed, and their appeals were ordered to be heard together.

On these appeals,—

Sir *Horace Davey Q.C.*, and Mr. *R. V. Doyne* (Mr. *C. W. Arathoon* with them) for the Maharani Indar Kunwar, the senior widow, argued that, as the devolution of the talukdari property of the late Maharaja, had he died intestate, would have been governed by s. 22 of the Oudh Estates Act, 1869, and as the junior widow could not have come in to the succession under the rules prescribed by that section, she was not a person who would have succeeded to any interest in the Maharaja's talukdari estate within the meaning of s. 13. She, therefore, could not take any bequest of such estate under a will not registered as that section required.

Neither under that Act, nor under the ordinary law "to which persons of the testator's tribe or religion were subject," could she have come in, the talukdari estate having been entered, and remaining, in lists II and V, prepared under s. 8. Moreover, even if under the ordinary law the junior widow could have come in, she was not a person entitled to succeed, within the meaning of the words "would have succeeded to such estate, or to a portion thereof, or to an interest therein," used in s. 13, those words expressing "following immediately after." This the junior widow would not do, as she would only be entitled to maintenance under s. 24, relating to the maintenance of surviving relatives of a talukdar. Maintenance was not an interest in the estate within the meaning of s. 13, and the person entitled to it was not entitled, by force of s. 24, to any charge on the estate, having only a personal claim against the owner for the time being. A mere hope of succession was not included. No one, in fact, was entitled to "succeed," after the Maharaja's death, except the senior Maharani. Thus the junior widow was excluded, and the estate having been entered in list II, the necessary presumption was that it devolved upon a single heir, in this case the senior widow, until such time as the effect of the adoption under the will should operate. The will not having been registered in compliance with the requirements of the Oudh Estates Act, 1869, the junior widow not coming within the exceptions of s. 13, any disposition made by it of talukdari

(1) 11 Moore's I. A., 487 2 P. C. J. 327.
(2) 3 Mad. H. C., 424.

property in her favour failed. Reference was made to *Ajudhia Baksh* v. *Rakmin Kuar*(1) and *Abdul Razzak* v. *Amir Haidar*(2).

As regarded the junior widow's claim to an interest in the non-talukdari property, it was untenable upon the true construction of the will, which gave to the senior widow all the estate for her life, or until adoption by her of a son to the Maharaja. The junior widow was not entitled jointly with the senior, nor entitled to anything but maintenance, taking no interest under the bequest. This rested upon the construction of the whole will which left no doubt of the meaning of "Maharani Sahiba." In these words there was at most a latent ambiguity, and extrinsic evidence was therefore admissible to explain them. The senior widow alone was intended to be referred to by these words, which were in the singular number, and not used, as they were in another part of the will, with the qualification of "donon." Without however relying on the testimony as to the Maharaja's probable intention, his intention was plainly visible upon the dispositions of the will, *viz.*, that an adopted son should inherit his possessions with an intermediate estate to his senior widow, the junior widow receiving only maintenance.

Reference was made to the Indian Succession Act, X of 1865, ss. 62, 67; Act XXI of 1870; Act I of 1869, ss. 3, 8, 13 and 22; Act I of 1877, s. 3, illustration *a*; *Doe d. Gord* v. *Need*(3); *Doe d. Allen* v. *Allen*(4).

As regards the adoption, whilst it was contended that it had not been invalidated by the junior widow's having had no part in it, it was submitted that it did not concern the senior widow's case as against the junior, the intention of the testator having been shown to be, upon the true construction of the will, in favour of the senior widow alone. Reference was made to *Ramasami Aiyar* v. *Vencataramaiyan* (5); *Chitko Raghanath Rajadiksh* v. *Yanaki*(6).

Sir *Charles Russell, Q.C.*, and Mr. *J. Righby, Q.C.* (Mr. *J. Brook Little* with them), for the appellant, Udit Narain Singh, contended that he had been duly adopted to the Maharaja according to the terms of his will; so far maintaining the case of the senior widow as to rely on her having been the sole donee of the power to adopt, and having made a valid adoption, although without the concurrence of the junior widow. Reference was made to Act I of 1869, s. 8; and it was argued that even if the authority to adopt had been given to the junior widow jointly with the senior (which, however, was not admitted) the adoption would have been valid as made. The construction of the will, as placed upon it by the Court of first instance, that the senior widow was solely empowered to adopt, was correct, the late Maharaja having contemplated speedy adoption, and there being no ground for supposing that he would have wanted the junior widow to be included in the power. It was admitted that two persons might not unusually, and not improperly, be described by a collective term; but here there was no ground or occasion for resorting to the construction that the two widows were meant. And the adoption, made by a proper person, had been plenary and unconditional; the estates of the adoptive father having thereupon vested in the adopted son, who stood in the line of succession from that moment, no omission having occured in the requisite ceremonial. Where Act I of 1869 applied, the adoption was under it, and as to the property to which it was inapplicable, the succession, in virtue of the adoption, followed by the operation of the ordinary law. Reference was made to *Kalliprossuno Ghose* v. *Gocool Chunder Mitter*(7).

(1) L. R. 11 I. A., 1; I. L. R., 10 Calc., 482; 4 P. C J, 947

(2) L. R, 11 I. A., 121; I. L. R., 10 Calc., 976; 4 P. C. J., 555.

(3) 2 M. and W., 129.

(4) 12 Ad. and E., 451.

(5) L. R., 6 I. A., 196; I. L. R., 2 Mad., 91; 3 P C J., 42.

(6) 11 Bom H. C, 199.

(7) I. L. R. 2 Calc., 295.

The conditions which the senior widow afterwards sought to impose were of no effect; and whether resort was had to the Hindu law, or to Act I of 1869, the adopted son's title was superior, and upon it the Judicial Commissioner should have adjudicated as between him and the junior widow. Correct as the judgment was in holding the junior widow disentitled to have the adoption invalidated in order that she might have part in it, still it should not have been held that she was entitled to the joint beneficial enjoyment, together with the senior, until the Court of Wards should assume management of the estate. The minor's title by his adoption was independent of any action on the part of that authority, and the Court's undertaking the management could not be made a condition precedent to his taking the ownership as adopted son. He had, having been adopted, already come in with a complete title.

Mr. *R. B. Finlay, Q.C.*, and Mr. *J. D. Mayne* (Mr. *T. T. Forbes* with them) argued that the appeals of the senior Maharani and of Udit Narain Singh should be dismissed; but that at the same time the judgment and decree of the Judicial Commissioner were incorrect upon some points, and should be varied in favour of the junior widow, the Maharani Jaipal Kunwar. The suit required and admitted an adjudication as to the rights of Udit Narain Singh as the adopted son so far as those rights affected the claim of the plaintiff, because her contention was that his adoption was invalid, and the first ground of its invalidity was want of concurrence in the act of adoption on the part of the junior widow. For this reason the judgment should have declared the adoption invalid. The probabilities were against the testator excluding one of his widows from the power to adopt, which was connected with binding usages, all of which regarded the widows as one for this purpose. He had used words that might include both widows. Then it was for those who would exclude the junior to show the ground for so doing. As to the argument derived from "capriciousness," and the improbability of the power being entrusted to two, the probabilities were all the other way. Reference was made to West and Buhler's Hindu law, 3rd Edition, 977, Book III, s. 3; Steel's Law of Castes; *Rakmabai* v. *Radhabai*(1). The ambiguity of the expression "Maharani Sahiba," with the absence of any indication as to which of the widows was meant, went far to show that both were intended. The words "khas mahal" ordinarily denoted the first married wife, but the testator used it to denote both his wives, whom he distinguished, when he wished to distinguish them, by using the adjectives "Bari" and "Choti." But as regards the testator's intention, it was improbable that he intended the junior Maharani to be left out; yet the construction contended for by the appellants would have left her without any provision for her maintenance, from the date of her husband's death until such time as an adoption over which she was to have no control should take place, the annuity not coming into effect till the adoption should be made. Moreover, there being no gift of a power to the survivor of the widows, this did much to show that both were intended. The adoption, moreover, was bad for other reason, *viz.*, as having been made under restrictions and conditions inconsistent with a complete giving and receiving, and not in pursuance of the authority given by the will; also because the ceremony was not completed by a writing as required by Act I of 1869, s. 22, cl. 8; also, because the provisions in the will as to adoption, and the consequent devolution of the property, could not operate for want of registration under s. 13. Reference was made to *Vinayak Anandrav* v. *Lakshmibai*(2); *Chitko Raganath Ragadikah* v. *Yanaki*(3); *Ramasami Aiyan* v. *Venkata Narayan*(4);

(1) 5 Bom H. C., 181 (193).
(2) 1 Bom. H. C., 117.
(3) 11 Bom. H. C., 199.
(4) L. R., 6 I. A., 196; I. L. R., 2 Mad., 91; 3 P. C. J., 42.

Thakurain Ramanand Koer v. *Thakurain Raghunath Koer*(1). [Sir R. COUCH referred to *Raja Vellanki Venkata Krisna Rao* v. *Venkata Rama Laksami Narsayya*(2).] Taking the will as a whole, the contention was that under it the two Maharanis received equal rights of management and possession of all the estate of the late Maharaja. And the Court below was wrong in holding that the moveable property, and such part of the immoveable property as was non-talukdari, followed the rule of succession applicable to the taluk. This by no means followed so far as impartibility was concerned; and as to such property at all events the junior Maharani was entitled to her share. Nor was it correct to say that her rights would be determinable upon the Government, as Court of Wards, at any time taking possession of the talukdari on behalf of the minor; for such possession could hardly be taken under the authority of a will that was not registered within s. 13 of Act I of 1869; and if and when taken, would be subject, by the effect of the rules binding on the court of Wards, to the provisions of the will in favour of the widows. So far the judgment of the Court below required modification. But that Court was right in holding that the will, as far as it conferred any rights on the junior Maharani, was not invalid for want of registration. The provisions as to registration did not apply to any but the talukdari property held under Act I of 1869; and, as applicable to talukdari property, they did not exclude a widow. The object of s. 13 was to prevent the talukdar from bequeathing his estate by an unregistered will to a stranger. Within the line of succession he might confer estate by an unregistered will upon such a relation as a widow, who was qualified to take in spite of non-registration; first, under sub-s. 9 of s, 22 of Act I of 1869; secondly, as having an interest in the estate within the meaning of s. 13 Moreover, had the talukdar died intestate, the junior widow would have had an interest expectant upon the death of her co-widow, there being in the case of intestacy a kind of statutory settlement on the first widow for life, on the second in default of adoption and contingently on her surviving—see s. 22 of Act I of 1869. The right to maintenance was an "interest" in a certain sense. For the meaning of this term, see Act I of 1877, the Specific Relief Act, s. 3; *Jumoona Dassya Chowdhrani* v. *Bamasoonderi Dassya Chowdhrani*(3); *Anand Koer* v. *Court of Wards*(4).

Act I of 1869 made maintenance a charge on the estate, as also did the general law under certain circumstances —see *Juggernanth Sawant* v. *Odhorane Narain Koomaree*(5).

As to the widow's power to adopt and its nature in general, see *Sri Raghunadha* v. *Sri Brojo Kishore*(6).

Mr. *J. Rigby, Q.C.*, replied, contending that the junior widow could have no right to dispute the adoption as made, not having shown that she took a joint estate with the senior widow under the will, and not being referred to on the authority given by the husband. He also cited *Sri Raghunadha* v. *Sri Brojo Kishore*(6).

On a subsequent day, 10th March, their Lordships' judgment was delivered by

THE RIGHT HON. LORD MACNAGHTEN.

The question in these consolidated appeals turns mainly on the construction and effect of the will of the late Maharaja Sir Digbijai Singh. The parties to the contest are the two widows of the Maharaja, and an infant adopted by the senior widow. The litigation was commenced by the junior widow, who challenged the validity of the adoption and

(1) L. R., 9 I. A., 41; I. L. R., 8 Calc., 769; 4 P. C. J., 316

(2) L. R, 4 I. A., 1; I. L. R., 1 Mad., 174, 3 P. C. J., 669.

(3) L. R., 3 I. A., 72; I. L. R., 1 Cal., 289; 3 P. C. J., 602.

(4) L. R., 8 I. A., 14; I L. R., 6 Calc., 761; 3 P. C. J., 198.

(5) 20 W. R, 126.

(6) L. R. 3 I. A., 154; I L. R., 1 Mad., 69; 2 P. C. J., 583.

claimed joint proprietary possession of the immoveable property and one-half share of the moveable property of the late Maharaja, of which the senior widow had taken sole possession. The junior widow founded her claim on the contention that the expression "Maharani Sahiba" was used in the will as a collective term comprehending both widows. The senior widow maintained that it applied to her alone. The District Court held that the junior widow's claim was not well founded, and that she was only entitled to maintenance under the will. The Judicial Commissioner, on the other hand, held that the junior widow was included in the expression "Maharani Sahiba." He treated the adoption as valid. He held that the moveables followed the raj, which was impartible. But he considered that the junior widow was entitled to equal beneficial enjoyment with the senior widow until the Government should take action by assuming the management of the estate in accordance with the request contained in the will. In the meantime the management of the estate was to remain in the hands of the senior widow. The conclusion of the Judicial Commissioner has not given satisfaction to any of the parties to the litigation. The senior widow and the adopted son have both appealed from the whole decree. Up to a certain point the case of the adopted son is the same as that of the senior widow. They differ only in their views as to the consequence of the adoption and the present rights conferred thereby—matters which cannot come into question in this suit. The junior widow has also appealed. She appeals from the decree so far as it holds the adoption valid and the moveables impartible, and so far as it commits the management of the estate to the senior widow.

In order to construe the will it is necessary to understand the testator's position. The testator was one of the few Oudh chieftains who remained loyal to the British Government during the troubles of 1857 and 1858. At that time he was Raja of Balrampur. His services were acknowledged by the Government. He was excepted by name from the Proclamation which confiscated proprietary rights in the soil of Oudh, and named first in the exception. He received the title of Maharaja and large grant of land. He seems to have been a person of considerable intelligence. As President of the Oudh Talukdars' Association, he took an active part in framing the Oudh Estates Act, 1869. He was also for a time, and at the time when that Act passed, Member of the Legislative Council of India. His name was entered in Lists Nos. II and V mentioned in s. 8 of the Act. List No. II is "a List of the Talukdars whose estates, according to the custom of the family on and before the 13th day of February 1856, ordinarily devolved upon a single heir." List No. V is "a List of Grantees to whom sanads or grants have been or may be given or made by the British Government up to the date fixed for the closing of such list, declaring that the succession to the estates comprised therein shall thereafter be regulated by the rule of primogeniture." On both those lists his name remained during his life.

In 1860 the Maharaja married the Maharani Indar Kunwar, who is generally referred to in these proceedings as the senior widow. In July 1877 he married the Maharani Jaipal Kunwar, who is the plaintiff in the suit.

On the 15th of March 1878 the Maharaja executed his will. The Maharani Indar Kunwar was then 41, and the younger Maharani 19. The will was deposited in the Registration Office of Lucknow, but owing to a misapprehension of the law which seems to have been prevalent at the time it was not duly registered under the Act of 1869. It is evident, however, that it was the intention of the Maharaja to comply with all the formalities required to give full effect to the dispositions of his will.

On the 27th of May 1882 the Maharaja died, leaving his two wives surviving. He died without legitimate issue, and

without having adopted a son in his life time. Besides his talukdari estates he left non-talukdari property and moveables of considerable value.

Their Lordships now proceed to consider the testator's will. The effect of non-registration in the view which their Lordships take of the true construction of the will will be considered afterwards.

The scheme of the will, apart from the bequest which has given rise to the present controversy, is clear and consistent throughout. In the various contingencies which it contemplates the will shows no little thought and consideration. The testator observes that at the time of writing his will he was childless, but not without hope of issue—when all hope of issue became lost he might adopt a son, and he proposes to do so if opportunity should occur—after adoption a son might be born to him. These events might happen in his lifetime. After his death, in default of issue, natural-born or adopted by himself, he authorizes the adoption of a son. The son so adopted might die in minority, and then there would be occasion for a second adoption; lastly, in default of issue, and in default of an adopted son, it was his wish that his property should devolve on the person lawfully entitled according to the custom of the riasat. The testator provides for all these different events. And in each case he is careful to repeat and emphasize his wish that the estate shall devolve in its integrity, and that his successor, whoever he may be, shall, like himself, be seated on the guddee, the owner of the entire riasat, and of all the property belonging to it, moveable and immoveable. So far there seems to be the most anxious desire on the part of the testator that the principle of succession which had prevailed in his family for generations, and which was recognized in the talukdari lists, the rule of single heirship—one owner at one time—should be maintained unimpaired.

Turning now to the passages of disputed meaning, it is to be observed that the expression "Maharani Sahiba" occurs there in connection with three different purposes which present themselves to the mind of the testator. In the first place, it is to be found in the bequest of the estate contingent on the testator leaving no natural born or adopted son. In that case the testator declares his will as follows: "Let the Maharani Sahiba after me be during lifetime the owner of the entire riasat, and of the property moveable and immoveable." Before the word translated "lifetime" there is in the original a possessive pronoun, but it may be translated either "her" or "their," and so it throws no light on the question. Maharani is a Hindu word, signifying the wife of a Maharaja; Sahiba is Arabic for "lady." Both words are in the singular number. They are however throughout used as governing verbs in the plural. No stress was laid on this circumstance. It was not disputed that the plural verb might properly be used out of courtesy, as a mark of respect. The use of the word malik, "owner," in the singular is more significant. The learned Counsel for the junior widow suggested that the word was used like an adjective, and that it would not be in accordance with the idiom in which the will was written to use the plural, malikan. But no proof was offered in support of this suggestion. And though the use of the word malik in the singular is certainly not conclusive, it is not without weight, especially as it is the same word that is used by the testator in reference to the position of the single heir, on whom, whether a natural-born son, or an adopted son, or the heir according to the custom of the riasat, the property was to devolve in its entirety. On the whole their Lordships are of opinion that the language of the bequest rather points to the exclusive possession of one than to the joint possession of two.

A similar observation applies to the provisions relating to adoption after the testator's death. "There is to the Maharani Sahiba full authority to select and within two years to adopt" a male child of the testator's family. In the event of the child so adopted dying in his mi-

nority, "again there is authority to the Maharani Sahiba to make a second adoption." The testator expresses a wish that "Government may have a care that . . a son be adopted by the Maharani Sahiba within two years. Should, peradventure, the Maharani Sahiba die without adopting any son," the estate is to go to the person lawfully entitled according to the custom of the riasat. The nature of the case seems to require that the donee of the power should be one individual. The language rather points in that direction. If the testator intended to commit the selection and adoption to his two widows jointly, it is certainly singular that no provision should be made for the not improbable event of their disagreeing. If he intended to give the power to the survivor after the death of one, it would have been more natural that he should have said so. It was urged that a joint power of adoption is in accordance with Hindu notions, that in some parts of India, when adoption has not been forbidden by a husband, the power falls to the widows jointly, and that the law provides for the case of a disagreement. That is true in Western India, but there is no evidence that such a custom is known in Oudh. It seems hardly applicable to the case of a family where the custom is single heirship and not joint possession.

The third passage, where the expression occurs, is in the clause relating to the provision to be made for the administration of the estate under the Court of Wards during the minority of an infant heir. The testator expresses a wish that in the management there should be associated "the district officer and the Maharani Sahiba, and some agent who is fit and a well-wisher of the riasat, . . . in order that the settlement of the raisat and welfare of the ryots may prosper." It is difficult to conceive that a man of the testator's experience and knowledge of the world could have proposed that his two widows should both sit on this council, or that he could have seriously imagined that the settlement of the riasat and the welfare of the ryots would be promoted by an arrangement so calculated to foster jealousies and encourage intrigues.

Though no one of these passages taken by itself may be conclusive upon the question, it seems to their Lordships that they all point in the same direction, and that taken together they lead almost irresistibly to the inference that one person, and one person only, was intended by the designation Maharani Sahiba where the meaning is in dispute.

This inference is much strengthened by the passage in the will where the testator provides maintenance for his widows. There he uses the same words, "Maharani Sahiba," but to prevent any mistake he adds the word "two," and speaks of "the two Maharani Sahiba." It was said that in this passage the word "two" was added because the intention was that the allowance should not be joint, but that each should have a separate share. But it is to be observed that this explanation hardly accounts for the use of the word "two" in the first sentence, where the allowance, which is afterwards divided between the two ladies, is lumped together as one sum of Rs. 55,000.

Again, in that passage in which the testator speaks of his hopes of issue where he uses the expression "Maharani Sahiba," he does not leave the expression unexplained.

We find then that in connection with the three purposes—of succession to the estate, selection and adoption of a heir, and representation on an administrative council during the heir's minority—in each of which a great noble in the testator's position might be expected to have in view one person, and one person only, the testator uses the expression "Maharani Sahiba" without qualification and without addition. In the two passages in which he must have had both his wives in view, in connection with the possibility of issue and in connection with the usual provision for widowhood, he qualifies the words "Maharani Sahiba" by other

words which leave no doubt as to his meaning.

It is not disputed that, if one person only is intended, that person must be the senior widow, who was, for some years before the Maharaja's marriage with the plaintiff, the only person entitled to the style and dignity of Maharani Sahiba, and who after that marriage still retained the pre-eminence of an elder wife.

One argument which was urged on behalf of the junior widow remains to be noticed. It was founded on the maintenance clause. It was argued that according to the true construction of this clause, having regard to its language and its position in the will, no allowance by way of maintenance was payable until an adoption was made. It was said too that it would be absurd to give an allowance out of the income of a property to a person entitled to a life estate in the whole. Starting from this position, the learned Counsel for the junior widow contended that, if the appellants were right, the result would be that there would be no provision for their client so long as the senior widow chose to keep the estate. But nothing, they said, was more unlikely than that the testator could have intended to leave his favourite wife, as they termed the junior widow, either dependent on the miserable pittance to which she would be entitled under the Act of 1869 or a pensioner on the bounty of a jealous rival, especially considering that both widows were ultimately to be placed almost on an equality as regards their maintenance. The only way to escape from a conclusion so improbable was to hold that the testator intended to give a joint life estate to both widows.

There would be much force in this argument if it rested on a sound foundation. But their Lordships think that it depends upon an erroneous construction of the provision for maintenance. That provision is no doubt apparently bound up with the clause which deals with the expenses of the riasat during the minority of an infant heir. But their Lordships consider that, upon the true construction of the will, it is a substantive and independent provision, and that maintenance runs from the death of the testator. There is no difficulty in the concurrent gifts to the senior widow of an allowance for maintenance and a life estate in the whole property. The life estate was not intended to continue at farthest beyond two years, and the duty of the senior widow would be to adopt as soon as possible. So long as the life estate might last, her allowance for maintenance would of course merge in the life estate.

Their Lordships desire to add that, in their opinion, this is not a case in which it would be proper to admit extrinsic evidence of the testator's intention. It is rather a case in which the difficulty created by the particular expression ought to be solved by adopting the construction which bespeaks a reasonable and probable intention, and rejecting that which would indicate an intention unreasonable, capricious, and inconsistent with the testator's views, as evidenced by his conduct and by the dispositions of his will which are not open to controversy.

The rule is laid down by Lord Cranworth in words which have often been cited with approval: "When, by acting on one interpretation of the words used, we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, then, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most grammatically accurate"—*Abbott* v. *Middleton*(1). Here the argument from reasonable and probable intention is in favour of the construction which is rather the more obvious of the two.

Their Lordships have already expressed their view as to the right of the junior widow to maintenance from the testator's

(1) 7 H. L C., 89.

death. They think that the maintenance is payable out of the whole estate, talukdari as well as non-talukdari, notwithstanding the non-registration of the will. If the Maharaja had died intestate the junior widow would have succeeded to a life estate in the talukdary property expectant on the determination of the life estate of the first married widow, but subject to be defeated by an adoption made by the first married widow, with the consent in writing of her husband. It seems impossible to say that that is not an interest in the estate within the meaning of s. 13, sub-s. 1 of the Act of 1869. Their Lordships do not think it necessary to express any further opinion on the construction of this most difficult section.

Although their Lordships hold that the claim put forward by the junior widow is not well founded, and that the order of the Judicial Commissioner granting relief on the footing of that claim must be discharged, they think it will be proper to make a declaration as to the allowance for maintenance to which they consider the junior widow entitled under the will.

As regards costs, the difficulty has been created by the testator himself, and under the circumstances, having regard to the position of the parties, their Lordships think it right that the order of the Judicial Commissioner as to costs should not be disturbed, and that the costs incurred in the execution proceedings in the Court of the Judicial Commissioner and the costs of all parties in these consolidated appeals should be paid, as between solicitor and client, out of the testator's estate. The appeal in the execution proceedings does not call for any observation beyond this, that the appeal seems to have been necessary, and that no blame of any sort is to be attributed to any of the parties who appeared before their Lordships on the application for special leave to appeal. The order of the 22nd June 1886 will be discharged.

Their Lordships will therefore humbly advise Her Majesty that an order be made to the following effect: Discharge the order of the Judicial Commissioner, except so far as it provides for costs. And in lieu of the decree of the District Court, and of so much of the order of the Judicial Commissioner as is discharged, declare that according to the true construction of the will of the testator the junior widow is entitled only to an annuity during her life of Rs. 25,000, commencing from the day of the testator's death, and that such annuity is charged upon and payable out of the income of the entirety of the testator's estate. Discharge the order of the 22nd June 1886. Direct that the costs of all parties incurred in the execution proceedings in the Judicial Commissioner's Court be taxed as between solicitor and client, and paid out of the testator's estate.

The costs of all parties of these consolidated appeals will also be taxed as between solicitor and client, and paid out of the testator's estate.

Solicitors for the appellants Maharani Indar Kunwar and Udit Narain Singh: *Messrs. T. L. Wilson & Co.*

Solicitors for the Maharani Jaipal Kunwar in the consolidated appeals: *Messrs. Watkins & Lattey.*

4th and 7th February 1888.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Watson, the Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

On Appeal from the Court of the Judicial Commissioner of Oudh.

RAJA MADHO SINGH* ... *Plaintiff*,

and

AJUDHIYA SINGH AND OTHERS ... *Defendants.*

Oudh Rent Act (XIX of 1868), *ss.* 41 *and* 83, *cl.* 4—*Liability of lessees in the position of under-proprietors not entitled to sub-settlement—The Oudh Sub-Settlement Act (XXVI of* 1866)—*The Oudh Land Revenue Act (XVII of* 1876), *s.* 158.

A decree, in 1869, of a Settlement Court, upon the compromise of a claim, made by village co-parcenary occupiers, to an order for sub-settlement as against the talukdar, declared the claimants to be entitled to a heritable, but not transferable, lease of the village, at a rent leaving twelve per cent. profit to the lessees. For default in payment of rent this lease was decreed to be in future liable to cancellation "by the decree of any competent Court, according to any law which may be in force in Oudh with respect to persons holding an under-proprietary right in land." Afterwards, in 1879, the parties agreed that the lessees might be dispossessed for non-payment of rent. Default occurred, decrees for arrears were made in 1882 and 1883, and remained unsatisfied. In a rent suit brought by the talukdar *held*, that he could not sue in a Revenue Court to have the lease cancelled, under the terms of the Oudh Rent Act (XIX of 1868), either by virtue of the decree, or of the subsequent agreement.

APPEAL from a decree (9th April 1885) of the Judicial Commissioner of Oudh, affirming a decree (18th September 1883) of the Commissioner of Rae Bareli, affirming a decree (23rd June 1883) of the Deputy Commissioner of Sultanpur.

In the suit out of which this appeal arose the present appellant sued the first respondent and twenty-four other defendants for cancellation of a lease to them of a village, Chak Pindaria, pergunnah Amethi, in zillah Sultanpur; and also for possession.

The terms of the lease were stated in a decree (2nd October 1869) of a Settlement Court; and were followed ten years afterwards by an agreement executed between the parties on 18th March 1879.

The present proceedings having been taken by the talukdar on non-payment of decrees for rent, under the Oudh Rent Act (XIX of 1868), the question now was whether they were authorised under that Act, of which s. 83 states in cl. 4 that suits "for the ejectment of a tenant, or for cancelling any lease on account of the non-payment of arrears of rent, or on account of a breach of the conditions of such lease," may be brought under it.

The lease originated thus: In 1869 a claim was made before a settlement officer by the present respondents, who were villagers occupying mouzah Pindaria in co-parcenary, for sub-settlement of that village to be made with them and as between them and the Raja of Amethi, in whose taluk the village, which he held in maafi, was situate. The claim as made was not allowed, not fulfilling the requirements of the rules regarding sub-settlements and other subordinate rights of property in Oudh, which are scheduled and made law by the Oudh Sub-Settlement Act (XXVI of 1866). By those rules, to entitle a claimant to sub-settlement, he must show that he possesses an under-proprietary right; and also that he, or some person from whom he has inherited, has by virtue of that under-proprietary right, and not merely through privilege granted on account of service, or by favour of the talukdar, held the land under contract (theka) with some degree of continuousness since the village came into the taluka. He also must have been entitled to profits exceeding

* 15 Cowell's Ind. Ap. 77; 15 Calc. 515.

twelve per cent. of the gross rental. However, in regard to this, a decree (2nd October 1869) was made in terms of an agreement to which the parties came, similar to another agreement between the Raja and other village claimants in the neighbouring mouzah of Thauraj, *viz.*, that the villagers should have a heritable but not transferable lease of mouzah Pindaria, the rent to be fixed at a sum which would leave the lessees twelve per cent. of the profits, provided that the jumma for the first ten years was to be Rs. 2,999. The amount of the lease on the twelve per cent. principal was open to be redetermined at the expiration of every ten years, and the Raja was to be responsible for payment of putwaris, chowkidari, and other village expenses. No fresh title was to accrue to the lessees owing to the concession, and the lease itself was to be liable to "cancellation for default by the decree of any competent Court, according to any law which might be from time to time in force in Oudh with respect to persons holding an under-proprietary right in land."

On the 18th March 1879, the villagers being then in arrear, a written agreement, in which they described themselves as "thekadars" of village Pindaria, was made between them and the Raja as follows:—

"Whereas up to this date the arrears of rent, decreed and not decreed, on account of joint lease of village Pindaria, amounting to Rs. 3,757, are due from all co-sharers of the aforesaid village within the period of limitation, and in consequence thereof, we are liable to be dispossessed at once by the Court; but as the Raja Madho Singh Bahadur has, at our request, granted us time, hence we, of our own will and consent, do execute this deed of agreement on our own behalf and on behalf of such of our under co-sharers as live in commensality with us, or over whose share we hold possession, and hereby covenant that we shall repay the aforesaid money without interest in accordance with the instalments specified below. Should there be breach of promise on our part as regards the payment of any of the instalments, the Raja Saheb Bahadur shall be at liberty to annul the arrangement about payment by instalments and to recover the money out of our property of all description, charging us at the same time with interest at Rs. 2 per cent. per mensem from this date, and in return for this default to eject us and our co-sharers from the lease of the entire village through the Civil Court, or in any other way he may be able to do it, without following the rules (of procedure) laid down in the Rent Act, and after such ejectment it shall not be lawful and proper for us to cultivate any land, or take the fruits and flowers of any fruit-tree, without previously obtaining a fresh lease. Should we do so, then, according to the actual capability of the soil, rent at the rate of Rs. 7 per bigha for land producing two crops in a year, Rs. 3-8 per bigha for land yielding one crop in a year, and As. 8 for each Mahua tree may be recovered from us; and the Maharaja Saheb Bahadur shall in future be at liberty to dispossess us of that (land and tree) also, and in each year, until the rent instalment for that year shall be paid up, the money paid by us shall not be credited on account of this agreement."

Afterwards on 20th April 1882 the Raja obtained a decree against the villagers for Rs. 2,534, arrears of rent; and again on 27th February 1883 a similar decree for Rs. 1,865. The plaint in the present suit prayed for possession of Pindaria under cl. 4, s. 83, of the Oudh Rent Act, for non-payment of rent, amounting to Rs. 10,241, with cancellation of the lease.

The defence was that the defendants were prepared to pay all the arrears really due, but were not liable to the extent alleged. At the hearing before the Deputy Commissioner of Sultanpur, an issue was fixed raising the question whether the defendants were liable to have the lease cancelled and to be dispossessed on proceedings under the Oudh Rent Act, 1868, either under the terms of the

settlement decree of 1869, or of the agreement of 18th March 1879.

The Deputy Commissioner held that neither such cancellation nor dispossession could be decreed under the Oudh Rent Act (XIX of 1868), its terms not being applicable to such a lease.

The Commissioner of Rae Bareli, on appeal, first dealing with the agreement of 1879, decided that its breach was not matter for a Revenue Court. He then considered the question of the outstanding arrears of rent, whether they were a cause of suit under Act XIX of 1868, and concluded that they were not. On this point his judgment was as follows:—

"The question whether the respondents are liable to ejectment under the Oudh Rent Act on account of the outstanding arrears of rent under the two decrees of 1882 and 1883 still remains to be decided. Section 41 and cl. 4 of s. 83 refer to tenants only and not to under-proprietors, and one of the stipulations of the decree under which the perpetual lease is held is 'that the lease is liable to cancellation for default by decree of any competent Court, according to any law which may be from time to time in force in Oudh with respect to persons holding an under-proprietary right in land.'

"Now the Oudh Rent Act was in force when the lease was ratified, and it could hardly have been the intention of the Courts sanctioning such lease to allow ejectment under s. 41* and cl. 4 of s. 83. Had that above-quoted stipulation been absent the lessees might be regarded in the position of tenants, and ejectment under cl. 4 of s. 83 for outstanding arrears might have been justified; but in the face of this stipulation they must be treated as under-proprietors are treated. Under-proprietors cannot be ejected under s. 41 and cl. 4 s. 83, hence the respondents cannot be so ejected either.

"It is contended that by such a decision all remedy on the part of the appellant against the respondents is practically barred, but s. 158 of Act XVII of 1876 provides, in my opinion, a very sufficient and effective remedy, and it is under that section that appellant should have proceeded instead of allowing hopeless arrears to accumulate as he has done. It is fortunate for the respondents that their lease is a non-transferable one under existing circumstances."

On an appeal to the Judicial Commissioner this judgment was upheld. The Additional Judicial Commisioner, Mr. T. B. Tracy, referred specially to an argument for the appeal based upon the language of s. 41 of the Oudh Rent Act (XIX of 1868); and held that the defendants were not placed on the footing, as regards liability to be sued under the Rent Act, of tenants with rights af occupancy. The decree of 1862 treated them as on the footing of under-proprietors. In regard to the words of the decree as to cancellation for default by the decree of any Court according to the law on the subject of persons holding under-proprietary rights, his judgment was as follows:—

"If it had been the intention of the Settlement Court that the respondents should be on the footing of tenants with rights of occupancy (as contended for the appeal), all this part of the decree would be mere surplusage, as the superior-proprietors could, as a matter of course, sue for the ejectment of the lessees under the provisions of the Rent Act on the occurrence of any breach in the conditions of the lease. It was clearly the intention of the Settlement Court that the respondents should be treated in case of default as defaulting under-proprietors, and that the lease should be liable to be cancelled in the same way and under the

* Section 41 of Act XIX of 1868 is as follows: "No tenant having a right of occupancy, or holding under an unexpired lease, or special agreement, or decree of Court, shall be ejected otherwise than in execution of decree for ejectment: provided that if the tenant have a right of occupancy in the land from which the landlord desires to eject him, the decree shall not be made unless at the date of the decree a decree against such tenant for an arrear of rent in respect of such land has remained unsatisfied for fifteen days or upwards."

same rules* as sub-settlements might be annulled. I concur with the Commissioner that the appellant's proper remedy lay in proceeding under s. 158 of Act XVII of 1876 The respondents' tenure is precisely that which is described in that section They hold 'under a heritable, nontransferable lease, the rent payable under which has been fixed by the Settlement Officer.'"

The appeal was accordingly dismissed, and the decree dismissing the suit upheld.

On this appeal Mr. *R. V. Doyne* and Mr. *C. W. Arathoon* appeared for the appellant.

The respondents did not appear.

For the appellant it was argued that the respondents, not having obtained a decree for, or shown themselves entitled to, sub-settlement, and having admitted, both by the agreement of 1879 and in the course of the proceedings throughout, that they were liable to ejectment upon default in payment of arrears of rent, were in the position, as regards liability to be sued, of occupancy tenants. This was not altered by the words in the decree of 1862 referring to their liability as under-proprietors. Neither at the time of the decree nor afterwards was there any law, if not that which the plaintiff invoked, that was peculiar to the case of the latter. The Courts below should have held that the Oudh Rent Act (XIX of 1868) was applicable. The term "under-proprietor," as used in the decree of 1862, must be understood in a large sense, as comprehending all rights inferior to the proprietary right.

Their Lordships' judgment, after Counsel for the appellants had been heard, was delivered by

THE RIGHT HON. SIR BARNES PEACOCK.

Their Lordships are of opinion that the three Courts below, who were unanimous in their judgments, are correct in the opinions which they have formed. It is clear that under the decree, by way of compromise, the parties had not a right to cancel the lease under the terms of the Rent Act.

With regard to the agreement, their Lordships are of opinion that the Courts below were right in holding that the plaintiff could not seek to enforce that agreement by suing in the Rent Court. His only remedy would have been to have sued in the Civil Court upon that agreement.

Under these circumstances their Lordships will humbly advise Her Majesty to affirm the decree of the Judicial Commissioner.

Appeal dismissed.

Solicitors for the appellant: *Messrs. T. L. Wilson & Co.*

7th February 1888.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Watson, the Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

On Appeal from the High Court in Bengal.

GUNGA NARAIN GUPTA* *Plaintiff,*

and

TILUCKRAM CHOWDHRY AND OTHERS ... } *Defendants.*

Plaint, Form of—Civil Procedure Code, 1882, *ss.* 50 *and* 53, *sub-section d—Charges of fraud—Pleading—Amendment of plaint—Rejection of plaint.*

A plaint charging fraud must set forth particulars; general allegations, however strong the words, not even amounting to an averment of fraud of which a Court can take notice

After an examination of the plaintiff's pleader by the Court to discover whether there were grounds, which did not appear, for an amendment, a suit was dismissed on the defects of the plaint, which, charging fraud, did not set forth a good cause of action in regard to the above.

* 15 Cowell's Ind. Ap 119, 15 Calc., 533.

Held, that dismissal was not the proper mode of disposal of the suit; but the plaint should have been rejected, a course which would have enabled the plaintiff, if he found himself at a future time in a position to make averments giving relevancy to an action, to present a fresh plaint.

APPEAL from a decree (1st June 1885) of the High Court, affirming a decree (15th April 1884) of the Subordinate Judge of Goalpara.

The question raised in the proceedings which gave rise to the suit in which this appeal was brought was as to the validity of an auction-sale in execution of a decree (25th April 1882) of which the first and second of the five respondents were the holders, the other respondents being the purchasers at the sale. The property sold (18th April 1883) was the plaintiff's interest in two separate shares in two zemindaries in the district, and they realized Rs. 21,500.

A petition by the present plaintiff to have this sale set aside under s. 311, on the ground that it had not been duly proclaimed, and that the execution purchasers had deterred others from bidding, was rejected (29th December 1882), and the High Court, McDONELL, and Tottenham, JJ., confirmed the order. The Judges said: "With regard to the point that the execution-purchasers had improperly deterred others from bidding for the property, it may be that they did deter others, but even if they did so, this would not, we think, be an irregularity in conducting the sale within the meaning of s. 311. Certain rulings have been pointed out to us, in which the decree-holder, having obtained permission from the Court to bid at the sale, in one case, openly within hearing of the Court made disparaging remarks to deter others from bidding for the property; and in the other case, a mokhtar, in the interests of the decree-holder, directly discouraged other bidders by his talk. Regard being had to the fact that they were the decree-holders at whose instance the sales were being held, and that the Court ought to have interfered, it was held that there had been material irregularity in conducting them. We are not, however, prepared to hold that acts done by bidders or by bystanders at a public sale without the knowledge of the Court, or private understandings between intending bidders, will amount to irregularities in conducting it, such as will render it liable to be set aside under s. 311."

The plaintiff brought the present suit (18th December 1883) against the decree-holders and the auction-purchasers to have the sale set aside, and the property restored to him, on the ground that the latter had fraudulently, and in collusion with the two decree-holders, prevented other persons from bidding at the sale, and so purchased the property for Rs. 21,500, the market value being Rs. 75,000. In separate written statements the defendants denied the fraud, urging that the plaint did not state distinctly how the fraud had been affected, and alleging that the value of the property did not exceed Rs. 21,500.

From the statement of the plaintiff's pleader, who was examined by the Subordinate Judge, the plaintiff's case appeared generally to be that the auction-purchasers, whom he called the Gowripore zemindars, had induced the decree-holders to sue for the debt due from the judgment-debtor, and had done hostile acts against him, in reference to the land, the subject of the auction-sale in dispute. According to him, persons on behalf of the auction-purchasers had induced others not to bid at the sale.

The Subordinate Judge's judgment was to the effect that, even if the plaintiff could prove the statements in the plaint and those of his pleader, there would be nothing to justify the Court in finding the sale had been brought about by fraud; that it was stated that certain people, on behalf of the Gowripore zemindars, went about inducing people not to bid; that that was exactly the ground the plaintiff took in his former application, and the High Court had then held that, even if they did deter others, it would not be an irregularity in conduct-

ing the sale within the meaning of s. 311. That if deterring others from bidding is not such an irregularity as to warrant the sale being set aside on that ground, it was not possible to obtain the same end merely by changing the name of the transaction and calling it a fraud instead of an irregularity. "It may be improper to induce people to abstain from bidding at a sale, but it is hardly a fraudulent proceeding." The suit was, therefore, dismissed with costs.

Against this decision the plaintiff appealed.

The judgment of the High Court (FIELD and O'KINEALY, JJ.) was as follows: "What the fraud on the part of the defendants, the decree-holders, was, is not stated in the plaint, and was not stated when the plaintiff's vakil was examined on his behalf." The appeal was accordingly dismissed.

On this appeal,—

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon* appeared for the appellant.

Mr. *J. Graham, Q.C.*, and Mr. *J. H. A. Branson* for the respondents.

For the appellant it was argued that the Subordinate Judge's judgment, based on the former decision of the High Court which only had reference to irregularity within the meaning of s. 311, did not cover the whole ground. The statements in the plaint were not so vague as to preclude the settlement of issues for the purpose of a hearing on the merits, the question being a wider one than the petition under s. 311 had raised. It was whether the property had been wrongfully disparaged by interested parties, with fraudulent intent, before the sale, with injury and loss resulting to the judgment-debtor. The High Court, instead of affirming the dismissal of the suit, should have remanded it. The dismissal in any view of the case was wrong, and the Court, even on its own showing, should have done no more than reject the plaint. The appellant now relied upon this, that, even if, of itself, the deterring others from bidding at a sale did not amount to a material irregularity within the meaning of s. 311, it might, when coupled with allegations of the property having been sold much below its market value, and coupled with charges of acts showing fraud and collusion, amount to a cause of action.

Reference was made to *Rukhinee Bullub* v. *Brojonath Sircar*(1); *Subbaji Rau* v. *Srinivasa Rau*(2); *Fuller* v. *Abrahams*(3); *Watson* v. *Birch*(4); Sugden's Vendors and Purchasers, 14th edition, Chap, 1, s. 5; Benjamin on Sales, Bk. III, Chap. 2.

For the respondents it was argued that no distinct act, constituting fraud, had been charged, and the case rested where it was, when the application under s. 311 had been rightly rejected.

Reference was made to *In re Carew's estate*(5); *Mason* v. *Armitage*(6); Dart's Vendors and Purchasers, 6th edition, Chap. III, s. 4, and cases collated at p. 121.

Mr. *R. V. Doyne* replied.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD WATSON.

This is an action brought by a judgment-debtor for the purpose of setting aside a judicial sale; and there are two sets of defendants, the one being the judgment-creditors and the other the auction-purchasers. The ground upon which the action is laid is said to be fraud.

The 50th section of the Civil Procedure Code (Act XIV of 1882) provides that every plaint must contain a plain and concise statement of the circumstances constituting the cause of action, and where and when it arose. By s. 53, sub-section *d*, the Judge before whom the plaint depends is authorised, if it does not disclose a sufficient cause of action, to adopt one or other of two courses: he may at or before the first hearing either

(1) I. L. R., 5 Calc., 308.
(2) I. L. R., 2 Mad., 264.
(3) 3 Brod. and Bing., 116.
(4) 3 Ves. Jun., 51.
(5) 26 Beav., 187.
(6) 13 Ves., 38.

reject the plaint, or allow an amendment, to be made upon the spot or within a limited time, upon such condition as to payment of costs as he may think proper. When fraud is charged against the defendants it is an acknowledged rule of pleading that the plaintiff must set forth the particulars of the fraud which he alleges. Lord Selborne said, in *Wallingford* v. The *Mutual Society*(1): "With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice." There can be no objection to the use of such general words as "fraud" or "collusion," but they are quite ineffectual to give a fraudulent colour to the particular statements of fact in the plaint, unless these statements, taken by themselves, are such as to imply that a fraud has actually been committed.

In the present case it is unnecessary to criticise the plaint minutely. Strike out the words "fraud," "deceit" "illegal and fraudulent acts," "machinations," and so forth, of which there is great superfluity, and what remains? Nothing, except an allegation of certain facts which might be unattended with any fraudulent or illegal purpose or character. In these circumstances, the Subordinate Judge, being of opinion that no cause of action was stated in the plaint, allowed an examination of the pleader for the plaintiff. He did so, not with the view of taking evidence, or of ascertaining what was to be the evidence in the case, but with the very proper object of ascertaining whether the pleader was in a position to make, on behalf of the plaintiff, an amendment of the plaint, which would introduce a specific and relevent cause of action. Counsel for the plaintiff—who is appellant here—admitted that the effect of the declaration of the pleader was to make matters worse instead of better; and in that observation by the learned counsel their Lordships are quite ready to concur.

(1) 5 App. Calc., 797.

Their Lordships are accordingly of opinion that the judgment of the High Court is well founded, and must be affirmed. They are, however, of opinion that in disposing of this case upon the defects of the plaint as not setting forth a good cause of action, the Subordinate Judge ought not to have taken the course of dismissing the suit. If he did not allow an amendment as authorised by s. 53 of the procedure Code, he ought, in terms of the same section, to have rejected the plaint. That, according to s. 56 of the Code, would have enabled the plaintiff to present a fresh plaint in respect of the same cause of action if he found himself in a position at any future time to make averments which would give relevancy to his action. However, no objection seems to have been taken in the Court below to the form of the judgment, which was the same in both Courts, dismissing the action. No objection was stated in the appellant's case, or raised by his counsel; and in these circumstances, and seeing that the time limited for bringing an action to set aside the judgment has already elapsed, their Lordships are of opinion that the ends of justice will be served by permitting the judgment of the Court below to stand in its present form.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgments appealed from, and to dismiss the appeal. The appellant must pay to the respondents, Surjeswari Baruani, Anundmoyi Baruani, and Kanchunpria Baruani, who appeared at their Lordships' bar, the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: *Messrs. T. L. Wilson & Co.*

Solicitors for the respondents, the auction-purchasers: *Messrs. Watkins & Lattey.*

8th February 1888.

PRESENT:

Members of the Judicial Committee,—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

On Appeal from the High Court in Bengal.

SARDHARI LAL* ... *Plaintiff,*

and

AMBIKA PERSHAD ... *Defendant.*

Limitation Act (XV of 1877), Sch. II, Art. 11—Code of Civil Procedure, ss. 278, 280, 283—Investigation of claim to attached property.

A decree holder, against whom the release of property, attached in execution of his decree, has been ordered, after investigation under s. 280 of the Code of Civil Procedure, is limited by Art. 11 of Sch. II of Act XV of 1877, the Indian Limitation Act, to one year within which to institute a suit to establish that the property is that of his judgment debtor.

The extent to which the "investigation" required by s. 280 should be carried depends upon the circumstances of the case.

APPEAL from a decree (16th December 1884) of the High Court, affirming a decree (28th December 1882) of the Subordinate Judge of Bhagulpore.

The principal question raised by this appeal was whether the suit was barred by limitation under Act XV of 1877, Sch. II, Art. 11; and this depended, according to the appellant's case, upon two others *viz.*, first, whether or not a decree-holder, against whom an order under s. 280, Civil Procedure, has been passed, and who attempts to establish, in a suit under s. 283, that the attached property is, in fact, the property of the judgment-debtor, is bringing a suit to establish *his* right within the meaning of Art. 11; secondly, whether the required "investigation" had been made in this case, before the order had issued, under s. 280, releasing the property; for if none had been made, that order would have given no starting point to limitation.

Articles 11 of the second schedule of the Limitation Act prescribes that a suit "by a person against whom an order is passed under ss. 280, 281, 282, or 335 of the Code of Civil Procedure to establish his right to, or to the present possession of, the property comprised in the order" shall be brought within one year from the date of the order.

The sections of the Code of Civil Procedure referred to are the following:—

"278. If any claim be preferred to or any objection be made to the attachment, of any property attached in execution of a decree, on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other respects as if he was a party to the suit."

"280. If upon the said investigation the Court is satisfied that for the reason stated in the claim or objection such property was not when attached in the possession of the judgment-debtor, or of some person in trust for him, or in the occupancy of a tenant or other person paying rent to him, or that, being in the possesssion of the judgment-debtor, at such time it was so in his possession not on his own account or as his own property, but on account of, or in trust for, some other person, or partly on his own account and partly on account of some other person, the Court shall pass an order for releasing the property wholly or to such extent as it thinks fit from attachment."

"283. The party against whom an order under ss. 280, 281, or 282 is passed may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive."

The present suit arose out of the ex-

* 15 Cowell's Ind. Ap. 134; 15 Calc., 521.

ecution applied for in 1877 of a decree (14th May 1877) against Bishen Mohun Singh and Ruder Mohun Singh upon a mortgage of their family estate executed in 1869 by their deceased father, Nandlal, for Rs. 24,021; they having, also, stated accounts, since Nandlal's death, with the mortgagee, and paid part of the debt. The decree was that the mortgaged properties should be sold, and that if they should not realize enough to pay the debt, the balance should be realized out of the estate of Nandlal. The family estate having been attached, the sale was fixed for 1st October 1877, but postponed on objections made from time to time. On the 19th July 1880 the two sons and wife and minor grandson of the judgment-debtor Bishen Mohun Singh, and the wife and minor son of the other judgment-debtor, Ruder Mohun Singh, objected by petition to the sale, on the ground that they had not been made parties to the decree about to be executed, which was for a personal debt due by the judgment-debtors. They alleged that their interests in the ancestral property were not liable to be sold, and that at most "only the partitioned rights and interests of the judgment-debtors should be sold, the rights and interests of the objectors being exempt."

On this the order (31st July 1880) was that the property should be released on the ground of its being ancestral, and that only the judgment-debtor's right upon partition should be sold. The decree-holder should he desire to bring that right to sale was to file a new inventory within two days. This not having been done, an order was made in the following December, striking the suit off the file.

An application for a review was subsequently rejected by the Subordinate Judge. The decree-holder then applied to the High Court to call for the record under s. 622, Civil Procedure Code. This the High Court did, but having found no illegality, or material irregularity, in the proceedings, they dismissed the application.

The plaint in the present suit (20th May 1882) stated the facts, and claimed a declaration that the mortgage executed by Nandlal as head and manager of the family was binding on the defendants.

The defendants, other than Ruder Mohun Singh, set up limitation, the suit not having been brought within one year from 31st July 1880, the date of the order upon the claim for release.

The Subordinate Judge having fixed an issue on the point decided that the suit was barred by Art. 11. He said: "The plaintiff's pleader has argued at very great length that the Court should have determined specifically what share the claimants were in possession of and what share the judgment-debtors had and which was liable to sale; and as it did not do so, the order was not one which it could make under s. 280, and therefore Art. 11 is not applicable. A number of rulings have been cited in support of the contention. It seems to me that had the contention been correct, the High Court would certainly have interfered under s. 622; but the High Court's order itself shows that the order made by the Subordinate Judge was within the exercise of his jurisdiction under s. 280."

The Subordinate Judge referred to *Deendyal Lal* v. *Jugdeepnarain Singh*(1); *Rainarain Das* v. *Nownit Lal*(2); *Ram Sahai* v. *Sheo Pershad Singh*(3). On appeal the High Court (TOTTENHAM and O'KINEALY, JJ.), holding that the order, which led to this suit being instituted, must be taken to have been passed under s. 280 of the Civil Procedure Code, affirmed the decree of the Subordinate Judge.

On this appeal,—

Mr. *R. V. Doyne* appeared for the appellant.

The respondent did not appear.

For the appellant it was argued that the present suit, not being one to establish the plaintiff's right to the property, or to the present possession of the property, comprised in the order of the 31st

(1) I. L. R., 3 Calc., 198; L. R., 4 I. A., 247.; 2 P. C. J., 730.
(2) I. L. R., 4 Calc., 809; 4 C. L. R., 67.
(3) I. L. R., 5 Calc., 148; L. R., 6 I. A., 88; 4 C. L. R., 226.; 3 P. C. J., 148.

July 1880, did not fall within the meaning of the provisions of Art. 11 of the second schedule of the Limitation Act. Also there had been no investigation such as was required by s. 280. The order, therefore, purporting to have been made under that section should have been treated as a nullity, and not as an order from the date of which time could run. The case of *Venkapa* v. *Chenbasapa* (1) was referred to.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD HOBHOUSE.

The sole question in this suit is whether it is brought in time to satisfy the exigencies of the Law of Limitation. The plaintiff's case is, that he was aggrieved by an order passed on the 31st of July 1880, and he now seeks to get rid of it in this suit. The order was passed in execution proceedings under the provisions of s. 280 of the Code of 1877, and the effect of it was to allow certain objections that had been lodged to an attachment obtained by the plaintiff in another suit in which he was plaintiff and decree-holder, and to release from attachment the property which at his instance had been attached and put up to sale. The plaintiff was entitled, under s. 283 of the Code, notwithstanding the order in question, to institute a suit to establish the right which he claims to the property then attached and put up to sale. But then it is provided by the eleventh article of the Limitation Act, Act XV of 1877, that a suit by a person against whom an order is passed under s. 280 of the Code of Civil Procedure to establish his right to the property comprised in the order must be brought within one year from the date of the order. Now this suit was not brought until the 20th May 1882, that is to say, about 22 months after the date of the order. It is clearly therefore out of time unless it can be shown that for some reason or other the case does not fall within the article of the Limitation Law.

Two reasons have been suggested why their Lordships should hold that the case does not so fall within the article. It is said that the article in question is aimed at orders passed against the persons who object to the attachment. But the answer is that it is aimed against persons who object to orders passed under s. 280; and it is not suggested that there can be any person against whom an order can be passed under s. 280 except the decree-holder himself. He therefore is the very person who by s. 283 is empowered to institute a suit to establish his claims, and who, by Art. 11 of the Limitation Law, is confined to one year for the institution of that suit.

The other reason assigned is that s. 280 does not contemplate that any order shall be made until after an investigation which is directed by s. 278. The answer to that is that in the first place we do not know what took place before the Subordinate Judge who made this order. It may have been that the parties who were before him agreed so far upon facts that he was enabled to deliver his opinion off-hand. But besides that, the Code does not prescribe the extent to which the investigation should go; and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Subordinate Judge at the time, leaving the aggrieved party to bring the suit which the law allows to him. However that may be (and their Lordships do not desire to pronounce any opinion as to the extent of the investigation which is required under the Code), in this case the order was made; and it was an order within the jurisdiction of the Court that made it. It is not conclusive; a suit may be brought to claim the property, notwithstanding the order; but then the law of Limitation says that the plaintiff must be prompt in bringing his suit. The policy of the Act evidently is to secure

(1) I. L. R., 4 Bom., 21.

the speedy settlement of questions of title raised at execution sales, and for that reason a year is fixed as the time within which the suit must be brought.

Their Lordships are clearly of opinion that this case falls within the scope of the eleventh article in question, and that the suit must fail upon that ground.

The result is that their Lordships agree with the Courts below; they think that the appeal should be dismissed, and they will humbly advise Her Majesty in accordance with that opinion.

Appeal Dismissed.

Solicitors for the appellant: *Messrs. T. L. Wilson & Co.*

9th, 10th, 11th and 15th February 1888.

PRESENT:

Members of the Judicial Committee,—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

On Appeal from the High Court in Bengal.

MAHOMED BUKSH KHAN AND OTHERS * ... } *Defendants,*

and

HOSSEINI BIBI AND OTHERS ... } *Plaintiffs.*

Issues—Inconsistent issues—Undue influence—Mahomedan law of gift—Possession not delivered at the time, but afterwards obtained—Mushâa, mixed, or common property, with shares undistinguished.

The execution of a hibanama having been denied by the plaintiff, a Mahomedan widow and purda nashin, in a suit brought by her to have it set aside as fabricated, she also alleged that undue influence had been exercised upon her. It was decided upon the evidence that the instrument was genuine, having been executed by her of her own free will.

The above questions being inconsistent with one another, the latter should not have been admitted to form part of an issue together with the former.

On an issue of undue influence, rightly raised, a Court should consider whether the gift in question (*a*) is one which a right-minded person might be expected to make; (*b*) is or is not an improvident act on the donor's part; (*c*) is such as to have required advice, if not obtained by the donor; and (*d*) whether the intention to make the gift originated with the donor, the principles being always the same, although the circumstances may differ.

The hibanama gave an undivided share in mokurari and zemindari holdings, besides other property not reduced into possession, the whole of which had, as a matter of title, devolved upon the donor as a member of a family of which the donees were also members.

Held, that the hibanama did not infringe the Mahomedan doctrine of mushâa, as an attempt to make a gift of an undivided share in property capable of division; it having been settled that one of two sharers may give his share to the other before division, whence it followed that one of three sharers might give his share to the other two. *Ameena Bibi* v. *Zeifa Bibi*(1) referred to and approved.

Held, also, that as the donor had done all that she could do to perfect the contemplated gift, which was attended with complete publicity, and as the donees had afterwards obtained possession, the fact of the donor's having been out of possession, and therefore not having delivered it, did not, of itself, invalidate the gift. In regard to the principle and the analogy in other systems of law to be found in the cases relating to voluntary transfers (where, if the donor should not have done all that he could have done to perfect his intended gift, he cannot be compelled to do more) the Hindu case of *Kali Das Mullick* v. *Kanhaya Lal Pundit*(2) was referred to.

APPEAL from a decree (12th September 1884) of the High Court, reversing a decree (7th October 1882) of the Subordinate Judge of Gya.

The suit giving rise to this appeal was commenced by a Mahomedan widow, a purda nashin, who died shortly after, and it was continued by her heirs. The questions now raised were: First, as to the actual execution of a hibanama by her, she having both denied the making of the instrument, and also alleged coercion,

* 15 Cowell's Ind. Ap. 91; 15 Calc., 684.

(1) 3 W. R., 37.

(2) L. R., 11 I. A., 218; I. L. R., 11 Calc., 121; 4 P. C. J., 578.

and other undue influence, to have been exercised upon her; and, secondly, whether the hiba, if made, was a gift of property so sufficiently ascertained and divided as to be valid by Mahomedan law; and, thirdly, whether, if the gift had been made, the requirements of that law had been fulfilled by possession following the gift. The hibanama, which was dated 30th May 1881, purported to have been executed by Shahzadi Bibi, who, in the following September, brought this suit to have it set aside. She died shortly after, and was now represented by her heirs. The instrument purported, as a hiba-bil-iwaz (in consideration of a ring given to the donor), to give the whole of Shahzadi's one-sixth share in the estate of her then recently deceased daughter, Omda Begum, to the minor children of the latter, under the guardianship of their father Mahomed Buksh Khan, who, with them, was a defendant in this suit. The share comprised, among other things, a one-sixth share of an hereditary and mokurari interest in about twenty villages, in pergunnah Shergatti, in the Gya district, which share, having been inherited, as the instrument recited, by Shahzadi, was by her given, by a previous hibanama dated 9th September 1876, to her daughter Omda, then alive. This having led to disputes, an ikrarnama, executed in 1879, gave the possession of nearly all the villages to Nubi Buksh Khan, Shahzadi's husband, who however died in that year, or the year following, with the result that Omda became entitled to the whole property given to her by Shahzadi, and more besides, under the rules of inheritance. Omda died on the 14th May 1881, when, under Sunni law, her mother Shahzadi became entitled to a one-sixth share in the whole of her estate. That estate was composed of the one-sixth share in the villages given by Shahzadi to Omda in 1876, with, in addition, Omda's interest in villages assigned to her under the ikrarnama of 1879, as well as her interest in property that had been her father's and was allowed to Omda by a family solehnama, executed on the 14th February 1880, after his death. Omda's estate also comprised her dower due from her husband, Mahomed Buksh Khan, and a part of certain decrees, the whole estate being valued in the hibanama of 30th May 1881 at Rs. 50,000.

This hibanama was alleged by the plaint not to have been executed by Shahzadi. Coercion was also alleged and the prevention of any communication by Shahzadi with her friends. The issue framed raised the questions whether the instrument was genuine and executed by her, or with her knowledge and consent, and whether it was, if executed, obtained by undue influence. The Subordinate Judge of Gya found that the hibanama was genuine, having been "executed with the knowledge, consent, and natural desire of Shahzadi Bibi"; adverting also to the inconsistency of the allegation of undue influence, with the denial of any execution whatever. Disallowing objections to the gift founded on the Mahomedan doctrine of mushâa, and also on the non-delivery of possession by Shahzadi, he dismissed the suit with costs.

On appeal this decree was reversed by a Divisional Bench of the High Court (GARTH, C.J., and BEVERLEY, J.). The judgment of the High Court went into the character and effect of the hibanama and the evidence given in support of it. The judges expressed themselves not satisfied that the document was executed, or that, even if it was, Shahzadi had understood its contents, or had been a free agent at the time.

On this appeal,—

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the appellants, argued that the High Court had reversed the decree of the Subordinate Judge on insufficient grounds.

Mr. *R. V. Doyne*, for the respondent, argued that the judgment of the High Court was correct in result, according to what this committee had recognized in regard to persons in the position of the alleged donor. Where documents had been executed by secluded women, it

must be shown that such persons had acted independently of all constraint, and had been able to consult their own legal advisers if they wished to do so, the affirmative being upon those who derived benefit from the transaction. As was said in the judgment in *Greeschunder Lahoree* v. *Bhuggobutty Debia*(1), the Courts in India had always to be careful to see that deeds taken from purda women had been fairly taken, and that a woman executing a deed of gift had been a free agent, and had been duly informed of the effect of what she was about. Even if this hibanama had been executed, there had been no evidence of a satisfactory kind that Shahzadi was a perfectly free agent; and it was for the defence to establish this. On the contrary there was much to show that she was under duress at the time of the alleged making of the instrument. Besides the above, there were two legal objections to the hibanama: First, that Shahzadi was out of the possession of the shares in the mokurari and zemindari interests, the subject of gift, as also of the share in the unpaid dower, and of the share in the money payable under the decree; secondly, that the share of Shahzadi in the above was in property jointly owned by her and by other persons, and such share had not been distinguished from those of the other owners. Such a gift, accordingly, fell within the doctrine of the Mahomedan law in regard to mushâa, or the undivided part of a thing, and was invalid. He referred to Baillie's Mahomedan Law, Book VIII, Chap. 1; Hedaya, Book XXX, Chap. 1; and Vol. III, p. 293 of Hamilton's Translation; *Mullick Abdool Guffoor* v. *Muleka*(2); and *Amirunnissa Khatoon* v. *Abedunnissa Khatoon* (3), which last case was distinguishable on the ground that specific interests were held, that not being the case here.

Mr. *J. D. Mayne*, in reply, having relied on the evidence to show that the deed was genuine, argued that the Mahomedan law was not contravened by giving effect to this gift. Nor did that law necessarily operate in this instance. The gift could be maintained as a contract, being in itself an equitable act on the part of the mother of the recently deceased Omda towards her children; and he referred to the restriction of 21 Geo. III, c. 70, s. 17, within the local jurisdiction of the Courts in the Presidency towns, as pointed out in the judgment in *Nobinchunder Bonnerjee* v. *Romeschunder Ghose*(4). He referred also to Act VI of 1871 and its provisions in s. 24. However, applying the Mahomedan law, the gift in this instance was of property sufficiently ascertained. On the question of mushâa the case of *Amena Bibi* v. *Zeifa Bibi*(5) was in point; he referred also to *Mullick Abdool Guffoor* v. *Muleka* (2). As regards possession having been obtained after, but not at the time of, the gift, he argued that the gift had been, nevertheless, completed by acts carrying it out, as far as it possibly could be carried out, the nature of the property being considered. The rules of the Mahomedan law, on this head, in insisting on possession being given only enforced a principle that was common to all jurisprudence. To explain the principle, perhaps the most appropriate case was a Hindu one, *viz.*, *Kali Das Mullick* v. *Kanhya Lal Pundit*(6), showing that the mere fact of the donor being out of possession cannot be used to defeat a gift otherwise complete. There, as here, the donor had done all that could be done to complete the gift, which was, therefore, maintainable. He referred also to Macnaghten's Mahomedan Law, Chap. V, p. 51; Baillie's Mahomedan Law, 522; Hedaya, Vol. III, 295, and Vol. IV, 204; *Bhai Khushal* v. *Lakhma Mana*(7);

(1) 13 Moore's Ind. Ap., 419, at p. 431; 2 P. C. J., 579.
(2) I. L. R., 10 Calc., 1112.
(3) L. R., 2 I. A., 88; 15 B. L. R., 673, P.C.J., 423.
(4) I. L. R., 14 Calc., 781 (787.)
(5) 3 W R., 37.
(6) L. R., 11 I. A., 218; I. L. R., 11 Calc., 121; 4 P. C. J., 578.
(7) I. L. R., 7 Bom., 452.

Ibrahim v. *Suleman*(1); and *Amirunnissa Khatoon* v. *Abedunnissa Khatoon*(2).

On a subsequent day, 15th February, their Lordships' judgment was delivered by

THE RIGHT HON. LORD MACNAGHTEN.

In this case the suit is brought to recover property contained in a hibanama or deed of gift bearing date the 30th May 1881, and purporting to be executed by a widow lady named Shahzadi Bibi, who is dead. The persons to whom the hibanama purports to convey the property are grandchildren of Shahzadi, the infant children of her daughter Omda, who had died a very short time before. The ground of action alleged by the plaint is that the hibanama was a fabricated document, and that the alleged signature of Shahzadi was a forgery.

To understand the story and the position of the parties it is necessary to give a short sketch of the pedigree of the family. Shahzadi Bibi was the daughter of Sikundar Ali and Hesamut Bibi; she had two brothers, Nawab Ali and Mannujan. Nawab Ali married a person of the name of Hedayat. Shahzadi Bibi herself married one Nubi Buksh. By him she had only two children, both daughters, Omda Bibi and Hosseini Bibi. Omda Bibi married Mahomed Buksh Khan, and by him had nine children, who are the infant appellants. Hosseini married Rubidad Khan. Mahomed Buksh Khan was the son of Jehangir Buksh Khan. Jehangir married a person of the name of Mahamdu. Mahamdu's mother was Hasan Bibi. Jehangir's mother was Rousham Bibi, who also appears to have been the mother of Nubi Buksh and the sister of a lady called Daem Bibi, who was grandmother or in the position of grandmother to Shahzadi.

It appears that from Daem Bibi, Shahzadi derived a property consisting of some 22 villages. In 1876, being then the wife of Nubi Buksh, but living apart from her husband, and apparently not being on good terms with him, she determined to make over this property to her daughter Omda Bibi. Her general mukhtear at that time was Mahadeo Lal. He seems to have remonstrated against the gift, and to have informed her husband, who also remonstrated. The lady, however, was firm in her purpose, and on the 9th September 1876 she executed a hibanama granting this property to her daughter.

Now there is no question as to the genuineness of that document. It is executed by Shahzadi, by the pen of Mahadeo Lal, her general mukhtear; but she also authenticates it by writing upon it some words in Hindi: "likha-se janoge," which are said to mean: "From what is written you will know." Among the attesting witnesses were Jehangir Buksh Khan, Jewan Lal, Mahadeo Lal, and Dost Mahomed Khan, who were examined in this suit in connection with the execution of the hibanama of 30th May 1881. It is not unimportant to observe that it appears by the attestation of the hibanama of 1876 that Dost Mahomed Khan was the person who then identified Shahzadi Bibi, which confirms his statement in this case that he was in the habit of appearing before her.

After that deed was executed disputes arose between Nubi Buksh Khan and Shahzadi. It is said that there were suits, both civil and criminal. Ultimately an arrangement was made on the 22nd December 1876 by which a life-interest in the bulk of the property was secured to Nubi Buksh, and subject to that the hibanama was confirmed. In order to equalise the shares of his two daughters, it appears that Nubi Buksh, after settling some property on two other children, who were not the children of Shahzadi, gave 10 annas of the rest of his property to Hosseini and 6 annas to Omda.

At the end of 1879, or the beginning of 1880, Nubi Buksh died. On his death fresh disputes arose in the family. They were ultimately settled by a deed of com-

(1) I. L. R., 9 Bom., 146

(2) L. R., 2 I. A., 88; 15 B. L. R., 67; 3 P.C. J. 423.

(3) 3 W. R., 37.

promise bearing date the 14th February 1880. From that time until the present quarrel the parties appear to have lived on good terms. The result of the various transactions which have been referred to was to place the two daughters, Omda Bibi and Hosseini Bibi, on an equal footing as regards the property they derived from their parents. Hesamut Bibi, the mother of Shahzadi, a witness for the respondents, says in her evidence: "Both Hosseini and Omda Bibi were equally rich, one of them was not richer than the other."

Shahzadi Bibi lived at Amas. Mahomed Buksh Khan and Omda lived at Khira. In May 1881 Omda fell sick, and she was moved to a place called Nawadi. Shahzadi went to Nawadi to be with her sick daughter. About four days after she went there Omda died. She died on the 14th May 1881. The body was taken to Madarpore, which was the family burying place, and all the immediate relatives, including Shahzadi, went there and stayed at the house of Hasan Bibi during the customary period of mourning, which is nominally 40 days. On the death of Omda, by Mahomedan law, Shahzadi succeeded to a sixth of her estate. Her estate consisted of the 22 villages which were conveyed to her by the deed of September 1876; of other villages which she derived under the arrangement of 1876 and the compromise of 1880; of her dower, which amounted to one lac; and of a decree against Jehangir Buksh Khan, the amount of which is not stated, and which does not appear in their Lordships' opinion to be material for any purpose in the suit. If it had been material no doubt the parties would have taken care to have informed the Court what the amount of that decree was. On the 18th June 1881 the 40 days of mourning ended with the ceremony called "Chehloom." Mahomed Buksh Khan then went to Khira, and took Shahzadi with him. On the 22nd of June it appears that Shahzadi made a complaint before a Magistrate that she was detained there against her will. The Magistrate investigated the complaint, and seems to have thought that it was to a certain extent well founded, and he sent her home to Amas under the protection of two constables. She repeated that complaint on the 15th of July, and again on the 25th of that month; but on the 2nd August the Magistrate in charge came to the conclusion that there were no sufficient grounds for a prosecution, and that if she chose to go on she must act at her own risk. The matter then dropped.

On the 22nd September 1881 Shahzadi filed her plaint in this suit. The only ground of action alleged in the plaint is, that the hibanama of 30th May 1881 was a fabricated document, and that her alleged signature was a forgery. On the 12th October 1881 Shahzadi died. The proceedings were continued by her daughter, Hosseini Bibi, and her father and mother, Sikundar Ali and Hesamut Bibi. On the 16th March 1882 issues were settled. Amongst the issues was this: "*2nd*, whether the hibanama on behalf of Shahzadi Bibi is genuine and valid and executed with her knowledge and consent, or whether it was manufactured without her knowledge and consent, or whether it was executed under undue influence?" In their Lordships' opinion the latter part of that issue ought not to have been admitted. It was absolutely inconsistent with the case made by the plaintiff. It only becomes possible on the assumption that the alleged cause of action is unfounded. There was another issue which also was only admissible on that assumption, namely: "*3rd*, whether in case the said hibanama is proved to be genuine it is invalid on any ground according to Mahomedan law."

The questions therefore which had to be decided by the Court and which now have to be considered by their Lordships, are three: First, was the deed really executed by Shahzadi? Secondly, if so, are there any circumstances which go to prove that it ought not to be held binding

upon her? and, thirdly, is the gift valid under Mahomedan law?

Now, to take the first question: Was the deed really executed by Shahzadi? It purports to be executed by her by the pen of Mahadeo Lal, who was no doubt for a considerable time her general mukhtear. It purports to bear as her signature the Hindi words which admittedly she wrote on the deed of the 9th September 1876 by way of authenticating that document. Her execution is attested by no less than 21 witnesses, nine of whom, as well as the writer, have been examined in support of the deed. She was a purda nashin lady. There were women inside, and they of course, according to the evidence, could have seen her execute the deed. Three swear they saw the execution; two whose presence is deposed to by several witnesses swear that they were not even in Madarpore. Their evidence, however, is not believed by either Court. Of the male witnesses three, and three only according to the evidence, could have seen the deed executed—Nawab Ali, who died before the hearing, Mannujan, and Dost Mahomed. The others attest the deed on Shahzadi's admission. In the afternoon of the day on which the deed is alleged to have been executed the Sub-Registrar came over and took her acknowledgment. The Sub-Registrar is stated by the Subordinate Judge to be "a respectable and learned person." He deposes that he knew Shahzadi's voice, and that she acknowledged the deed before him.

The Subordinate Judge, who had the advantage of seeing the witnesses, unhesitatingly came to the conclusion that the deed was genuine. He relied principally on the evidence of Mannujan, Mahadeo Lal, and Manwar Ali, the Sub-Registrar. The High Court came to a different conclusion. They say: "We think that a large amount of suspicion attaches to this evidence, and we are not satisfied that the deed was really executed by Shahzadi." Their Lordships cannot consider the judgment of the High Court satisfactory. The learned Judges suspect everybody; they suspect everything. Every one who took an intelligent part in the transaction, the dead as well as the living—Shahzadi's relations as well as her son-in-law's dependents; even the Sub-Registrar of the district who attended only in the discharge of his official duties—one and all are alike involved in general and indiscriminate suspicion.

The learned Judges say that they cannot but regard Jehangir Buksh Khan as the prime mover in the matter; and they add: "We cannot help suspecting that this witness had a good deal more to do with the preparation, execution, and registration of this deed than he has chosen to tell the Court." In their Lordships' opinion this witness seems to have answered fairly every question that was put to him, and if his evidence be true, and there is nothing to contradict it, his connexion with the transaction was of the slightest. According to his statement, he was summoned by a letter from Shahzadi to come over and witness the execution of the deed. He came over in the early morning; he spoke to Shahzadi, and she spoke to him. She acknowledged that she had executed the deed, and he attested it. Then he mounted his horse and rode away, and that appears to be the only connexion he had with the transaction, except that he is the father of Mahomed Buksh Khan and Mahadeo Lal was his general mukhtear.

The learned Judges also mention as a matter of suspicion that no independent person seems to have been called in to attest that deed, and that no independent person has deposed in favour of its execution. The latter conclusion is not quite accurate. The Sub-Registrar, whether he is to be believed or not, was unquestionably an independent person, and had no connexion whatever with either side. It is somewhat difficult to understand what is meant by the objection that no independent person was called in to attest the deed. It has not been suggested that any member of the family or any person who would naturally

have been present if the deed were genuine was absent on the occasion when it is said to have been executed. Every member of the family with whom we are acquainted, with the exception of Hoseini Bibi and her husband, was present and attested the deed. It would not have been very natural that Hosseini or her husband should have been called in to attest a deed which disappointed their hopes, or at any rate defeated their chance of succession. But, in point of fact, according to the statement of Rubidad Khan, Hosseini Bibi was incapacitated by illness from going to Madarpore. It is stated that she did not go there until the chehloom. Rubidad Khan also states that he was not there, that he was present at the burial, but that from the time of the burial till the chehloom he did not go to Madarpore. It is difficult to see what advantage would have been gained by summoning an independent person to attest the deed. The lady was a purda nashin lady. A stranger would not have been admitted to her presence. The attestation of a stranger who could not have seen her write and who could not have known her voice would have carried the matter very little further.

Then there are three minor matters of suspicion on which the learned Judges comment. They say the draft of the deed was not produced. It is difficult to see what light that draft could have thrown upon the transaction. At any rate, it was not called for. It is said that two letters which are mentioned in the evidence as having been sent by Shahzadi to summon Mahadeo Lal and Jehangir Buksh Khan were also not produced. They were not called for either. The plaintiffs seem to have been satisfied with a statement of what was contained in those letters by the recipient of the one and the writer of the other. Of course, if the deed was forged, notwithstanding the publicity connected with it, there could have been no difficulty in forging Shahzadi's signature to a letter.

The learned Judges also observe that it is a remarkable circumstance that none of the female witnesses who were behind the purda make any direct statement on the point of Shahzadi's writing the words in Hindi. They merely state, say the Judges in general terms, that Shahzadi executed the deed. That observation also does not appear to be quite accurate. The three ladies who were behind the purda, and who gave evidence for the defendants Malik Jehan Bibi, Hasan, and Mahamdu, state that the deed was executed by Shahzadi in their presence. One—and one only—of those ladies was cross-examined upon the point, and her statement in cross-examination is very positive. That is Mahamdu. She says: "The females had witnessed it in my presence. First the females witnessed it and then the males. The signature of Shahzadi Bibi was put in my presence. Shahzadi Bibi ordered Mahadeo Lal to sign for her, and then he signed for her. After that she wrote below it two or four letters in Hindi which she knew." Mahamdu seems to have been the first witness who was examined on behalf of the defendants—certainly the first or second—the other two were not cross-examined upon the point. Their cross-examination appears to have been entirely directed to irrelevant objects.

"Another very suspicious circumstance" in the opinion of the learned Judges is this, that the Hindi words written, or said to have been written, on the deed by Shahzadi Bibi, with the object of authenticating it, are identically the same, letter for letter, as those which are found on the hibanama of 1876. They add: "The fact of these Hindi words corresponding so exactly with those on the deed of 1876, which was apparently not in Shahzadi's possession or produced before her at the time of execution, does certainly raise the suspicion that they were not really written by her, but had been copied by some other person from the former deed."

Now it is material to mention a circumstance which in that passage appears to have been overlooked, namely, that those words occur, not once only, but

twice. They were written in the morning, and they were written again in the evening when the Sub-Registrar came over to take Shahzadi's acknowledgment. The Sub-Registrar states that he knew Shahzadi's voice; he states that he read the deed to her. Then he goes on to say: "I asked whether she had executed the deed of gift or not? She said that she had executed it, and it might be registered. On the back of the deed of gift I, at that time, wrote out the registration with my own hand. After that I asked the Mussumat who knew her. The Mussumat said that Nawab Ali Khan and Mannujan Khan, who are her full brothers, knew her. I then asked both of them, and they said that they knew her. After that I wrote out in the deed the identification by both. After that I pointed out to Nawab Ali Khan the place where he should sign for Shahzadi Bibi, and also the place where they should affix their own signatures. After that Mahadeo Lal, mukhtear, signed for Shahzadi Bibi by his own pen, and she also wrote: 'You will know from what is written.' Nawab Ali Khan and Mannujan Khan affixed their signatures. After the signature affixed by Mahadeo Lal, Shahzadi Bibi affixed her signature. I did not make any objection to what Shahzadi Bibi wrote, because on other occasions also when I had taken her admission and made registration she used to write so much, and I knew that she knew to write so much." Therefore, whether the first signature—that is, the Hindi words—be genuine or not, it is quite plain that these same words were added again in the evening when the Sub-Registrar went over to take Shahzadi's acknowledgment. If the learned Judges of the High Court are right, who was the forger? None of the ladies could write. That is clear. Jehan Lal, the writer of the deed, was not present at the time; he only came up just as the Sub-Registrar was going away. The only males who, according to the evidence, saw the lady on that occasion were her brother Nawab Ali and Mannujan. Mannujan cannot write. So that the words must either have been written by Nawab Ali or by the lady herself. There is not the slightest ground to suspect Nawab Ali of any fraud or forgery, and therefore it appears to be the necessary conclusion that the words must have been written by the lady herself.

When the cloud of suspicion in which the High Court has enveloped the transaction has been cleared away, the evidence in favour of the genuineness of the deed is absolutely overwhelming. There is no evidence whatever on the other side.

There is nothing but Shahzadi's assertion that she did not execute the deed—an assertion in which no doubt she persisted from the time she complained to the Magistrate down to the time of her death.

Their Lordships think that the Subordinate Judge was right in relying on the evidence of the Sub-Registrar and of Mahadeo Lal, the mukhtear, with whose character the Subordinate Judge also seems to have been acquainted. He says he "holds a diploma, and is a respectable person in his community, and the Court has never seen any act of his by which it can suspect him." Mannujan broke down on cross-examination. The Subordinate Judge attributes his confusion entirely to illness, and apparently the civil surgeon and assistant civil surgeon of the district certified to that effect. Be that as it may, their Lordships think that it would not be safe to rely on Mannujan's evidence, except so far as it is corroborated by other witnesses, and they consider that more reliance is to be placed on the fact that the signature of Shahzadi was identified by her brother Nawab Ali, who seems to have been in a superior position to Mannujan. He was a person of education, and appears to have been trusted by other members of the family. The mother, Hesamut, employed him to receive for her the allowance which her husband was condemned to pay, and she says: "I was on good terms with Nawab Khan. There was no misunderstanding between us at any

time. I had confidence in him." Certainly if this deed was a forgery he must have known all about it, but what possible reason can there be to suspect him of having been a party to such a gross fraud? In their Lordships' opinion there is none. It is not necessary to go further into the evidence. It is sufficient to say that their Lordships have come to the same conclusion as the Subordinate Judge, that the deed was really executed by Shahzadi.

Then comes the question, was the deed executed under such circumstances that it ought not to be allowed to stand? Duress and coercion may be laid out of consideration. The witnesses who spoke to anything of that kind were discredited by both Courts. But there remains the more subtle form of undue influence. Their Lordships desire not to say a word which could interfere with the settled principles on which the Court acts in considering the deeds of purda nashin ladies, or could tend to lessen the protection which it is the duty of the Court to throw around those who are unable to protect themselves. They do not forget that this lady was a purda nashin lady. They do not forget that at the time of the execution of the deed she was living in more than ordinary seclusion; that she was in very deep distress; and that she was surrounded by the members of that branch of the family to which the objects of her bounty more immediately belonged. But bearing all these things in mind, and reviewing the whole evidence, they come to the conclusion that the lady knew perfectly well what she was doing, and that in every sense the act was her own act.

Where undue influence is alleged it is necessary to examine very closely all the circumstances of the case. The principles are always the same, though the circumstances differ; and, as a general rule, the same questions arise. The first and practically perhaps the most important question is, was the transaction a righteous transaction- that is, was it a thing which a right-minded person might be expected to do? Can there be any doubt about the answer to that question? Shahzadi made a settlement on Omda. Omda was her favourite daughter, and had a large family. By an untoward and unlooked-for event a share of Omda's fortune which was principally derived from that settlement devolves on Shahzadi. To her the acquisition of property by her daughter's untimely death seems to have been an odious and repulsive thing, and she determines as soon as possible to give it back to her daughter's orphan children. Was there anything unnatural in that? It appears to their Lordships to have been a most natural act, and one which a right-minded person would be disposed to do.

Then there comes the question—was it an improvident act? That is to say, does it show so much improvidence as to suggest the idea that the lady was not mistress of herself and not in a state of mind to weigh what she was doing? Upon that Mr. Doyne made some forcible observations. He said that by the earlier hibanama this lady had stripped herself of all that she possessed; that she had reduced herself to penury; that then by accident a portion of the property came back to her; and he insisted that it was an improvident act on her part to divest herself immediately of that pittance when she had nothing else to live upon. Now that case is not made by the evidence. There does not appear from first to last any complaint on the part of this lady that she was reduced to poverty. Nor was her position that of a pauper. She had a house of her own; she had servants; she comes in a dooli; so far as the evidence goes she had enough for her wants, and her wants as a widow were probably very small. It does not, therefore, appear to have been a transaction so improvident as to show that it was not her own act.

Then was it a matter requiring a legal adviser? What could have been simpler than what she desired to do? She was not apportioning her property among the members of her family; she was not

determining how much she could spare; but when property came to her by this sad accident she says: "I will have none of it." What could a legal adviser have told her? If he had advised her to wait till she left the house where Mahomed Khan was, if he had told her to place herself between two fires, and allow Rubidad Khan on the one hand and Mahomed on the other to urge the claims of their respective children, she would not have benefited much by the advice.

Lastly, did the intention of making the gift originate with Shahzadi? Upon that there is positive evidence, and there is negative evidence. The positive evidence is very strong, but the negative evidence appears to be stronger still. Mahadeo Lal, who was unquestionably her general mukhtear as long as she had any property to deal with, and who was employed by her to prepare this deed, says: "I went to Shahzadi Bibi at the deori for condolement, and then Shahzadi Bibi told me this: 'I at first given my property in writing to my daughter Omda Bibi, but now owing to her death one sixth share devolves upon me. As I have no hope of living long I do not like to take the estate of Omda Bibi. I wish to give that share to her sons and daughter. Please write out a draft of hibanama'" In cross-examination he says even more positively that it was her own doing, and that he prepared the hibanama by her own direction.

Then Mahamdu says this in cross-examination: "Shahzadi Bibi herself commenced to talk about the hiba. I do not recollect how many days after going to Madarpore conversation took place about the hiba. But she had spoken of it after ten or fifteen days. Shahzadi Bibi first spoke about the hiba to me and other females. Shahzadi Bibi said: 'I had already given in writing during the lifetime of my daughter. Now she is dead, and a share has devolved upon me. How can I snatch it from grandsons and granddaughters? The children have become motherless. I will again give them in writing.' We told her: 'It is your pleasure. You have got a share; you may do with it whatever you like.'" There is not a scrap of evidence to show that the idea was suggested to her by Mahomed Buksh Khan or any one else. And it is a circumstance not to be overlooked that Mahomed Buksh Khan did not obtain any benefit personally for himself.

But the negative evidence is still stronger. No case of undue influence was set up by Shahzadi. The plaint is based on forgery, and forgery alone. The question of undue influence was introduced for the first time in the issues; but, although it was introduced then, it was not accepted by the family. We find that on the application for registration, which took place a few days after the issues were settled—the date is the 23rd March 1882—the sole averment still is that the deed was a forgery. It is somewhat singular that, although the ladies who were examined as witnesses for the defendants were the first witnesses who were examined, and they stated that Shahzadi executed the deed of her own free will and without undue influence, the ladies on the other side who came forward a month afterwards to give evidence preferred to state what both Courts have held to be absolutely untrue, namely, that they were not present at Madarpore at all—they preferred stating that to admitting that they were present and trying to make out a case of undue influence, which they must have known then would have been fatal to the deed if it could be proved.

Their Lordships therefore hold that the suggestion of undue influence is not proved.

There remains the question whether the gift was good by Mahomedan law. On that two points were made. In the first place it was said to be open to objection on the Mahomedan doctrine of mushâa, which appears to be this: that a gift of an undivided share in a subject capable of division is not good because it would lead to confusion. But it appears to be settled by Mahomedan law that if

there are two shares of property, one may give his share to the other before division. That seems to be established by a passage in Macnaghten's Precedents, Case XIII, which was adopted in the case to which Mr. Mayne referred of *Ameena Bibi* v. *Zeifa Bibi*(1).

Now, if one of two sharers may give his share to the other, supposing there are three sharers, what is there to prevent one of the three giving his share to either of the other two? Mr. Doyne was asked what confusion that would introduce. Mr. Doyne took refuge in the doctrine itself, which he said was a very refined doctrine. To extend it to this case would be a refinement on a refinement, amounting, in their Lordships' opinion, almost to a *reductio ad absurdum*.

The other point was, that the gift was invalid because possession was not given. That subject was considered in a case which came before this Board in 1884, *Kali Das Mullick* v. *Kanhya Lal Pundit* (2). There it is stated that the principle on which the rule rests has nothing to do with feudal rules, and that the European analogy is rather to be found in the cases relating to voluntary contracts or transfers, where, if the donor has not done all he could to perfect his contemplated gift, he cannot be compelled to do more. In this case it appears to their Lordships that the lady did all she could to perfect the contemplated gift, and that nothing more was required from her. The gift was attended with the utmost publicity, the hibanama itself authorises the donees to take possession, and it appears that in fact they did take possession. Their Lordships hold, under these circumstances, that there can be no objection to the gift on the ground that Shahzadi had not possession, and that she herself did not give possession at the time. That view seems to be supported by a passage in Macnaghten's Precedents, Case X, where the question was: If property left by two brothers devolve on the widows, "are the widows entitled to dispose of their late husband's property by gift, and if they have a right to do so, is the deed of gift executed by them in favour of one of the husband's heirs available in law?" Then it is stated that, "although the widows at the time of the execution of the deed of gift were not seised of the property, yet if agreeably to their desire, the donee, in pursuance of a judicial decree, became subsequently seised thereof, the fact of the donors having been out of possession at the time of making the gift is not sufficient to invalidate it."

Their Lordships, therefore, are of opinion that the appeal ought to be allowed, and that the decree of the High Court ought to be reversed and the decree of the Subordinate Judge restored, and they will humbly advise Her Majesty accordingly. The respondents will pay the costs of the appeal and the costs in the High Court. The deposit of 300*l.*, which was made by the appellants, will be returned.

Appeal allowed.

Solicitors for the appellant: *Messrs. T. L. Wilson & Co.*

Solicitors for the respondent: *Messrs. Barrow & Rogers.*

(1) 3 W R., 37

(2) L. R., 11 I. A. 218, I L. R., 11 Calc., 121, 4 P. C J, 578.

15th February 1888.

PRESENT :

Members of the *Judicial Committee*,—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

On Appeal from the High Court in Bengal.

BHAGBUT PERSHAD SINGH AND OTHERS* } *Defendants,*

and

GIRJA KOER AND OTHERS .. } *Plaintiffs.*

Hindu law, Alienation—Sale of joint family estate in execution of decree upon the father's debt—Exoneration of son's share only where debt has been incurred for an immoral or illegal purpose—Burden of proving the nature of the debt.

The sons in a joint family, under the Mitakshara, cannot set up their rights of inheritance in the family estate against their father's alienation for an antecedent debt, or against a sale in execution of a decree upon such debt, although the sons may not have been parties to the decree, unless the sons can establish that the debt has been contracted for an immoral or illegal purpose.

The son's position is distinct in this respect from that of other relations in the joint family, inasmuch as it is his duty to pay, out of the family estate, his father's debt.

A decree against indebted fathers, in a family consisting of fathers and sons, charged the family estate, and the sale in execution was not merely of the right, title and interest of the debtors, but of the property being such interest. On the other hand, before the sale, notice was given on behalf of the sons that the property was ancestral and joint.

Held, in a suit on behalf of the sons against the purchaser at the sale to recover their shares, that it was for the plaintiffs to show affirmatively that the debts were contracted for an illegal or immoral purpose, and that to establish general extravagance against the fathers was insufficient. It was not necessary for the purchaser to show that there had been a proper inquiry as to the purpose of the loan, or to prove that the money was borrowed for family necessities.

* 15 Cowell's Ind. Ap. 99 ; 15 Calc. 717.

APPEAL from a decree (21st June 1883) of the High Court, affirming a decree (8th June 1881) of the Subordinate Judge of Patna.

The appellants were the sons and representatives of Punnu Singh, deceased, against whom this suit was brought, he having in his lifetime purchased, at several sales in execution of decrees against the respondents' fathers, the family estate in which the respondents now claimed their shares. This family estate was a five-anna four-pie share of mouzah Bazidpur Dhanki, in the Patna district. The question raised by this appeal was whether, after the sales of this estate in execution, the interests of the sons of the judgment-debtors could be recovered from the purchaser in consequence of the nature of the debts.

Under successive sales in 1879 fractional parts of the family share in Bazidpur Dhanki were sold in execution of decrees obtained by different creditors against three brothers living jointly, each with their families in the same coparcenary, *viz.*, Jhaller Singh, Pertab Narain Singh, and Roghuburdyal Singh, the sons of Sumbhu Dut Singh. Three sons of each of the above three brothers, some of the sons being minors, now represented by their respective mothers, sued Punnu Singh, the purchaser of the share in Bazidpur Dhanki, to obtain a decree for their interests, inherited under the Mitakshara, in the family estate. They joined as co-defendants with the purchaser their three several fathers, and the wives, besides claiming as guardians of the minor sons, claimed their own interests also.

The plaint alleged that the income of the ancestral estate was sufficient for the family, and that there was no necessity for the loans contracted by the fathers; but that the latter by dissipation and extravagance wasted the income, and had taken loans on the security of the ancestral estate, the mahajuns having lent without due inquiry. It also stated that the order issued for possession, on the

application of Punnu Singh, was only in respect of the right, title and interest of the judgment-debtors, the fathers, but that he had taken possession of the entire share of five annas and four pie in Bazidpur Dhanki, and the claim was that "in case the purchase of defendant No. 1, Punnu Singh, in respect of the rights and interests of the fathers should be held valid, then that the plaintiffs might be put into possession of their legal shares by partition, and that mesne profits and interest might be awarded."

In his written statement Punnu Singh alleged that the loans were taken for necessary expenses and the payment of former debts, the maintenance and education of the minors, and expenditure in suits. Of these loans the plaintiffs had derived the benefit, some of them, moreover, not having been born at the time when the family "became involved in debt."

At the same time that they instituted this suit (30th September 1880) the plaintiffs brought another against other purchasers of portions of the joint family estate at other sales.

The Subordinate Judge tried the two suits together, and dealing with the issues in both, which raised the question of the nature of the father's debts, he found that the plaintiffs had not proved that "the monies which were borrowed were applied specially for licentious purposes." At the same time he found that the defendants had failed to prove that there was any necessity for the loans, or that the defendants had inquired into the necessity of them "to such an extent as a cautious man would have inquired." He also found that five of the plaintiffs had not been born until after the date of the decree. Having rejected the claims of the latter, the Subordinate Judge held that the others were entitled to decrees for their shares, "not having been parties to the suit in which the auction sale had taken place, and thus having been unable to protect their rights."

He accordingly made the order for the division of the ancestral estate as set forth in their Lordships' judgment.

In both suits the purchasers of the family estate appealed to the High Court, of which a Divisional Bench, MITTER and WILKINSON, JJ., gave judgment in both appeals, referring in the judgment in this case to what was applicable in the judgment delivered in the other. The view taken by the Judges of the facts was that on the one hand the defendants had not proved that the monies borrowed were required for family necessities, and, on the other, that the plaintiffs had not established that they were applied to immoral purposes, though the conduct of the three brothers had been shown to have been immoral.

They referred to *Deen Dyal* v. *Jugdeep Narain Singh* (1), and held the plaintiffs entitled to the decree as made by the Subordinate Judge, the purchaser having bought with knowledge of their claim. They therefore affirmed the judgment of the Subordinate Judge.

On this appeal,—

Mr. *C. W. Arathoon*, for the appellants, contended that the purchaser at the execution sale was entitled to the entire share in the village as sold and certified to have been sold. The Courts below had concurred in finding that the debts in satisfaction of which the family estate had been sold had not been incurred, or shown to have been contracted, for immoral purposes. The purchaser was not bound to look behind the decree under which the sale took place, nor to prove any necessity for the loans, nor that inquiries had been made by the creditors before making them. He referred to *Nanomi Babuasin* v. *Modhun Mohun* (2); *Hanuman Pershad Panday* v. *Baboee Munraj Koer*(3); *Girdhari Lal* v. *Kantoo Lal* (4); *Suraj Bansi Koer* v. *Sheopershad Singh* (5).

The respondents did not appear.

(1) L. R., 4 I. A., 247 ; 1. L. R., 3 Calc., 198.
(2) I. L. R., 13 Calc., 21 ; L. R., 13 I. A., 1 ; 4 P. C. J., 682.
(3) 6 Moore's I. A., 424 ; 1 P. C. J. 552.
(4) L. R., 1 I. A., 321 ; 14 B. L. R., 187 ; 3 P. C. J., 380.
(5) L. R., 6 I. A., 85 ; I. L. R., 5 Calc., 184 ; 4 P. C. J. 1.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR BARNES PEACOCK.

This is an appeal from a decree of the High Court in a suit brought by the widows of Baboo Jhaller Singh, Baboo Pertab Narain Singh, and Baboo Roghuburdyal Singh, on behalf of themselves and the infant children of their respective husbands, to recover possession of property which had been purchased by the first defendant, Baboo Punnu Singh, under certain orders made in execution against the three husbands. The property which was the subject of this suit, namely, a five annas four pies share of Bazidpur Dhanki, was ancestral property governed by the Mitakshara. The husbands by four bonds had charged the five annas four pies share with certain debts. One of those bonds was given by one of the husbands alone, namely, Jhaller. The decree under which the first sale in execution took place was on a judgment upon a bond given by the three husbands to secure a certain sum for money lent to them, and by which they charged by way of mortgage, as security for the amount lent, the five annas four pies share. They were sued, not only to recover the money out of their general assets, but in the first place to have it realized out of the five annas four pies share. The decree was that the money should be recovered out of the property charged, and the five annas four pies share was attached in execution of the decree, and was sold in execution. The sale was confirmed by the Court, and the confirmation recites that the action had been brought for the recovery of a certain amount, and "as the right and interest of Baboo Jhaller Singh, and Baboo Pertab Narain Singh, and Roghuburdyal Singh, judgment-debtors, in the undermentioned land, or immovable property, were sold on the 6th October 1879, in execution of this decree through the bailiff of the Court of the Judge of Patna, and as seven days have elapsed and no objection is filed, it is ordered that the said auction sale be confirmed, and the said sale is confirmed by this order." Then at the foot of the certificate of confirmation the property is stated to be the five annas four pies share of the mouzah Bazidpur Dhanki, so that there can be no doubt that by the bond under which the sale took place that property was charged; the debt was decreed to be recovered out of the property; the property was attached; the property was sold, and the sale was confirmed as to the property itself. Therefore it was not a mere sale of the right, title, and interest of the debtors. It was the sale of the property being the right, title, and interest of the debtors.

The suit was brought by the widows on behalf of themselves and the children to set aside the sale entirely; and they also prayed that possession might be awarded in respect of the whole five annas four pies share; and secondly: "In case the purchase of defendant No. 1,"—that is, the purchase of Punnu—"in respect of the right and interest of defendants Nos. 3 to 5 (that is, the three husbands), be held valid, then your petitioners might be put in possession of their legal share by partition."

The case was tried by the Subordinate Judge, and he gave a decree in favour of the plaintiffs for the shares to which he considered the claimants would be entitled if a partition had been made. His judgment is in the Record, and his order is: "That the case of the plaintiffs be decided with this detail, that the claim of five of the plaintiffs"—naming them—"be dismissed with costs." Those were five of the children who were not in existence when the bonds were executed. There is no appeal on the part of those children with regard to the dismissal of their claim. Then upon the claim of the widows and the other children he ordered that the property "be divided into fifteen sahams,"—which means fifteen shares,—"of which twelve sahams be declared to be the property of the plaintiffs, and three of Jhaller, Pertab, and Roghubur, that each of the plaintiffs mentioned above do

get possession of one saham, and the remaining shares, that is to say, the shares of the three husbands, remain in the possession of the defendants."

Upon that there was an appeal to the High Court, and the Court gave their judgment on the 21st of June 1883. For their reasons they referred to a judgment they had given in another suit. The effect of the judgment was, that although the defendants had failed to prove that the loans in respect of which the bonds were executed were required for family necessities, still the plaintiffs had equally failed to establish that they were "applied to immoral purposes;" that the lenders did not make any proper inquiry which a prudent lender would make to satisfy himself as to the necessity to the loans. As to the evidence of immoral and extravagant conduct of the husbands, the High Court said: "Although the witnesses examined by the plaintiffs give a some what exaggerated account of it, yet we are on the whole satisfied that these persons were leading a life of debauchery and sensuality; and if the lenders had made proper inquiry they would have found that the necessities of the loan arose from their improper and immoral way of life. The lower Court seems also to be of this opinion. The Subordinate Judge in one portion of his judgment says: 'The mere bad conduct of Jhaller, Pertab, and Roghubur is not sufficient to resume the property.' But the lower Court thinks that the evidence adduced is not sufficient to establish that the amounts borrowed under the aforesaid bonds were actually applied to immoral purposes. In this opinion we also concur." It therefore appears that the High Court thought that, although the bonds were not proved to have been given for monies advanced for improper purposes, still the lenders of the money who had sued and recoverd their judgments had not made proper inquiries to ascertain whether there was an actual necessity for the loans. But it must be borne in mind that this was not a case of the joint family consisting of brothers, but it was one consisting of fathers and children; and it has been held that sons are liable to pay the debts of their fathers, unless incurred for immoral or illegal purposes.

That principle was laid down by the Judicial Committee in the case of *Suraj Bunsi Koer* v. *Sheopershad Sing* (1), where a ruling of Chief Justice Westropp (2) was referred to with approbation, in which he said: "Subject to certain limited exceptions (as, for instance, debts contracted for immoral or illegal purposes) the whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the debts of the father and grandfather." Colebrooke's Dig., Book I, cap. I, par. 167, and *Girdhari Lal* v. *Kantoo Lal* (3) were cited as authorities for the proposition, and in a subsequent part of their Lordships' judgment the decision in the case of *Kantoo Lal* is summed up in the words following: "This case then, which is a decision of this tribunal, is undoubtedly an authority for these propositions: First, that were joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons, by reason of their duty to pay their father's debt, cannot recover that property unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted."

Now, although at the time of the sale notice was given on behalf of the children that the property was joint ancestral property, and that the fathers had no right to mortgage it, still the question arises whether, under the execution of the decree under which the property was ordered to be attached, it was for the purchaser to show that there was a necessity for the loan, or whether it was not necessary for those who claimed on behalf of

(1) L. R., 6 I. A., 104; I. L. R., 5 Calc., 148; 4 P. C. J., 1.
(2) 11 Bom. H. C. Rep., 83.
(3) L. R., 1 I. A., 321; 14 B. L. R., 187; 3 P. C. J., 380.

the children to show that the debt was contracted for an immoral or illegal purpose. If it was necessary to show that the debt was so contracted, the plaintiffs failed to prove the fact, and that is so found by the High Court. It appears to their Lordships that according to the decision in the case of *Suraj Bunsi Koer* v. *Sheopershad Singh* (1) it was necessary for the plaintiffs to show that the debt was contracted for an illegal or immoral purpose.

In the case of *Nanomi Babuasin* v. *Modun Mohun* (2) the principle laid down in the previous case was adopted; and at page 17, L. R., 13 I. A., in the judgment of their Lordships, it is said: "Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have, for some time, established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditor's remedies for their debts if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority." It appears, therefore, from the decisions that, in a case like the present, where sons claim against a purchaser of an ancestral estate under an execution against their father upon a debt contracted by him, it is necessary for the sons to prove that the debt was contracted for an immoral purpose, and it is not necessary for the creditors to show that there was a proper inquiry, or to prove that the money was borrowed in a case of necessity.

Under these circumstances their Lordships think that judgment of the High Court was an erroneous one, and they will humbly advise Her Majesty that that judgment and the judgment of the Subordinate Court, in so far as it was adverse to the appellants, should be reversed, and that the suit be dismissed with costs in both those courts. The respondents will pay the costs of this appeal.

Appeal Allowed.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

(1) L. R., 6 I. A., 104; I. L. R., 5 Calc., 148; 4 P. C. J., 1.

(2) L. R., 13 I. A., 1; I. L. R., 13 Calc. 21; 4 P. C. J., 682.

1st, 2nd, 3rd, and 8th March and 21st. April, 1888.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock and the Right Hon. Sir Richard Couch.

On appeal from the High Court at Madras.

SRI AMMI DEVI* ... *Plaintiff*,

and

SRI VIKRAMA DEVU (A MINOR, BY THE AGENT TO THE COURT OF WARDS) ... *Defendant.*

Failure to prove alleged authority to widow who had purported to adopt to her deceased husband. Query; as to effect upon an adoption of an adopted child being the only son of his father.

Whether an elder widow who had purported to adopt a son to her deceased husband under his authority had received such authority orally or by will, was disputed by a junior widow, the Courts below differing as to the question of fact. Upon the evidence, the finding of the Subordinate Judge that no such authority had been given, was maintained.

The Courts below also differed as to whether the adoption, if authorized was validly effected, the boy adopted having been the only son of his natural father. Whether this is a disqualification invalidating an adoption, is a question that has not come before Her Majesty in Council for decision.

APPEAL from a decree (20th December 1884) of the High Court reversing a decree (17th March 1882) of the Subordinate Judge of Vizagapatam.

As to the fact of an authority to adopt having been given orally or by will, and

* 15 Cowell's Ind. Ap. 176; 11 Mad. 486.

as to the legal competency of the subject of an alleged adoption, the Courts below had differed in opinion.

The suit was brought by the appellant's mother, Sri Nilamani Patta Maha Devi, the junior widow of Krishna Bhupati Devu, zamindar of Madgole, in the Vizagapatam District, deceased, on the 25th December 1875.

The defendants were Sita Patta Maha Devi, the senior widow of the deceased raja, and Vikrama Devu, whom she had purported to adopt. The plaint alleged that the late zamindar who left no male issue had given no authority either oral or written to the widow to adopt a son to him; and that it was without any authority that she had purported to adopt the second defendant, who besides was the only son of his father, and, therefore, could not according to the sastras be adopted. On both these grounds it was claimed that the adoption should be set aside. The defence was that the authority to adopt had been given by the deceased raja to the senior widow both orally on the 20th December 1875, and again by his will executed on the following day, 21st, in the presence of witnesses. It was also asserted that although the boy adopted was now the only surviving son of his natural father, he was his second-born son; and that the adoption was valid.

The Board of Revenue in its capacity as Court of Wards was directed by the Madras Government on 19th October 1877 to apply to intervene for the protection of the widows; but on the application of the plaintiff, the High Court having received a report from the District Judge (s. 7, cl. 3, Regulation V of 1804) that she was competent to manage her affairs without a guardian, submitted a certificate to that effect to the Government. After the filing of the plaint the suit was before the Subordinate Judge for settlement of issues, when the Collector having obtained sanction to defend on behalf of the minor, filed his written statement to the effect that on the 20th December 1875 the late zamindar of Madgole orally authorized his senior wife, the first defendant, to adopt a son to him, and on the following day executed a will providing for the adoption of a boy. In accordance with the above, she duly adopted on the 8th November 1876 the second defendant, who, though now the only surviving son of his natural father, was his second-born son; and that the adoption of even an only son when complete was valid according to Hindu Law.

Sri Krishna Chandra Devu, the natural father of the second defendant, then was, on his own application, added as a defendant. He filed a written statement to the same effect. The issues raised the questions of the giving of the authority by the late zamindar either orally or by will, and also as to the validity of the adoption authorized.

The alleged will was as follows:—

"Will executed on the 21st day of December 1875 by (us) Sri Sri Sri Krishna Bhupati Devu Maharajulungaru, zamindar of Madgole, in favour of our seniour wife Sri Sita Patta Mahadevigaru.

"1. Thinking that our end is approaching—as you have become sonless owing to our having no male issue—you will at least after our death make one or two adoptions for the continuance of the family and continue the line.

"2. Till the person you may adopt comes of age, you will yourself, in co-operation with the *varisu* (heir) Vaddadi Gopala Bhupatigaru, manage carefully the affairs of the whole of our Madgole zamindari, and after that will deliver over possession of the same to the person whom you may adopt.

"3. From the said zamindari estate itself the debts which we justly owe to the zamindar of Jeypore and others shall be paid.

"4. You may, as you choose, continue the mokhasas, inams, lands, and other grants made by us from the zamindari to the respective parties in enjoyment of such grants.

"5. After the discharge of debts you will give to Ammi Devi, daughter by our junior wife Sri Nilamani Devigaru, a

village yielding a cist of Rs. 1,200 per annum on account of her 'pasupu kunkumu.'

"6. You will cause to be paid to our junior wife, the said Sri Nilamani Mahadevi, Rs. 2,400 per annum for her maintenance.

"7. You will yourself cause to be paid to our mistresses, Sitomma and Nilamani, Rs. 600 each per annum as long as they live.

"8. Having resolved that you should act as stated above, authority is by this will itself granted to you to take possession of the said zamindari with all our properties, movable and immovable. You shall therefore act according to this will.

"Tuesday, the 9th of Margasira Bahula, Yuva year."

This was said to have been executed by the deceased in the presence of many witnesses by stamping it with the "matsya santakam" or family device of a fish for his signature a few days before his death.

The Subordinate Judge, A. L. V. Ramana, found it not proved that the authority was given orally or by will; no such will, as had been alleged, having been executed. He was of opinion that the adoption of an only son, whether the first-born or an after-born son, was invalid among the regenerate classes, to one of which the parties, being kshatryas, belonged.

On appeal, this judgment was reversed by the High Court (Sir C. Turner, C.J., and Muttusami Ayyar, J.). Their judgment concluded as follows:—

"On the whole we consider the appellant sufficiently established that authority to adopt had been given, and that the will had been executed by the zamindar, and that the respondent failed to prove that at the time the authority was given and the will executed the zamindar was not competent to give the one or execute the other. We shall, therefore, hold that on these issues the respondent's case failed.

"There is the further point, viz., the question whether the adoption is valid in respect of the competency of the person adopted? At the hearing we were inclined to refer to a Full Bench for consideration the question, whether it has been rightly held that an eldest or only son can legally be adopted? The point has been decided in this Presidency in favour of the validity of the adoption, and in a case under the Mitakshara Law, a decision of the High Court of Bengal to the same effect has been approved by the Privy Council. We, therefore, fear that it would be useless to ask the Court to reconsider a question of law on which the highest tribunal has pronounced an opinion, seeing that the reasons on which we still entertain doubt as to the validity of such an adoption have been stated with great ability by Mr. Justice Mitter of the Calcutta High Court. The essence of adoption being gift, the competency of the giver is essential to the effectual creation of sonship, and the Hindu Law, as we understand it, declared the Hindu house-holder incompetent to give his only son. Moreover, in the various treatises which illustrate the later law obtaining in this Presidency, we find that the commentators, when discussing restrictions which some writers imposed on adoptions, and declaring that they could not apply in cases of necessity, are generally careful to add that the adoption is valid if the boy be a younger son. We should be glad if opportunity arose for the reconsideration of this question by the Privy Council; but until the present precedents are overruled, we feel ourselves constrained to follow them. We do not, therefore, direct an inquiry as to whether the appellant was the eldest or the only son of his father."

After obtaining leave to appeal from this judgment the plaintiff died, leaving an only daughter, the present appellant Krishna Chandra Devu, the natural father of the adopted minor, having also died, the Court of Wards represented the minor on this appeal.

Mr. *J. D. Mayne* and Mr. *G. P. Johnstone* appeared for the appellant.

Mr. *R. V. Doyne* and Mr. *C. C. Macrae* for the respondent.

Only the question of fact, as to the authority having been given to the widow, was now argued; the argument of the question of law being postponed till it should be ascertained whether it was raised: the result being that it was not raised.(1)

On a subsequent day (21st April) their Lordships' judgment was delivered by

THE RIGHT HON. LORD MACNAGHTEN.

The zamindar of Madgole died on the 25th of December 1875. He left two widows but no male issue. On the 8th of November 1876 the senior widow adopted a son to her deceased husband.

In 1881 the junior widow brought the present suit to have the adoption set aside, on the ground that the senior widow had no authority from her husband to make an adoption; and also on the ground that the adoption was invalid by Hindu law, because the infant who was adopted was the only son of his natural father.

The question of Hindu law was not argued before their Lordships. In the view which they took of the evidence, it became unnecessary to have it discussed. But as this question seems to have been determined by the High Court in deference to a decision, or supposed decision of this Board, it may be as well to state that the learned Counsel on both sides informed their Lordships that they had been unable to find the decision by which the High Court conceived themselves bound.

The case presented on behalf of the senior widow and the adopted child was this:—On Monday the 20th December 1875 the zamindar verbally authorized the senior rani to make an adoption; on the follwing day he executed a will expressly conferring upon her authority to adopt, and at the same time he dictated a letter and sent it to the Collector at Vizagapatam intimating the fact of his having executed a will to that effect. Each of these allegations was traversed by the junior widow.

Apart from the matters directly at issue, the circumstances of the case are not in dispute.

The zamindars of Madgole belonged to a family of some antiquity, with pretentions to a mythical descent. In token of their descent they used the badge or emblem of a fish on their banners and on the seal of the zamindari, and they were in the habit of authenticating documents by a drawing intended to represent the same device, and called the matsya santakam or fish signature.

The late zamindar succeeded to the family estate in 1833. The property was then much embarrassed. It became still further involved during his tenure. The principal creditor was the maharaja of Jeypore, who was in possession as mortgagee. A person of the name of Lakshmaji was the zamindar's muktyar, and he received a similar appointment from the maharaja. In 1875 Lakhsmaji took a lease of the zamindari. The control of affairs was thus in his hands, and all the officials of the estate were under his orders. Lakshmaji is said by the High Court to have been a clever but unscrupulous person. Probably this statement does him no great injustice. At the date of the judgment of the High Court he appears to have been undergoing a sentence of imprisonment for forgery.

For some 13 years or more before his death the zamindar was a helpless cripple from rheumatism. He became seriously ill about a month or six weeks before he died. In a letter from the Sub-Magistrate to the Collector of Vizagapatam, dated the 25th December 1875, announcing the zamindar's death, it is stated that he had been bed ridden for three days before the 21st, "owing to excessive heat, swelling of the body, and diarrhœa, and the weakness resulting therefrom." On Monday the 20th of

(1) In *Nil Madub Doss* v. *Bishumber Doss*, 13 M.I.A., 1885; 2 P. C. J., 489, the fact of adoption severing the relation of the boy with his natural father was negatived by the decision; and that the father would not be likely to give in adoption an eldest or only son otherwise than as "dwayamashyayana" was referred to among the reasons.

December he was seized with a violent attack of vomiting, and it is said that "the burning in his limbs increased largely." Under that attack, from which he never rallied, he sank on Saturday the 25th of December.

There seems to have been among the zamindar's dependants a faction opposed to Lakshmaji, and nominally, at any rate, in the interest of the senior rani. The head of this faction was one Gopala, an illegitimate brother of the zamindar.

As the illness of the zamindar increased and his death was evidently approaching, Gopala's faction grew bolder and there were disturbances between the adherents of Gopala and those of Lakshmaji. The Sub-Magistrate was informed that rioting was apprehended. On the evening of Friday the 24th of December the Sub-Magistrate received a summons from Gopala, requesting him to enter the fort where the zamindar resided and quell a disturbance. He went there accompanied by the inspector of Police. On entering the fort, Gopala took him to the senior rani, who was in her husband's room. The rani exclaimed: "This is just the time for preserving the matsya race, and told one of the servants to bring that paper." A paper was brought and placed in the hand of the rani, who gave it to the Sub-Magistrate, saying it was the will of the raja. The Sub-Magistrate went up to the zamindar to ask him if it was so. The zamindar's eyes were open. He seems to have made an effort to speak, but failed. He gave no sign with his hands or with his head. The Sub-Magistrate then had the document read aloud. When the will was read out Lakshmaji said, "Raja did not execute it. It is a forgery." The Sub-Magistrate then sealed up the zamindar's property as far as was practicable. He tried to find the seal of the zamindari. The rani said it was with Lakshmaji. Lakshmaji denied that he had it. The Sub-Magistrate then went to the house of the manager Narasimham. He was examined in the absence of Lakshmaji, and he stated that he had sent the seal to Lakshmaji three or four days before. The seal however could not be found, and it has not been discovered since. The Sub-Magistrate took possession of the document which was represented to be the zamindar's will, and sent it on the following day to the Collector. There is no doubt that it was produced at the trial in the same state in which it was on the night of the 24th of December. It is sealed with the seal of the zamindari, and also bears the fish signature. It purports to be attested by 20 witnesses, and to be subscribed by one Lingava as the writer of the document.

The zamindar did not recover consciousness, and died as already stated on the 25th of December.

In March 1876 the alleged will was presented for registration. In support of the application thirteen witnesses, of whom the senior rani was not one, were examined. The acting Registrar refused registration. Among the reasons which he gave for the refusal, he referred to the discrepancies in the evidence of the witnesses and to their demeanour. On that occasion the witnesses who deposed to the execution stated that the zamindar sat up and signed the document in their presence. They did not, they said, see it sealed or delivered to the senior rani, but they understood that it was sent to the manager to be sealed, and that it was afterwards delivered to her.

An appeal was presented from the decision of the Acting Registrar. In view of this appeal the senior rani was examined herself. Her statement was this:—On Monday the 20th of December her husband was in a critical state. She went into his room about 9 A.M. She asked, "What is to be my fate? I have no children, and what is to become of me?" He told her to make one or two adoptions, to reign over the country, protect the second wife and concubines just as he did, and conduct the administration. On Tuesday about 3 P.M. at the time of meals he gave her the will. No one was in the room at the time but herself and the raja. On the very day he gave her the will he had sent either a

will or a letter to the Collector. He signed the will in her presence, and also smeared the ink on the seal and affixed the seal himself. No one attested the will while she was there. She took the will and left it in her box for three days, and gave it to the Sub-Magistrate on the Friday.

After this evidence was given the appeal from the Acting Registrar's decision was allowed to drop. The rani's statement to Mr. Goodrich, the Acting Collector, who made inquiries into the matter at the instance of the Board of Revenue in July, 1877, was that she was advised that it was unnecessary to establish the genuineness of the will, as the zamindar had given her authority to adopt. Mr. Goodrich's report was put in evidence by the rani. It may be observed, in passing, that Mr. Goodrich remarks:—"Unfortunately, there has been keen contention all through the business; many have changed sides, some more than once; and the amount of perjured evidence at the disposal of each faction has been great."

In October 1877 the Governor in Council directed the Board of Revenue to intervene in their capacity of Court of Wards for the protection of the rights of the two widows, who were registered as proprietresses of the Madgole estate.

In December 1879 the junior widow was relieved from the guardianship of the Court of Wards.

This suit was instituted on the 8th of August 1881. The senior widow and ten other persons, four of whom had been witnesses in the registration proceedings, were examined for the defence. The senior widow was the first witness. Her account of the conversation of Monday was much the same as that which she gave on the former occasion, except that she placed the conversation at 2 jhams or 12 o'clock, and said that when she went to her husband's room there were males in the room, who were ordered to leave, and she added that the people outside could have heard her conversation with her husband, and that the interview ended by her husband saying:—"You had better go now. I shall execute a will to-morrow and give you." As regards the interview on Tuesday, she adhered to her statement that she went at 3 jhams or 3 o'clock to see her husband at meal time, and that her husband both signed and sealed the will in her presence. She added that she stayed alone with her husband about an hour talking over their past griefs and joys.

The room in which the sick man was lying was an apartment without windows. The door opened into a verandah 3 cubits wide. The room is said to have been about 7 or 8 cubits wide and 10 or 18 cubits long from north to south. The cot on which the sick man lay was close by the southern wall.

Several witnesses speak to being in the room on Monday when the rani came in. They say they went out, sat down on the verandah, and heared the whole conversation. The persons outside were about twenty in all. After the rani left the sick man repeated the conversation to them, and they congratulated him on having authorized his wife to make an adoption. He told them he was going to execute a will on the following morning, and asked them all to come quickly. Accordingly they came. Lingaya was among the first to arrive. The zamindar handed him a draft and told him to copy. it. He was about an hour copying. He did not know in whose handwriting the draft was. It was in the handwriting of some Madgole man. When the will was copied it was read out once or twice, and then the zamindar sat up and signed it, and handed it back to be witnessed by those present. While the will was being signed, the zamindar dictated a letter to the Agent of the Government at Vizagapatam. It was written by Venkanna, not by Lingaya, the writer of the will. When the letter was finished, it was handed to the zamindar, and then the rani came in. Those present then left the room. Some went away at once; others waited in the verandah for about an hour. During that time they were not peeping in. Then

they peeped through the door, which was ajar about a span, and just at that moment it happened that the zamindar called for his seal. It was taken from his box. He signed the letter. He sealed the letter and the will, and gave the will to the Rani.

Such in substance is the account given by the witnesses for the defence on whom the learned Counsel for the respondent relied. On the other hand, there are witnesses for the defence from whose evidence it may be collected that a person standing at the door of the sick man's room could not see him where he was lying, that nobody peeped through the door, and that, in fact, it was not possible to do so; and also that the conversation could not be heard outside, that the sick man's voice was feeble, and that the rani spoke low. And it is to be observed that Narasimham, the manager, ninth witness for the defence, who does not seem to have had any motive for stating that which was untrue, says that he saw the zamindar daily, from the 20th to the 24th of December inclusive, and he adds: "I did not get any papers signed by him. He was too weak to transact business or to sign papers during those days. His hand was swollen. He postponed signing chitta for a fortnight, as he could not sign."

Taking the evidence of the accepted witnesses, there are discrepancies to which the Subordinate Judge has perhaps attached too much importance. There are contradictions of more importance between the statements made by Lingaya, Venkanna, and a third witness, Bhupala Raj, in this suit, and their former depositions which were put in evidence. The account of the transaction adopted by the learned Counsel for the respondent, presents many improbabilities. The story of the assembly in the sick man's room on Monday morning, of the persons present going into the verandah and hearing there the conversation between the zamindar and the rani, and the zamindar's promise to execute a will on the following day, seems improbable. It is not a little remarkable that there appears to be no trace whatever of this story in the evidence given on the registration proceedings. It is also remarkable that the time of the rani's visit to her husband on Monday is now placed much later in the day than it was in her evidence in 1876. In 1876 the visit is stated to have taken place at 9 A.M., a time at which it is not likely that the zamindar would have had visitors, if one may judge from what is said to have occurred on the following day. People were asked, it is said, to come early on the following day to witness the will, and yet no one seems to have come before 10. The account of the scene, when the will is said to have been copied, signed, and attested also seems improbable. It is improbable that a person admittedly in the state in which the zamindar was should have been able to trace the fish signature with his own hand, and to take so active a part in the transaction,—sitting up without assistance, giving direction, and above all, dictating a letter of some length to the Collector, which explained his will as regards adoption, and asked the favourable consideration of the Government. It is most improbable that this scene, for which arrangements were openly made the day before, should have gone on for so many hours without attracting the notice of Lakshmaji, who is said never to have left the fort during the zamindar's illness, and to have kept a vigilant watch on the proceedings of the opposite faction.

But these improbabilities are trifling compared with the improbability presented by the document itself, and by the circumstances under which it was first introduced on the stage.

The alleged will is a remarkable document. It is clear and concise, and singularly well arranged. It provides for many things besides providing for adoption, which is said to have been the reason for its execution. It provides for an allowance for the second wife, for the testator's daughter, for his concubines,

and above all, it provides for placing the adminstration of the estate in the hands of Gopala. Now Gopala, as we know from the statement of the senior rani herself, was in disgrace at the time. She says in her final examination · "At the time of the raja's death Gopala Bhupati was banished from the fort. It was the raja himself who precluded him from coming into the fort." In the judgment of the High Court it is stated that he had not been allowed access to the palace for some years. Whether this statement be founded on an admission at the hearing or not, Gopala's banishment, as it was the act of the zamindar himself, must in all probability have occured before the zamindar's last illness. It is almost incredible that the zamindar could have meant to commit the management of his estate to a person whom he had himself banished from his presence. Then there is nothing in the evidence to show that the dispositions in the alleged will emanated from the mind of the alleged testator, or that he had anything whatever to do with the instructions from which the will was prepared. Lingaya says that he wrote the will on the Tuesday morning from a draft handed to him by the zamindar. The draft is not forthcoming, which is perhaps not to be wondered at. But the person who wrote the draft, who is said to have been a Madgole man, is not produced. No one seems to know who he was. As the zamindar could not leave his room, the writer must have come to the zamindar. There could have been no difficulty in finding the writer, and it is to be observed that the will was challenged as a forgery when first it was produced, and that Lingaya was questioned as to the writer of the draft on his first examination in 1876, so there can be no ground for suggesting that this point, which is obviously of the utmost importance, comes as a surprise to the supporters of the will. Again, there is nothing to show that the zamindar had anything to do with procuring the seal from the manager, in whose custody it was until three days before the death. It seems to have been obtainted from him by trick. Two messengers were sent for the seal. They each said the zamindar wanted the seal, and that Lakshmaji was with him at the time. It was given to the second man, because his story corresponded with that of the first. The second messenger is said not to be alive, but there was no suggestion that the first messenger was dead, and he is not produced.

On the whole, therefore, the irresistible inference seems to be that the alleged will, whether it was prepared before or after Monday the 20th, was not prepared by the instructions of the zamindar, and that the seal, by which it purports to be authenticated, was not procured from the manager by the zamindar's directions.

Under these circumstances, their Lordships are of opinion that it would not be safe to rely on the oral evidence as proof that the document propounded by the respondent does contain the last will and testament of the deceased. The burden of proof rests with the propounder of the will, and, in their Lordships' opinion, the respondent has not discharged that burden. In their opinion, no reliance can be placed on the alleged coversation on Monday, or on the letter which is said to have been signed by the testator on the 21st, but which, from a pencil memorandum upon it, does not appear to have been received until after the zamindar's death. It was for those who produced that letter to give an explanation of the date endorsed, if they meant to contend that that date was not, as it presumably was, the date of receipt.

In the result, their Lordships agree with the findings of the Subordinate Judge, though much of his reasoning appears to be far-fetched and ill-founded. In particular, there seems to be no ground for his strictures upon the conduct of the Sub-Magistrate.

Their Lordships will humbly advise Her Majesty that the appeal ought to be allowed, and that the respondent ought to pay the costs in the High Court and in the Court of the Subordinate Judge,

whose judgment will be restored, except as regards the payment of costs. The respondent must pay the costs of the appeal.

8th and 9th March, 21st. April, 1888.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock and the Right Hon. Sir Richard Couch.

On appeal from the High Court at Bengal.

HARI SARAN MOITRA* ... *Petitioner*,

and

BHUBANESWARI DEBI (FOR HERSELF AND AS GUARDIAN OF JOTINDRA MOHUN LAHIRI A MINOR) AND ANOTHER. *Objectors.*

Execution of decree—Mesne profits—Decree made against a widow representing estate, enforced against a minor adopted son, through the widow as his guardian—Devolution of liability, along with estate, upon the minor, without his having been made formally a party to the decree—His similar liability in a suit for mesne profits.

A minor, who had been adopted by a widow as a son to her deceased husband, was not made a party to an appeal, which she preferred after the adoption, from a decree made against her when she represented the estate. *Held*, that, as liability under the decree, made when the widow fully represented the estate, devolved upon the minor on his adoption, the widow's estate being also thereupon divested, it would be right for her to continue to defend, but only as guardian of the minor. Also, that it having been for the minor's benefit that the widow, as guardian, should appeal from a decree, which had already diminished his estate, the minor was bound by the adverse decree of the Appellate Court, although he had not been made, formally, a party thereto. The principle of the decision in *Dhurm Dass Pandey* v. *Samasoondery Debia* (1) referred to, and applied in this case.

Held, also, that the minor, by his adoptive mother as his guardian, was liable in a suit for mesne profits, brought after the decree upon title; it being made clear that the suit for mesne profits was substantially brought against the minor.

Sureshchunder Wum Chowdhry v. *Jugutchunder Deb* (2) approved.

CONSOLIDATED appeals from two decrees (June 9th and 10th 1884) of the High Court, reversing an order made in execution, and a decree for mesne profits (10th January 1882), by the Subordinate Judge of Rungpore.

The principal question on these appeals related to the enforcement of a decree against a minor, as a consequence of his adoption by the judgment-debtor, a widow, against whom, as representing the deceased manager of family estate, a decree had been obtained by another member of the family for a share. Whether that decree was enforcible against, and mesne profits were claimable from, the adopted minor, through his adoptive mother as his guardian, the above decree having been made without his having been formally made a party thereto, was the first question. Other points were in dispute, *viz.*, as to what property was to be included in the execution; as to the relative liability of the judgment-debtors among themselves; and as to whether their liability was joint, or several.

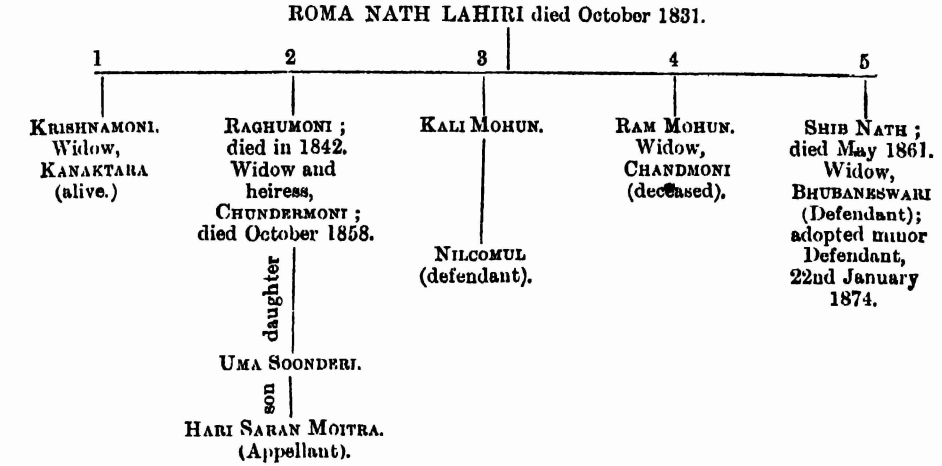
The first of these appeals arose out of a petition by a present appellant, as decree-holder, for execution of a decree (22nd December 1874), made in his favor by the High Court in a suit brought in 1870 against Bhubaneswari Debi, Nilcomul Lahiri, and Kanaktara Debi; and affirmed by an order (20th November 1880) of Her Majesty in Council. This decree declared his mother, Umasoonderi, whom he now represented, to be entitled on partition to the possession of a share in the joint family estate. The other

* 15 Cowell's Ind. Ap 195; 16 Calc., 40.

(1) 3 Moore's I. A., 229; 1 P. C. J., 271.
(2) I. L. R., 14 Calc., 204.

appeal was from a decree (10th January 1882) in a suit brought by the present appellant for mesne profits of the share in lands to which the decree of 1874 had established his title. Execution was sought, and the suit for mesne profits was brought, against the present respondents, Bhubaneswari Debi, for herself, and as guardian of the minor Jotindramohun Lahiri, and Nilcomul Lahiri.

The relationship of the parties appears in the following table :—



In the suit brought in 1870 Umasoonderi claimed to establish her title, as heiress of her father, Raghumoni, to a one-fifth share of the estate which had been Romanath's, together with the accretions thereto made by Shibnath, as manager of the family till his death, and she asked to have set aside as against her a partition alleged by the defendants to have been made by Romanath on October 26th, by which he purported to give a 3-anna share of his estate to his eldest son, Krishnamoni, and shares of 2½ annas to the other sons, and to reserve the remaining 3 annas for himself, and also to set aside a deed of sale, dated 2nd March 1856, by which Chundermoni, the plaintiff's mother, purported to sell to Shibnath a one-fifth part of her 2½ anna share.

The details of the property, claimed as being subject to partition, were given in two schedules, the first of which comprised inherited land belonging to the family, and the second stated the property acquired by the family whilst joint.

The decree of the Subordinate Judge of Rungpore (13th December 1872) was in favor of the plaintiff as to part of her claim ; and it was, in the main, affirmed by the High Court (24th December 1874), the decree being in the terms set forth in their Lordships' judgment below.

The adoption of Jotindramohun, meantime, and pending the proceedings by Bhubaneswari in appeal, took place (under an *anumati patro* contained in the will of Shib Nath) on 22nd January 1874(1). But Jotindramohun was not made a party to the appeal by any proceeding before the Court. And from the decree of the High Court, Bhubaneswari alone appealed to Her Majesty in Council, whose order (20th November 1880) followed the judgment reported in *Bhubaneswari Debi* v. *Hari Saran Moitra*(2).

Application for execution was made by the present applicant, whose name had

(1) See *Bhubaneswari Debi* v. *Nilcomul Lahiri*, I. L. R., 12 Calc., 18, and *Sotishchunder Lahiri* v. *Nilcomul Lahiri* I. L. R., 11 Calc., 45.

(2) I. L. R., 6 Calc., 720.

been substituted for that of his mother, by that time deceased, on the 9th April 1881.

This application was against "Bhubaneswari for herself, and as guardian on behalf of the minor Jotindramohun Lahiri," and also against Nilcomul to recover possession of the immoveable properties mentioned in the plaint, and in the decree, as also of certain moveable properties, or their value. As to the last, the moveables, there was no dispute on this appeal.

The suit for mesne profits was brought on the 12th April 1881 against the same parties as defendants, so as to include Bhubaneswari in her individual capacity, and the minor through her as guardian, together with Nilcomul.

Bhubaneswari objected that she was not liable in the execution proceedings, having, before the decree of 1874, adopted the minor, who, on the advice of Nilcomul, was not made a party in the appeal of the principal suit; and she defended the suit for mesne profits on similar grounds, throwing the liability on to Nilcomul. In neither of these proceedings, not in the execution nor in the suit, could the minor be held liable, because he had not been a party to the decree of 1874. On the merits, Bhubaneswari represented that Nilcomul was entitled, on the whole, to no more than a four annas thirteen gundas share, while she herself was entitled to an equal share, with some addition; and she alleged that Nilcomul had admitted, in the previous litigation, possession of six annas ten gundas, showing thereby that he had, without title, and excess of one anna seventeen gundas.

Nilcomul, by his objections to the execution and in his defence to the suit for mesne profits, insisted that he was in possession of only his rightful share, and that the decree-holder should look only to Bhubaneswari, who was in possession of a five annas share; whereas, at the outside, she had only a right to her husband's quota of three annas and four gundas, together with what the latter might have obtained from Kanaktara's share. This objector further alleged that, if he should be held at all liable, such liability would be limited to the two gundas share, held by him in excess of the six annas eight gundas share, to which, under the decree itself, he was entitled.

One Rudrachunder Roy also filed objections on behalf of the minor, founded, like those taken by Bhubaneswari on his behalf, on his not having been a party to the decree of 1874.

The Subordinate Judge of Rungpore, Bhugwan Chunder Chukerbati, on the question of the minor's liability through his guardian, both in the execution, and in the suit for mesne profits, was of opinion that Bhubaneswari having acted for the minor's interests, he was bound by the result of her appeals. His judgment on this point was as follows: "In fact, the appeals were prosecuted and defended by her with the *bona fide* intention that her husbands's real rights had been interfered with. On that understanding she went up even to the Privy Council, without alluding to the fact of her having adopted a son. There is no reliable evidence that the plaintiff knew of the adoption having been validly effected. I am inclined, therefore, to follow the rulings in *Ramkishore Chuckerbutty* v. *Kally Kanto Chuckerbutty*(1) and *Jotendro Mohun Tagore* v. *Jogul Kishore*(2), and to hold that the minor Jotindramohun will be liable for the wasilat, which tantamounts in substance to the effect that the estate of his adoptive father will be virtually liable, in asmuch as it was for his interest that the suit was defended, and the appeal carried up to the highest tribunal; and so he cannot evade the consequences of the act which was done with a motive to render his future good, though the result turned out otherwise than was anticipated."

The Subordinate Judge was of opinion, also, that the liability of the defendants

(1) I. L. R 6 Calc., 479, 8 C. L. R., 1
(2) I. L R. 7 Calc, 357, 9 C L. R, 57.

was several, as they were severally in possession, and he awarded to the decree-holder "possession and wasilat of his decretal share from each of them exclusively and separately."

Finding that Bhubaneswari held, for herself, and as guardian of the minor, five annas, that Nilcomul had six and a half annas and Kanaktara two and a half annas, while the decree-holder had two annas only, the Subordinate Judge decreed that "possession be given to the decree-holder of his remaining one anna and four gundas in the following proportion, *viz.*, thirteen and two-third gundas from Bhubaneswari, representing the minor adopted son, and ten and one-third gundas from Nilcomul. As respects properties which each of the judgment-debtors holds in his exclusive possession, he or she should make over to the decree-holder the full decretal share, which is three annas four gundas."

The Subordinate Judge also decreed to this appellant interest upon wasilat to the end of each year, and describing the properties or plots of land for which wasilat was due, and in whose possession they respectively were, he made a decree for payment to the plaintiff by Bhubaneswari, as guardian of the minor Jotindramohun, for mesne profits with interest, the sum of Rs. 3,297, and by Nilcomul, the sum of Rs. 2,394; adding interest to the date of payment.

In a separate judgment in the execution case, the Subordinate Judge decided against this appellant as to the building being included in the execution; being of opinion that the High Court, in awarding, to the then plaintiff, a share "of all the property" named in the two schedules, intended to include only the landed property therein, and not the buildings and moveables.

Rudrachunder Roy was not recognized by the Subordinate Judge as a party to the proceedings in the character of next friend of the minor, the Judge being of opinion that in the execution proceedings he should not be allowed to appear on behalf of the minor, whose interests the adoptive mother could sufficiently protect. Rudrachunder, however, filed a petition of appeal to the High Court, in the execution case, on behalf of the minor. Bhubaneswari also appealed, taking the same objections as were taken by Rudrachunder to the execution against the minor. She appealed also on her own behalf. Nilcomul Lahiri also appealed against the order in execution; and the petitioner, Hari Saran Moitra, filed objections in the form of a cross-appeal, from the order as to the buildings and the moveables. Against the decree for mesne profits, both Bhubaneswari, for herself and as guardian of the minor, and Nilcomul Lahiri appealed.

A Division Bench of the High Court (McDonell and Field, JJ.) reversed the decision of the first Court on the question of the minor's liability upon execution of the decree of 1874, and in the suit for mesne profits. They held that making a person's guardian defendant to a suit was not the same thing as making that person himself a party, and that this was not affected by the fact of his being a minor. The procedure of the Code had not been followed, and it contemplated a minor being made a party to the suit in his own name, directing that the Court, on being satisfied of the fact of his minority, should appoint a proper person to conduct his defence. They added: "In this case the plaintiff did not make any application to the Court to have a guardian *ad litem* appointed for the minor. There was an application made by a third person, who urged that he, and not Bhubaneswari, ought to be appointed guardian of the minor; but this was rejected, and the Subordinate Judge thought that Bhubaneswari was the minor's proper guardian. The Subordinate Judge was thus aware of the fact of Jotindramohun's minority, and being so aware, it was his duty to follow the procedure provided by s. 456. This, however, he did not do. Bhubaneswari then objected, and still objects, to being made a guardian *ad litem*. No defence was filed in the suit as on behalf of the minor,

and it appears to us clear that the minor has not become a party to these proceedings so as to become bound by the decree."

In regard to Bhubaneswari's individual responsibility under the decree, the Judges said: "But then it is contended that Bhubaneswari Debi is bound. She was made a defendant in a double capacity, for self and as guardian on behalf of the minor. In her personal capacity no decree has been passed against her. .

.....If the decree against Bhubaneswari Debi, in the form in which it has been made, that is, in her capacity as agent or manager, is allowed to stand, it is clear that the Court would have no authority to enforce it as against the minor, who was not a party to the suit, and who cannot be affected by this decree. We think, therefore, that the decree as made against Bhubaneswari Debi, guardian or manager of the minor, cannot be allowed to stand."

The Judges held that the Subordinate Judge was wrong in dealing with the decree of 1874, as if it had been a separate decree against each of the two judgment-debtors. In their opinion it was a joint decree and should be so executed as to give this appellant possession of an undivided share of three annas four gundas in every plot of the immoveable property.

As to the buildings, the decree-holder had, the Judges found, taken no steps either under the Code (s. 137) to have the original plaint made part of the execution record, or to file a certified copy of the two schedules. They, therefore, left this matter for the Subordinate Judge to see that a certified copy of the schedules annexed to the plaint was filed.

Dealing with Nilcomul's appeal, the Judges held that he was rightly entitled to a six annas eight gundas share, being three annas four gundas inherited by him from his father, and a similar share, which fell to him on the death of Chandmoni; so that, being in possession of six annas ten gundas, he held only two gundas over and above his proper share. Their judgment on this point was the following: "As regards these two gundas, the possession of Nilcomul being admitted, there must be a decree for mesne profits, and these mesne profits will be calculated upon the figures which the Subordinate Judge has taken in his decree. The result will be, that the appeal of Bhubaneswari will be decreed, and so far as she is concerned, the decree of the lower Court will be set aside. There will be a declaration that the minor Jotindramohun Lahiri has not been properly made a party to these proceedings and is in no way affected by the result. As regards Nilcomul, there will be a decree for mesne profits for four years, 1284 to 1287, upon two gundas of the property only."

The decree on Nilcomul's appeal was that, in lieu of the award to the plaintiff of Rs. 5,692, as mesne profits, the sum of Rs. 475 was payable only in respect of the two gundas share. In regard to the possession to be given to the decree-holder, under the execution order, the order of the Lower Court was varied by awarding to the decree-holder possession, as against both Bhubaneswari and Nilcomul jointly of an undivided three annas and four gundas share in every plot of land in dispute, giving to the decree-holder a one anna four gundas share in the plots in which he, or his mother, had possession of a two annas share before suit, and a three annas four gundas share of those plots in which he, or she, had no previous possession.

On this appeal,—

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the appellant, argued that the Appellate Court should have held that the minor, having become to all intents a party to the decree of 1874, upon the devolution of estate upon him, consequent on his adoption, the decree was enforcible against him; and that he was also liable in the suit for mesne profits. Whether Bhubaneswari sufficiently represented the minor as his guardian had been a question for the Subordinate Court before allowing the execution to proceed The Court had allowed it to proceed, and

thus the question had been disposed of. If any irregularity had taken place in the matter, it could not now be made a ground for reversing the order of the Court executing the decree, inasmuch as no material injury had been, or could be, shown to have resulted. At the time when the proceedings in appeal were taken, and the decree was passed, s. 11 of Act XXIII of 1861, amending Act VIII of 1859, was in force. The minor's liability, through his guardian, was not affected, either as regarded the proceedings against him in execution, or the suit for mesne profits; there being nothing to prevent that liability from devolving upon him, represented as he was by his guardian, along with the interest which he took in the estate, which was bound by the decree of 1874. The minor was substituted for Bhubaneswari from whom both interest and liability passed, on the adoption, in her capacity as representing the estate, to her as representing the minor as his guardian. The parties who for the time being were entitled to the estate were those against whom the Subordinate Judge had rightly ordered execution, and the liability for mesne profits rested on the decree. The minor had not been precluded from taking any real objection if he had had one to maintain.

[SIR RICHARD COUCH, in reference to the guardianship of the mother, referred to Sir T. Strange's Hindu Law, vol. 2, appendix to Chap. VIII, and vol. 1, cap, 3, para. 4.]

Any merely formal defect had been cured by the action of the first Court and the proceedings taken. Accordingly, both as to the execution by delivery of possession to the appellant, and as to the award of mesne profits, the decree of the High Court was erroneous and should be reversed. On the merits also, the appellant was entitled to the possession of the shares as ordered in the Court of first instance against the defendants under the decree of 1874.

[In reference to the question of guardianship SIR BARNES PEACOCK referred to *Doorgapersad* v. *Keshopersad Singh* (1).]

The following cases were referred to in the argument for the appellant: *Ishan Chunder Mitter* v. *Buksh Ali Soudagar* (2); *Manager of Raj Dharbanga* v. *Coomar Ramapat Singh*(3); *Bissessur Lal Sahoo* v. *Luchmessur Singh*(4); *Hunoomanpersad Panday* v. *Munraj Konwaree* (5); *Jogulkishore* v. *Jotendromohun Tagore* (6); *Jairam Rajah* v. *Joma Kondia* (7); *Kishen Singh* v. *Mareshwar* (8); *Komul Chunder Sen* v., *Surbessur Dass Goopto* (9); *Jogi Singh* v. *Kunj Behari Singh* (10); *Alim Baksh Fakir* v. *Jhalo Bibi* (11); *Suresh Chunder Wum Chowdkry* v. *Jugut Chunder Deb* (12).

Mr. *R. V. Doyne*, for the respondent Nilcomul Lahiri, argued that the appellant's rights under the decree of 1874 were fully satisfied by the terms of the decrees of the High Court. Against him the appellant had not made out any further claim than to receive the three annas four gundas share decreed in 1874; and in finding that Nilcomul had obtained possession of no more than he was entitled to, with the small exception of two gundas, as to which the decree for mesne profits had been allowed to remain, the High Court had come to a correct decision.

Mr. *Lawrence Biale*, for the respondents Bhubaneswari, and the minor adopted son Jotindramohun, argued that the decision of the High Court was correct. It could not be held that the minor had been constructively a party to the decree of 1874, and in consequence of his not having been represented by a

(1) L. R., 9 I. A., 27; I. L. R, 8 Calc., 656; 4 P. C. J., 332.
(2) Marsh, 614.
(3) 14 Moore's I. A. 605; 3 P. C. J., 117
(4) L. R, 6 I. A., 233; 3 P. C. J., 76.
(5) 6 Moore's 1 A, 393, 1 P C. J, 552.
(6) L. R., 11 I. A., 166; I. L. R., 10 Calc., 983; 4 P. C. J., 553.
(7) I. L. R., 11 Bom., 91.
(8) I. L. R., 7 Bom., 91.
(9) 21 W. R., 298.
(10) I. L R, 11 Calc., 509.
(11) I L. R., 12 Calc., 48.
(12) I. L. R., 14 Calc., 429.

duly constituted guardian *ad litem*, at the time when the proceedings took place, resulting in the decree of 1874, the decree could not be held to be binding upon him. The Minors' Act, XL of 1858, in s. 3, required that a minor in a suit should be represented by his duly authorized guardian, and the procedure was prescribed accordingly. This was in accordance with general principles, and that Bhubaneswari, not being duly appointed, could yet be the guardian of Jotindramohun so as to represent him in the suit had not been shown. The main point was that all that had occurred before the decree of 1874 had been insufficient to bring the minor before the Court, or his name on to the record; and that, without having been properly represented and heard by his guardian, he could not be treated as one of the judgment-debtors, who were parties to that decree, which must receive effect, as it stood, against those who were parties in it. The High Court had correctly refused to allow execution of that decree to proceed on this application against Bhubaneswari in her personal capacity; for in that character she had ceased upon the adoption to be responsible; while, at the same time, the adopted son could not be held liable through her, inasmuch as she had not been appointed his guardian *ad litem*, and there had been no formal appointment made, such as alone could empower her to act in defending the minor's interest. This was a point on which an order was required at the proper stage, when application should have been made. And it was not apparent that Bhubaneswari was in a position to represent the minor's interests as well as her own. It was, at all events, against the minor's interest that he should be taken to have been made a party, without the necessary and proper steps having been taken to make him one, and to give him an opportunity of being heard. This was the irregularity, and a most material one. In the case of a minor, the strict rule as to the joinder of parties should have been applied, and it could not be said that the omission was an immaterial one. True it was that the enforcement of decrees against persons upon whom interests had devolved, after such decrees had been passed, was a proceeding permitted in some well ascertained cases of successive liability. This appeared from the cases decided under Act VIII of 1859, chap. IV, ss. 109-206. See the note, collecting the cases, in Mr. W. Macpherson's edition of 1871, of the Code of Procedure. But there was no case in which a minor, without having been represented by a duly appointed guardian, had been held to be a party to a decree only by reason of his adoption. The High Court might have said that the minor was not liable in either the suit for mesne profits, or in the execution proceedings, as the same considerations applied in regard to the minor's liability upon either the one or the other; but the result at which the Court had arrived was right. He referred to *Ishan Chunder Mitter* v. *Buksh Ali Soudagar*(1); *Bissessur Lal Sahoo* v. *Luchmessur Singh*(2).

[SIR R. COUCH referred to *Dhurm Dass Panday* v. *Shamasoondary Debia* (3).]

The argument was that although, as in that case, the minor could receive a benefit, and an omission would not deprive him of an advantage, yet that, before his estate could suffer detriment, he must be represented and heard.

On the merits, as against Bhubaneswari and the minor, the actual rights of the appellant were, it was contended, fully satisfied by the decree of the High Court. In respect of mesne profits, Nilcomul, as in effect had been decided, should alone be held responsible.

Mr. *J. D. Mayne* replied, pointing out that in the cases already cited in the argument for the appellant, the defendants, against whom execution was allowed, were not parties to the decrees, which, however, were held to bind the property

(1) Marsh, 614.
(2) L. R., 6 I. A., 233; 3 P. C. J., 76.
(3) 3 Moore's I. A., 299; 1 P. C. J., 271.

in their hands. So here the property was bound by the decree of 1874. The appellant wanted nothing to be added to the decree to make it effective in his favour; the liability of the adopted son being correlative with his right to succeed, the latter right being shown on his taking the benefit of a decree in his guardian's favour in the case of *Dhurm Dass Pandey* v. *Shamasoondery Debia*(1)

Their Lordships' judgment was delivered, on a subsequent day (April 21st) by

THE RIGHT HON. SIR RICHARD COUCH:

In 1870 Uma Sundary Debi, the mother of the Appellant, and daughter and heiress of Raghumani, who was one of five brothers, sons of Rama Nath Lahiri, forming a joint Hindu family, brought a suit against Bhubaneswari Debi, the widow of Shib Nath, one of the brothers, who had managed the family property, Nilcomul, the son of Kali Mohun, another brother, and Kanaktara, the widow of Krishnamoni, another brother. These were the only members of the family who were then alive, Ram Mohun, the fifth brother, having died without issue, leaving a widow, who was then also dead. In the suit Uma Sundari claimed to recover possession of her father's share of the family property, which was said in the plaint to consist of land mentioned in schedules Nos. 1 and 2, and pucca buildings and personal properties. Schedule No. 1 contained the lands which the brothers had inherited from their father, and No. 2 the lands which were said to have been acquired whilst the members of the family were living in commensality. On the 13th December, 1872, the Subordinate Judge of Rungpore made a decree in favour of Uma Sundari in respect of part of the share which she had claimed. Thereupon Bhubaneswari, Uma Sundari, and Nilcomul separately appealed to the High Court, which, on the 22nd December, 1874, made a decree in the following terms: "It is ordered and decreed that the decree of the Lower Court be varied, and in lieu thereof it is hereby decreed and declared that the Plaintiff is entitled to 3 annas and 4 gundahs share (the share claimed) of all the property which is named and described in the two schedules appended to the plaint." And Uma Sundari having before the suit been put in possession of 2 annas of the property named and described in the first schedule, it was ordered and decreed that she should recover from the defendants possession of the remaining 1 anna and 4 gundas, and possession of 3 annas 4 gundas of the property named and described in the second schedule. Thereupon Bhubaneswari appealed to Her Majesty in Council, who, by an order in Council, made on the 20th day of November 1880, affirmed the decree of the High Court. Whilst the appeals were pending in the High Court, Bhubaneswari adopted a son, Jotindramohun Lahiri, but she continued to prosecute her appeal in that Court, and appealed to Her Majesty in Council in her own name, taking no notice of the adoption. On the 9th April 1881, Uma Sundari having died, the appellant as her heir made an application to the Court of the Subordinate Judge for execution of the decree. It stated that the enforcement of the decree was sought against Bhubaneswari for self and as guardian on behalf of the minor Jotindramohun Lahiri, and against Nilcomul Lahiri. Execution was not sought against Kanaktara, who was said in the judgment of the High Court to have made no defence to the suit. The reason of this may be that she was not in possession of more than her husband's share. On the 12th of April 1881 the appellant brought a suit in the same Court for mesne profits, naming as the defendants Bhubaneswari Debi, for self and as guardian and executor of Jotindramohun Lahiri, minor, and Nilcomul Lahiri The Subordinate Judge, on the 10th January 1882, gave judgment in both cases, referring in one judgment to the other where the question appeared to him to be the same. The judgments will be more conveniently stated

(1) 3 Moore's I. A., 299, 1 P. C. J., 271.

hereafter. In the execution case Jotindramohun, by his next friend Rudrachunder Roy, appealed to the High Court. This person had presented a petition of objection, as next friend of the minor, to the Court of the Subordinate Judge. He was not shown to have obtained any authority to act as next friend of the minor, and is said to have been a servant of Bhubaneswari. She also appealed, taking the same objections as regards the minor as were taken by the assumed next friend. Nilcomul also appealed, and Hari Saran Moitra, the present appellant, filed objections by way of cross-appeal. In the suit for mesne profits both Bhubaneswari and Nilcomul separately appealed.

On the 9th of June 1884 the High Court gave judgment in the suit for mesne profits, and on the 10th in the execution case, and the present appeal is from the orders or decrees made upon those judgments.

In the execution case there are three questions: (1) whether execution can be had against the minor personally or against Bhubaneswari; (2) whether the pucca buildings and moveables are to be included in the execution; (3) whether possession in execution was to be given against the parties jointly or severally. Upon the first of these questions the Subordinate Judge said:—

"Whether the execution in this case should proceed against the minor personally or against his adoptive mother is a point which has been equally raised and decided in the decree holder's suit for wasilat, No. 26 of 1881. The question being similar the same judgment should govern them both. I hold, therefore, under the decision I have this day delivered in the trial of issue 7 in the above suit for wasilat, that the execution should be carried out against the minor, and hence against the estate left by his adoptive father. Bhubaneswari, for herself, cannot be made personally liable when the assets of her husband are available at hand to fulfil the conditions of the decree. Then, as apparent from the record of the suit No. 26, Bhubaneswari was a defendant in the original suit in the capacity of a representative and in possession of her husband's estate. That possession is still with her, though, since the adoption, it has been converted to one on behalf of her minor son. The minor is also under her guardianship and protection. Bhubaneswari is, therefore, the proper person to represent the minor, and I do not think it equitable that Rudrachunder Roy, almost a stranger, should be allowed to stand on behalf of the minor when his connection is far remoter than that of Bhubaneswari, who protects the minor, and is his nearest kindred as the adoptive mother."

On the same question the High Court said:—

"The present appeal arises out of proceedings taken to execute the decree in the title suit passed by the High Court, and confirmed on appeal by the Privy Council. It is contended that that decree cannot be executed against the minor Jotindramohun Lahiri, because he was not a party to it, and those steps which, according to law, might have been taken to make him a party were not taken Section 372 of the Code of Civil Procedure provides for making the assignee or other transferee of the interest of a defendant a party to the suit when the assignment or transfer has been made during the pendency of the suit. No action was taken under this section. It has been urged that the devolution of the defendant's interest upon the adopted son by reason of the adoption was not known to the decree holder, and that therefore he could not take the necessary steps to make the minor a defendant. This may be so, but upon this point we pronounce no opinion. We further pronounce no opinion upon the question whether the minor is bound by the decree in the title suit. All we decide on the present occasion is that the decree cannot be executed against the minor because he is not a party judgment-debtor upon the record."

Their Lordships find a difficulty in understanding what the High Court meant by this judgment. The Code of Civil Procedure referred to must be Act X of 1877, as s. 372 of the previous Code relates to special appeals. Act X of 1877 came into force on the 1st October 1877, nearly three years after the decree of the High Court. If it was material that no action was taken under s. 372, it appears to their Lordships that the question whether the adoption was or was not known to the decree-holder was a matter upon which an opinion should have been pronounced. What follows is still more difficult to be understood. The Court say: "We pronounce further no opinion upon the question whether the minor is bound by the decree in the suit; all we decide on the present occasion is that the decree cannot be executed against the

minor because he is not a party judgment-debtor upon the record." In the suit for mesne profits, where Bhubaneswari was sued as widow for self and as guardian on behalf of the minor, they say: "Now there can be no doubt that making a person's guardian defendant to a suit is not the same as making that person himself a party, and this is not affected by the fact of his being a minor. . . . A minor, in order to be bound by the result of legal proceedings, must be made a party to the suit in his own name," and decide that the minor was not bound by the decree. Their Lordships are unable to see why the High Court, having said in the suit for mesne profits that the minor was not bound by the decree, declined on the next day to pronounce an opinion upon the question.

It was just as necessary to decide the question in the execution proceedings as in the suit for mesne profits. The decree in the original suit was sought to be enforced against Bhubaneswari personally and as guardian of the minor. So far as he was concerned the sole question was whether the decree bound him. If it did, execution was rightfully sought against him through his guardian, and it was no answer that his name was not on the record.

The decree of the Subordinate Judge, made as it was before the adoption, when Bhubaneswari was the owner of the estate and fully represented it, was binding on the minor. It took away part of the estate of which Shib Nath was in possession when he died. After the adoption it was for the interest of the minor that Bhubaneswari's appeal should be prosecuted, and the appeals of Uma Soonderi and Nilcomul defended. Bhubaneswari's estate had been divested, and she could obtain nothing, but as the adoptive mother and guardian of the minor it would be right for her to continue to defend the suit. There has been no suggestion that it was improperly defended, or that the appeal to Her Majesty in Council was not proper. In his judgment in the suit for mesne profits the Subordinate Judge says: "In fact, the appeals were prosecuted and defended by her with the *bonâ fide* intention that her husband's real rights had been interfered with." If her appeal had been successful, Bhubaneswari, as the guardian of the minor, would have been kept in possession of the whole of what Shib Nath died possessed of, and would have been accountable to the minor for it. In *Dhurm Das Pandey* v. *Shama Soondery Debia* (1) a Hindu widow brought a suit for partition, and to be put in possession of her husband's share in the joint undivided estate. Pending the suit she adopted a son, and notwithstanding the adoption, the suit was prosecuted in the widow's name, and a decree made directing her to be put in possession. Their Lordships said (page 243): "All the facts being stated, it is assumed as matter of law that after she had executed the act of adoption, she prosecuted the suit only as guardian of her adopted son. Then, as the suit must be considered as afterwards prosecuted by her in her name for his benefit, the decree must be considered for his benefit, and that she is put in possession as trustee for him." Their Lordships are opinion that this principle is applicable in the present case, that the minor is bound by the dercee in the title suit, and the High Court was in error in allowing his appeal in the execution case, which they have done by their decree in the appeal No. 97.

The next question is as to the pucca buildings and moveables. The decree of the High Court in the original suit was: "It is ordered and decreed that the decree of the lower Court be varied, and in lieu thereof it is hereby decreed and declared that the plaintiff is entitled to 3 annas and 4 gundas share of all the property which is named and described in the two schedules appended to the plaint." The moveables were in a separate inventory, and it is now admitted that execution cannot be had in respect of them. As to the pucca buildings the Subordinate Judge said: "I consider it

(1) 3 Moore's I. A, 229 1 P. C. J., 271.

to have been purely the intention of the High Court that, in awarding a decree in favour of the plaintiff for a 3 annas 4 gundas share of all the property which is named in the two schedules, only the landed property was meant, and decided upon without relevancy to the buildings or moveables." But as it had been contended that the decree literally included the buildings, he thought it equitable that the decree should be returned to the decree-holder for amendment in the proper Court, and then the execution be revised in conformity with the judgment. The judgment of the High Court upon which the decree was drawn up used exactly the same words, and so there could be no amendment. The effect, therefore, was that execution in respect of the pucca buildings was refused.

The High Court dealt with the question in a rather singular way. They said that, in order to discover what the property was, they must refer to the two schedules appended to the plaint, and as the decree-holder had taken no steps to have the original plaint made a part of the execution record, or to file a certified copy of the two schedules, they were unable to discover from the record whether the pucca buildings and the moveable property were or were not included in the schedules annexed to the plaint. The Subordinate Judge had inserted in his decree two schedules which were described as schedules of immoveable property under claim, and had awarded a 2½ annas share of the landed properties stated in those schedules. The High Court varied the decree by giving a larger share. It was obvious that they intended this to be a share of the same property, *viz.*, what was described in the decree of the Subordinate Judge as under claim, that is, claimed in the plaint. If proof of the contents of the schedules to the plaint was necessary, the Court might have postponed giving judgment, and allowed a certified copy to be filed. Their Lordships are of opinion that such proof was not necessary, and that the cross-appeal upon this question, which was No. 125, ought to have been allowed, and the order appealed from varied by including the pucca buildings.

As to the third question, namely, whether possession in execution was to be given against the parties jointly or severally, which was raised in the appeal No. 126, the High Court decided that decree ought to be executed by giving the decree-holder as against Bhubaneswari and Nilcomul a 1 anna 4 gundas share in the plots of which he already had possession of 2 annas, and 3 annas 4 gundas of the plots in which he had no possession. They accordingly ordered, in the appeals Nos. 125 and 126, that the objections or cross-appeal should be disallowed, and, except as aforesaid, the order of the Subordinate Judge should be varied by awarding to the decree-holder possession jointly as against Bhubaneswari and Nilcomul of an undivided share of 3 annas 4 gundas in every plot of the land in dispute.

The learned Counsel for the appellant has not disputed that the possession is rightly awarded jointly against the parties liable to have it recovered from them.

So far, the decree of the High Court may stand; but their Lordships being of opinion, as has been stated, that the minor is bound by the decree, and that execution may be had against him, the decree in the appeal No. 97 will be reversed, and the appeal dismissed with costs, and the decree in Nos. 125 and 126 will be varied by ordering that appeal No. 125 should be dismissed with costs, and by allowing the plaintiff's objections or cross-appeal so far as regards the pucca buildings, and by including them in the award of possession. And their Lordships will humbly advise Her Majesty accordingly.

The action for mesne profits has now to be considered. In this the questions are: (1), whether the liability was joint or several; (2), whether Jotindra Mohun was liable. In the title of the plaint

the defendants are stated to be Bhubaneswari Debi, widow of the late Shib Nath Lahiri, for self, and as guardian and executor of Jotindramohun Lahiri, minor, and Nilcomul Lahiri. The Subordinate Judge decided that the liability of the defendants should be separately assessed, and looking at the possession of the joint ancestral property, which he said had been fully admitted in the suit by all the parties concerned in it, he found that out of the 1 anna 4 gundas share in the joint ancestral property which had been decreed in favour of the plaintiff, 13⅓ gundas share was in possession of Bhubaneswari, and 10⅓ gundas share in the possession of Nilcomul. Accordingly he decided that with respect to the land held in common, the mesne profits were to be calculated and separately charged in these proportions. As to the second question, he said that the appeals to the High Court and Her Majesty in Council were prosecuted by Bhubaneswari "with the *bonâ fide* intention that her husband's real rights had been interfered with;" and inasmuch as it was for the interest of Jotindramohun that the suit was defended and the suit carried up to the highest tribunal, he held him to be liable for the mesne profits. The decree awarded for mesne profits within the period allowed by the law of limitation a total sum of Rs. 5,692-7-2 pies, and ordered that the plaintiff should recover from Bhubaneswari as guardian on behalf of the minor Jotindramohun Rs. 3,297-10-2 pies, and from Nilcomul Rs. 2,394-13 annas. Both Nilcomul and Bhubaneswari appealed to the High Court,—the former on the ground that the plaintiff was not entitled to recover from him the 10⅓ gundas share, and at the most he was not liable to make good more than 2 gundas, and Bhubaneswari on the ground that Jotindramohun was not properly made a party to the suit, and should not have been held liable.

The High Court in their judgment deal first with this question. They say: "In the plaint the minor is not made a defendant. The defendants are Nilcomul Lahiri and Bhubaneswari Debi as widow of the late Shib Nath Lahiri, and as guardian on behalf of the minor Jotindramohun Lahiri. Now there can be no doubt that making a person's guardian defendant to a suit is not the same as making that person himself a party, and this is not affected by the fact of his being a minor. There is no excuse for ignorance as to the proper procedure in respect of minors, seeing that the provisions contained in the present Code of Civil Procedure became law nearly seven years ago, in 1877. A minor, in order to be bound by the result of legal proceedings, must be made a party to the suit in his own name." And after referring to the provisions for the appointment of a guardian *ad litem* they say: "No defence was filed in the suit as on behalf of the minor, and it appears to us clear that the minor has not become a party to these proceedings so as to be bound by the decree."

In *Sureshchunder Wum Chowdhry* v. *Jugut Chunder Deb* (1) a plaint in a suit described one of the defendants thus: "N. C., guardian, on behalf of her own minor son, S. C.," and it was held by a Full Bench of the High Court at Calcutta that, it appearing that the suit was substantially brought against the minor, and the error of description in the plaint being one of mere form, it could not, without proof of prejudice, invalidate a decree against him in the suit; also, that the want of a formal order appointing a guardian *ad litem* was not fatal to the suit when it appeared on the face of the proceedings that the Court had sanctioned the appointment. Their Lordships are satisfied that the suit for mesne profits was substantially brought against the minor. The 7th issue decided by the Subordinate Judge contained the question whether he could be made liable when he was not a party in the former suit. And the grounds of appeal in Bhubaneswari's appeal to the High Court show that she appealed on his behalf as

(1) I. L. R., 14 Calc., 204.

well as her own. It is also apparent that the Subordinate Judge treated her as appearing in the suit as guardian, and sanctioned it. This is very clear in his judgment in the execution case before quoted. He says: "The minor is also under her guardianship and protection; Bhubaneswari is therefore the proper person to represent the minor." Their Lordships, therefore, are of opinion that the High Court was in error in decreeing that the suit should be dismissed as against Jotindramohun, and declaring that he was not a party to it and was not bound by the result of the proceedings.

In the appeal by Nilcomul, the High Court said that the Subordinate Judge did not find that Nilcomul was in possession of any portion of the property in excess of the share to which he was himself legally entitled, but that he had been in possession of 6 annas 10 gundas had been practically admitted before them at the hearing of the appeal, while a title to more than 6 annas 8 gundas was not asserted. It was also admitted in his written statement. They thought, therefore, that, except as regards the 2 gundas, the plaintiff had not proved that Nilcomul was, during the years for which mesne profits were claimed, in possession of any portion of the property, the title to which was concluded by the decision in 1880. They therefore held that, as regards the 2 gundas, there must be a decree for mesne profits calculated upon the figures which the Subordinate Judge had taken in his decree. Accordingly they varied his decree by decreeing that Nilcomul should pay, instead of the sum awarded by that decree, the sum of Rs. 475 only, as mesne profits, with interest thereon from the 10th of January 1882, the date of the decree of the lower Court. The learned Counsel for the appellant did not object to this decision, nor did the learned Counsel who appeared for Bhubaneswari and the minor object to it. Further, it is not disputed that the aggregate of the portions of the property of which Nilcomul and Bhubaneswari have been in possession during the years for which mesne profits have been awarded shows an excess over their lawful shares at least equal to the share of which the plaintiff has been wrongfully deprived. Consequently, if Nilcomul held only 2 gundas, Jotindramohun would be liable for the mesne profits of the remainder, and the plaintiff would be entitled to recover the balance of the total sum of Rs. 5,692-7-2 pies awarded for mesne profits from his estate. This would be Rs. 5,217-7-2. Therefore the decree of the High Court in the appeal by Bhubaneswari (appeal No. 130 of 1882) should be reversed, and the appeal dismissed with costs, and in lieu thereof, and of the decree of the Subordinate Judge, it should be decreed that the plaintiff do recover from Bhubaneswari as guardian on behalf of the minor, Jotindramohun, the sum of Rs. 5,217-7-2, with interest at 6 per cent. per annum from the 10th January 1882, and costs of the suit in the first Court in proportion to the whole of the claim allowed. The decree of the High Court in appeal No. 121 of 1882, so far as it relates to payment by Nilcomul Lahiri and to costs, will be affirmed. Their Lordships will humbly advise Her Majesty accordingly.

With regard to the costs of these appeals, their Lordships think that the proper course will be to order the appellant to pay the costs of the respondent Nilcomul, and that the appellant's costs, but not including what he is ordered to pay to Nilcomul, be paid by Bhubaneswari as guardian on behalf of the minor.

One of the consolidated appeals allowed: in the other, decree affirmed.

Solicitors for appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for respondent, Nilcomul Lahiri: Messrs. *Gordon & Dalbiac.*

Solicitors for respondents, Bhubaneswari Debi and Jotindramohun Lahiri: Mr. *S. G. Stevens.*

15th March 1888.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, and the Right Hon. Sir Barnes Peacock.

On appeal from the High Court in Bengal.

RADHAMADHUB HOLDAR AND ANOTHER* ... } *Plaintiffs*,

and

MONOHUR MUKERJI .. *Defendant.*

Res judicata—Civil Procedure Code, 1882, s. 13—Matter adjudged in a former suit—Purchase pendente lite.

A Zemindar, having granted a putni lease, mortgaged the zemindari to the putnidar, who, having afterwards obtained a decree against the zemindar upon the mortgage, attached and purchased, at the sale in execution, the zemindari interest, subject to the mortgage.

Before that purchase, though after the attachment, another holder of a decree against the zemindar brought the right, title, and interest in the zemindari to sale in execution of his decree, and himself became the purchaser. He then, claiming to have obtained the zemindari estate, sued the putnidar for rent due under the lease. This suit was dismissed, save as to rent due for the time intervening between the two sales in execution, on the ground that the relation of zemindar to lessee had ceased on the purchase by the latter.

The present suit was brought by the purchaser from the zemindar, stating his title, acquired at the prior of the two sales, and claiming to redeem the mortgage. *Held*, that the dismissal of the rent suit, which involved the title, barred the present one; and the opinion was expressed that the plaintiff had been rightly adjudged in the rent suit to be bound by the proceedings taken by the mortgagee, pending which the purchase relied upon had been made.

APPEAL from a decree (27th April 1885) of the High Court, reversing a decree (14th March 1883) of the Subordinate Judge of Hughli.

The question was whether a decree made by the High Court in 1874 was a conclusive adjudication upon the right of the plaintiff, who now appealed, to redeem a mortgage upon, and obtain possession of, a zemindari estate in a three annas and four gundas share in pergunnah Shankhali in the Hughli district. He claimed title to the zemindari as purchaser, at an execution sale of the estate of the mortgagor, against the mortgagee, who had previously attached the property under a decree upon his mortgage, and who subsequently, and after the date of the sale to the plaintiff, bought, at a sale in execution of his own decree, the right, title, and interest of the zemindar who had mortgaged to him.

Before the proceedings giving rise to this dispute, Srimati Matangini Debi, then owner of the zemindari, granted a putni of her share in Shankhali to the late Rajkrishna Mukerji, father of the defendant, the present respondent, thus limiting herself to receiving the rent reserved. Afterwards, she executed, on the 16th May 1864, a bond and mortgage to the same Rajkrishna, charging her zemindari estate with Rs. 999 and interest.

Matangini having afterwards been sued by one Dinonath Bose, the latter attached her interest in Shankhali, in execution of a decree, on the 7th November 1871.

On the 30th December 1871 Rajkrishna Mukerji sued Matangini on the mortgage, and on 22nd February 1872 obtained a decree "that the plaintiff should realize Rs. 1,291 from the mortgaged property with interest," and on 3rd April 1872 attached the right of Matangini to receive the putni rent. On the 18th of the same month of April, the interest of Matangini in Shankhali having been put up for sale by the Court in execution of Dinonath Bose's decree, Radhamadhub Holdar, the present appellant, became the purchaser for Rs. 5,350.

On the 14th May 1872 Rajkrishna Mukerji, at a sale in execution of his own decree against Matangini, purchased for Rs. 1,590 her zemindari interest, *i.e.*, her right to receive the putni rent from him.

* 15 Cowell's Ind Ap. 97; 15 Calc., 756.

After that date he paid no further rent except the sum of Rs. 250 under a decree of the High Court, that sum being due for the period from 18th April to the 14th May 1872.

The decree of the High Court under which that sum was paid was made upon the appeal in a rent suit, brought in 1873 by Radhamadhub Holdar in the Court of the Subordinate Judge of Hughli, to recover Rs. 1,488 as rent due from the defendant as putnidar from the 18th April 1872, the date of the plaintiff's purchase to the institution of that suit. In defending that suit, Rajkrishna Mukerji admitted that he was in possession of the property, but alleged that the relation of landlord and tenant did not exist between him and Radhamadhub.

The Subordinate Judge (19th March 1873) expressed his opinion that, in a rent suit, such a question of title could not be decided, and he decreed the rent, referring the defendant to a regular suit if he wished to establish his title to the zemindari interest, and holding that, till he did so, he must be treated as a tenant. A regular appeal to the District Judge was dismissed (3rd July 1873), the Appellate Court being of the same opinion. On this Rajkrishna Mukerji preferred a special appeal to the High Court.

The High Court (Sir RICHARD COUCH, C.J., and GLOVER, J.) in giving judgment (11th March 1874) observed that there was no reason why in a suit for rent, where the defendant repudiated the relation of tenant, that question should not be tried; considered what were the rights of the parties arising out of the state of things stated above; and concluded that the defendant had shown that, as against the plaintiff, he had a right to be no longer treated as a tenant from the time when he purchased the property. If any rent had become due between the two periods of their respective purchases, that might be decreed; and the Court accordingly inquired whether any, and what, rent became due between these dates. The parties then agreed that this came to Rs. 250; and for that sum, with interest, the Court made a decree.

In the present suit (14th March 1883) Radhamadhub Holdar alleged the same title as before, claiming a declaration of his right to redeem. The defence was: First, that the disputed property was already under attachment in execution of the decree obtained by the defendant's father, when it was sold in execution of the decree obtained by Dinonath Bose, and the latter sale could not confer a title; and, secondly, that the decree of the High Court, of the 11th March 1874, was conclusive.

The Subordinate Judge held that the trial of this suit was not barred by the adjudication of 1874, as the question of title was only tried for the purpose of deciding a rent suit; and that no question of the right to redeem had been, or could be, raised in a suit for arrears of rent. He was also of opinion that the plaintiff's purchase on the 18th April 1872 was not affected by any *lis pendens*, regard being had to the provisions of s. 333 of the Code of Civil Procedure; and, further, that Rajkrishna Mukerji ought to have made Dinonath Bose a party to the suit of 1873; and that the plaintiff, that not having been done, was not bound by the decree of 1874; and, having purchased the equity of redemption which Matangini had in the property, was entitled to redeem. The Court, however, disallowed a claim for an account against the defendant.

Monohur Mukerji, who had succeeded Rajkrishna, appealed to the High Court, Radhamadhub filing objections under s. 561 to so much of the decree as disallowed an account.

The High Court (CUNNINGHAM and O'KINEALY, JJ.) reversed the decree of the Subordinate Judge. They were of opinion that the question substantially raised between the parties in the suit decided in 1874 was identical with the one now raised, and involved the point whether the plaintiff had such a proprietary right purchased at the sale of 18th

April 1872 as would entitle him to redeem. The suit was dismissed with reference to s. 13 of the Code of Civil Procedure.

From this decree Radhamadhub Holdar, together with one Nawadwip Chunder Chowdhry, who had been added as a respondent in the appeal to the High Court on account of his having acquired some interest from the original plaintiff, preferred the present appeal.

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the appellants, argued that the sale of the 18th April 1872 was complete on that date, including the right to redeem the mortgage. The purchaser at a sale in execution was affected only by decrees actually obtained, and no doctrine of *lis pendens* applied to bind this prior judgment-creditor, whom the mortgagee should have made a party defendant, or who, at least, was entitled to notice of the execution proceedings by the other decree-holder, if he was to be held bound by the latter.

In the next place the question whether the appellants were or were not concluded by the decree of 1874, must be decided in their favour, for that decree did not cover the ground of their claim, the subject-matter of it not having been identical with that in the present suit; nor the actual point decided the same with that now raised. Moreover, the jurisdiction of the Courts had to be considered, the Court of first instance in 1874 having had only authority indirectly to determine title.

Run Bahadur Singh v. *Luchoo Koer*(1) was referred to.

Mr. *T. H. Cowie, Q.C*, and Mr. *R. V. Doyne* for the respondent, were not called upon.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD HOBHOUSE.

Their Lordships think that this case is a very clear and simple one when once the numerous proceedings and dates are ascertained.

The material circumstances are these: Matangini was the proprietor of the estate in question, and she granted the estate in putni to one Mukerji, the father of the present defendant. No difference is made by the change of title; and it may be considered that the putnidar has remained one and the same person. After that Matangini mortgaged her proprietary interest to Mukerji. Mukerji's position therefore was this: that he was putnidar of the estate with a charge upon what we should call the reversion of the proprietary interest. Under those circumstances a creditor of Matangini sues for his debt, gets a decree, attaches the property, and sells it in the month of April 1872; and under that sale the plaintiff Radhamadhub became the purchaser. What did he get by his purchase? He got Matangini's proprietary right, subject to the putni, and subject to the charge. But in the meantime Mukerji had been enforcing his charge against Matangini, and he got a decree, and in the month of May 1872, about a month after the sale to the plaintiff, a sale took place under his decree, and he himself purchased at that sale. Now if Matangini herself had remained the owner of the proprietary interest she would be clearly excluded by that sale from all interest in the property. It is equally clear that the plaintiff must be excluded,he having purchased only the right, title and interest of Matangini, unless he can show that after the purchase in April 1872 he was not bound by the proceedings in Mukerji's suit. That very question has been raised and decided between the parties. After the two sales Radhamadhub, as claiming to be proprietor, sued Mukerji as putnidar for the rent due upon the putni, and his claim was that he stood in the shoes of Matangini. On the other hand Mukerji defended himself by saying: "It is not you, but I, who stand in the shoes of Matangini, and therefore you have no claim against me;" and the decision was that, inasmuch as Mukerji's suit to enforce his charge was pending at the time

(1) L. R., 12 I. A., 23; I. 4 P. C. J., 602; L. R. 11 Calc. 301.

of the sale to Radhamadhub, Radhamadhub was bound by the proceedings against Matangini On that ground the rent suit was decided against Radhamadhub. Radhamadhub now comes to redeem; but the right to redeem rests on precisely the same ground as the right to rent was rested. In each case the question is equally: Who is the true representative of Matangini? Therefore their Lordships conceive that the matter was expressly decided by the High Court in the rent suit; but they desire to add that even if it had not been so decided they see no reason to believe that any amount of argument would induce them to come to a different conclusion than that to which the High Court came.

Their Lordships are therefore of opinion that the appeal must be dismissed, and that the appellants must pay the costs; and they will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Wrentmore & Swinhoe.*

15th and 16th March 1888.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghton, the Right Hon. Sir Barnes Peacock and the Right Hon. Sir Richard Couch.

On appeal from the Court of Judicial Commissioner of Oudh.

AMANAT BIBI AND OTHERS* *Defendants,*

and

IMDAD HUSAIN... ... *Plaintiff.*

Res judicata—Civil Procedure Code, 1877, ss. 13 and 43—Act XII of 1879, s. 6—Act VIII of 1859, s. 7—Inclusion of whole claim in suit.

The present suit was preceded by others in which the plaintiff sought to establish a right in the same part of the talukdari estate that he now claimed to redeem from mortgage.

The first suit, in which he with another claimed as under proprietors, was dismissed in 1866 on the ground that they had not shown themselves to have held such right under the talukdars within the period since 1841. Proceedings not to be regarded as judicial, subsequently taken under Circular 4 of 1867, resulted in a finding that the dismissal was right upon the merits, the property having been transferred to the talukdar by a conditional sale which had become absolute.

Another suit was then brought to recover the talukdari right, under the terms of Circular 106 of 1869, it being alleged that arrears of revenue paid by the talukdar had been paid on the plaintiff's account. That suit was also dismissed. *Held*, that the present suit to redeem the same property under a mortgage was not barred under s. 13 of Act X of 1877, as amended by s. 6 of Act XII of 1879. The claim to redeem did not arise out of the former cause of action within the meaning of the sections of Act VIII of 1859 relating to the inclusion of the whole claim in a suit. The plaintiff not then being aware of his right when he sued before, it could not be regarded as a "portion of his claim," and he was not precluded, by having omitted it, from bringing it forward.

APPEAL from a decree (26th September 1884) of the Judicial Commissioner, affirming a decree (13th April 1883) of the District Judge of Fyzabad, which was made upon an order (1st August 1882) of the Judicial Commissioner, reversing a decree (27th October 1881) of the District Judge of Fyzabad, and remanding the suit to the Court of the District Judge.

This was a suit for the redemption from mortgage of ten villages, with Chaks appertaining, in Ilaka Jiapur in the Fyzabad district. The mortgage money was Rs. 2,000, on payment of which redemption was to take place, one-seventh of the rents and profits of the estates to be paid annually as naukar, and the rest to be credited for interest.

The questions now were whether the issue as to the right to redeem had been substantially determined in prior proceedings; and whether the plaintiff, having been bound to bring forward his claim to redeem on a former occasion, if

* 15 Cowell's Ind. Ap. 106, 15 Calc., 800.

he was to insist upon it, was now precluded by reason of his omission.

The appellant Amanat Bibi, the defendant in the suit, was the widow and representative of Malik Hidayat Husain, deceased, who was the brother and successor in the talukdari of Jiapur, of Malik Tafazzal Husain. The other appellants Lachman Persad and Narotam Das were mortgagees from Malik Hidayat Husain.

Ilaka Jiapur, the mortgaged property, originally formed part of the estate of two brothers, Abbas Ali and Hafiz Ali, and upon a partition between them in 1251 Fusli, corresponding to 1843 A.D., became the share of Hafiz Ali, who was the father of the present plaintiff. It was ground common to both parties to this suit that Jiapur passed into the possession of Malik Tafazzal Husain by way of mortgage. Also it was admitted that the settlement of Jiapur was made with Tafazzal, having been included in the sanad relating to Taluka Samanpur. The difference between the parties was in this, that the plaintiff asserted that the mortgage took place about the 1st June 1854, and fixed no term for redemption, while on the other hand the defendants maintained that the mortgage was of earlier date, and having been by way of conditional sale had become absolute upon non-payment of the mortgage money within eight months, the period fixed for re-payment.

Ilaka Jiapur became, in and after 1866, the subject of several distinct litigations, carried on against Hidayat Husain by members of his uncle's family.

In 1866 Imdad Ali joined his cousin Mehdi Ali in suing to establish sub-proprietary rights in the villages which had by that time been included in the taluka of Hidayat Husain. The Settlement Officer's order (16th March 1866) contained a finding that Jiapur had originally belonged to the family of the claimants, and that the case of the defendant accounting for the change of possession was weak. But he held himself bound to dismiss the claim, in reference to the agreement made by the Government with the talukdars, that only those would be recognized as sub-proprietary who were proved to have held under them on a sub-proprietary basis within limitation, while the plaintiffs admitted that they never held as sub-proprietors under the talukdars during the nawabi. This decision was affirmed by the Commissioner on the 20th June 1866, and by the Financial Commissioner on the 25th October 1866.

Both claimants then applied to the Financial Commissioner, under Circular 4 of 1867, known in Oudh as the "Hard Case Circular," which provided for the hearing of claims preferred by persons who had suffered in the re-adjustments of property operated in the province after the general confiscation of rights in land ordered by Lord Canning in 1858. The result, however, was the same; the Financial Commissioner remarking that, putting aside other reasons as regards Mehdi Ali's application, he had not held since 1255 F., about 1847, and the petition was rejected, an order which was affirmed on review on the 27th February 1868.

Imdad Husain's case was referred to an Assistant Settlement Officer for report, and the Financial Commissioner (11th April 1868), upon the investigation, dismissed his claim also.

Imdad Husain then made a third attempt under Book Circular 106 of 1867, "which prescribed that, when proprietors had been ousted, and their lands transferred to another proprietor on account of arrears of revenue by order of the former Courts of Oudh, such transfer should be considered temporary only, and the ex-proprietor should have a claim to re-enter into possession on payment of the moneys advanced by the temporary transferee, and that the lien of the latter should be held to be of the nature of a redeemable mortgage."

His petition was dismissed by the Settlement Officer on the 26th November 1868, the Financial Commissioner con-

firming the dismissal on the 17th April 1869.

Mehdi Ali commenced another suit in 1877 against Hidayat Husain and this respondent Imdad Husain and others, in which he asserted that in 1854 Hafiz Ali, as his manager, had mortgaged Jiapur to Tafazzal for Rs. 2,000, and that on the 12th June 1854 Tafazzal had executed an agreement to Hafiz Ali, acknowledging his right to redeem at any time on payment of the mortgage amount. This respondent, in his written statement, admitted the mortgage agreement, but asserted that it had been granted to his father, Hafiz Ali, in his own right, and not as agent for Mehdi Ali, and that the document had been lost during the minority of the sons of Hafiz Ali. It was then, in effect, found that Hafiz Ali had not acted in the transaction as agent for Mehdi Ali, who therefore had no title to sue; and this suit was also dismissed finally on 29th July 1879.

The present suit was instituted on the 25th February 1881. The plaintiff, Imdad Husain, stated that the claim for a sub-settlement was preferred in ignorance that the property now in suit had been mortgaged by his father, and that the power to redeem subsisted. He alleged that, according to the agreement dated 4th Ramzan 1270 H., corresponding to 1st June 1854, it was clear that the whole mortgage money was paid out of the seventh part of the income; and he claimed to redeem under s. 6 of Act I of 1869, the Oudh Estates Act, and that accounts should be taken.

It was held in the Court of first instance that this suit for redemption of the villages in Jiapur was barred by the former proceedings in the Settlement Courts. This judgment was, however, reversed on appeal, and the suit was remanded for decision on the merits.

The issues then recorded raised the two questions whether the suit was barred as *res judicata*, and whether the property had been mortgaged in 1854. The District Judge (Colonel F. E. A. Chamier) decreed in favor of the plaintiff for redemption of the property on payment of Rs. 2,001.

An appeal from this decree was dismissed by the Judicial Commissioner (Mr. W. Young). In his judgment upon the question of *res judicata*, after stating the previous proceedings, he said: "The procedure was in my opinion altogether defective even on the materials then before the Courts, but it is obvious that the case then before those Courts was of a wholly different character from the present suit. That was a claim based on orders of the Government. This relies on a private bargain of the parties.

On the second point he summed up his examination of the evidence as follows: "On the whole, I think, that this agreement (1st June 1854) must be accepted as genuine, and taking it with the other evidence for the plaintiff, it seems to me that his contention, that the estate was mortgaged to the Malik in 1261 F. (1854) and not before, and that the mortgage was redeemable as set forth by the terms of the agreement, must be held to be established."

Mr. *J Graham, Q.C.*, and Mr. *J. H. A. Branson*, for the appellants, argued that the proceedings in the Settlement Courts barred the present suit. They referred to *Thakur Shankar Baksh* v. *Daya Shankar* (1); *Phosphate Sewage Company* v. *Malleson* (2); *Hunter* v. *Stewart* (3); *Toponidhee Dhirj Gir Gosain* v. *Sreeputty Sahanee* (4) *Moonshi Buzloor Ruheem* v. *Sham Soonnessa Begum* (5); *Moottoo Vijaya Raghanada* v. *Katama Natchiar* (*Shivaganga* case) (6) *Soorjomonee Dayee* v. *Suddanund Mohapattur* (7); Act III of 1859, ss. 6 and 13; Act X of 1877, ss. 43 and 623.

(1) L. R., 15 I. A., 66; I. L. R., 15 Calc., 422;
(2) L. R., 4 App. Ca. (H L.), 881.
(3) 4 De G. F. and J., 168.
(4) I. L. R., 5 Calc., 832.
(5) 11 Moore's I. A., 551; 8 W. R. (P. C.), 12; 2 P. C. J., 259.
(6) 11 Moore's I. A., 73; 2 P. C. J, 213.
(7) L. R., I. A., Sup. Vol., 212; S. C., 12 B. L. R., 304; 3 P. C. J., 285.

Mr. *J. D. Mayne*, for the respondent, contended that the decision of the Judicial Commissioner was correct upon the question of *res judicata*. There were also concurrent findings of both Courts that the property was held under a redeemable mortgage. The cause of action was not identical with that in the former proceedings. The plaintiff was not bound to include the present claim in his former suit, and in fact was in ignorance of it at the time of the proceedings in the settlement; nor could he have succeeded in making good his claim until after the passing of the Oudh Estates Act, 1869.

Mr. *J. Graham, Q.C.*, in reply, referred to *Krishna Behari Roy* v. *Brojeswari Chaodhrani*(1).

[SIR BARNES PEACOCK referred to the *Raja of Pittapur* v. *Venkata Mahipati Surya*(2).]

Their Lordships' judgment at the conclusion of the arguments was delivered by

THE RIGHT HON. LORD MACNAGHTEN.

This is an appeal from a judgment of the Judicial Commissioner of Oudh, affirming a decision of the District Judge of Fyzabad, by which he granted a decree for redemption of certain property said to be on mortgage. The mortgage deed is not produced, but there has been produced a memorandum under the seal of a predecessor in title of the appellants, which stated upon the face of it that the property had been mortgaged and was subject to redemption. That memorandum has been held by two Courts to be a genuine document, and to be sufficient evidence of the alleged mortgage. The sole ground of appeal is that the respondent's suit ought to have been held barred by what took place in certain settlement proceedings, for two reasons: (*a*) because the issue in this suit was substantially determined by the determination of an issue in those proceedings; and (*b*) because the respondent was bound to have brought forward, in the previous proceedings, the mortgage transaction on which he relies in the present suit.

The settlement proceedings may be stated very shortly. The respondent in 1866 brought a claim to establish an alleged sub-proprietary right. That claim was dismissed on an admission by the respondent that he never had held as sub-proprietor under the talukdar during the native rule, or during the term of limitation, that is, the period from 1844 to 1856. The dismissal was confirmed by the Commissioner and also by the Financial Commissioner, Colonel Barrow. After that proceeding had come to an end a Government Circular was issued, Book Circular 4 of 1867, which is known as "The Hard Case Circular," and thereupon the plaintiff applied for a review of his case. The Financial Commissioner entertained the application, and remanded the matter to the Settlement Officer. The Settlement Officer made a most minute and elaborate examination into all the circumstances. He found that the property had been conveyed to the talukdar by a conditional deed of sale, under which the purchase money was to be repaid within the period of eight months, and that on the expiration of that period the sale became absolute. He also found that the talukdar had paid up certain arrears of Government revenue which ought to have been paid by the respondent or his predecessors in title. The Financial Commissioner accepted the report of the Settlement Officer, and refused to disturb the previous orders. Their Lordships are of opinion that proceedings under the "Hard Case Circular" cannot be treated as judicial proceedings. It appears from the Circular that the talukdars had engaged to take cases of proved hardship into their favourable consideration. But relief was to be granted not as a matter of right, enforceable by pro

(1) L. R., 21 A., 283; 3 P. C. J., 559.
(2) L. R., 12 I. A., 116; I. L. R., 8 Mad., 520; 4 P. C. J., 638

cess of law, but as a matter of concession in a spirit of fairness and liberality. His appeal on the ground of hardship having been rejected, the respondent then sought to avail himself of another Circular. Adopting the finding of the Settlement Officer that the talukdar had paid arrears of Government revenue, he sought to treat those arrears as paid on his account, and he brought a suit to recover the property under the terms of Circular No. 106 of 1869. That suit was dismissed. But it may be assumed for the purposes of this judgment that in that suit—which was a judicial proceeding—the Settlement Officer re-affirmed his previous findings, and determined that the property had been transferred to the talukdar by a deed of sale, which was dated in February 1853, and became absolute eight months after its date.

Is that determination a bar to this suit, founded, as the suit is, on a mortgage recognized as subsisting in 1854?

The section of the Act of 1877, as amended by the Act of 1879, which is applicable to the case, is in these terms: "No Court shall try any suit or issue in which the matter directly and substantially in issue, having been directly and substantially in issue in a former suit in a Court of competent jurisdiction between the same parties or between parties under whom they or any of them claim, litigating under the same title, has been heard and finally decided by such Court." Now what was the question in issue in the former suit? The question was whether the plaintiff was entitled to recover the property which had been transferred by the Government to the talukdar on repaying to the talukdar the arrears of revenue which he had paid to Government. The matter in issue in this suit is the respondent's right to redemption under a mortgage deed. It may be difficult to reconcile the position of the talukdar as mortgagee in 1854 with his position as absolute owner in 1853 under a purchase from the mortgagor. But if it be established that the respondent was mortgagor in 1854 with the right of redemption, why should he be barred of his right merely because at an earlier date he may have had no right to the property at all?

Then comes the question, was the respondent bound to have brought forward his present claim in the former suit? Section 7 of Act No. 8 of 1859 is in these terms: "Every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff may relinquish any portion of his claim, in order to bring the suit within the jurisdiction of any Court. If a plaintiff relinquish or omit to sue for any portion of his claim, a suit for the portion so relinquished or omitted shall not afterwards be entertained." That section has already been under the consideration of this Board in the case of *The Raja of Pittapur* v. *Venkata Mahipati Surya*(1), and the commentary upon it at page 119 is: "That section does not say that every suit shall include every cause of action, or every claim which the party has, but 'every suit shall include the whole of the claim arising out of the cause of action'—meaning the cause of action for which the suit is brought." The respondent's present claim certainly did not arise out of the cause of action which was the foundation of the former suit.

Moreover, it appears to their Lordships that the fair result of the evidence is that at the date of the former suit the respondent was not aware of the right on which he is now insisting. A right, which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as a "portion of his claim" within the meaning of the section in question.

On the whole, therefore, their Lordships are of opinion that the judgment of the Judicial Commissioner was correct, and that the appeal ought to be dismissed, and they will humbly advise Her Majesty

(1) L. R., 12 I. A., 116; 4 P. C. J., 638.

in accordance with that view. The appellants will pay the costs of the appeal.

Appeal Dismissed.

Solicitors for the appellants: Messrs. *Watkins & Lattey.*

Solicitors for the respondent: Messrs *Barrow & Rogers.*

20th March 1888.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock and the Right Hon. Sir Richard Couch.

On appeal from the Court of the Judicial Commissioner of Oudh.

TRILOKI NATH SINGH* ... *Plaintiff*,

and

PERTAB NARAIN SINGH ... *Defendant.*

Res judicata—Code of Civil Procedure, s. 13—Identity of cause of action with that of prior suit, to which the plaintiff in a subsequent suit had been a party—Effect of judgment, that a will had been revoked, to bar, between the parties, any claim founded solely on the will.

The widow of a talukdar, acting under his supposed will, appointed the present appellant to succeed to the taluks and other estate which had belonged to the deceased.

The heir of the deceased, under the Oudh Estates Act, I of 1869, obtained the judgment of the Judicial Committee, declaring that he was entitled to the taluks as against the present appellant, whose title was under the will, which had been revoked, as the Committee found Another suit brought by the present appellant for a decree declaring that, in virtue of his appointment by the widow under the will, he was entitled to the whole of the estate of the deceased, talukdari and non-talukdari, was dismissed by the Judicial Committee on the ground that he had no such title to the whole or any part of the estate.

Held, that this prior judgment was conclusive to bar the present suit, which, being founded entirely upon the appellant's appointment in pursuance of the will, was brought for possession of all the estate of the deceased, as well as a declaration of right thereto.

Although the heir was not entitled to possession of the estate of the deceased other than talukdari, inasmuch as the widow took her estate therein, nevertheless the claim of the present appellant being only founded upon her appointment under the will, as if unrevoked, and not being a claim for property as descending to the widow upon her husband's intestacy, the prior judgment was binding in the present suit.

APPEAL from a decree (26th November 1884) of the Judicial Commissioner, reversing a decree (25th September 1882) of the District Judge of Fyzabad.

This appeal, and the suit out of which it arose, followed previous proceedings in the Oudh Courts and on appeal to Her Majesty in Council, concerning the rights of the present appellant, Triloki Nath Singh, nephew of the late Maharajah Man Singh, K.C.S.I., who died without issue on the 11th October 1870. The respondent, Pertab Narain Singh, was the son of the Maharajah's daughter; and the question in the suit, which commenced these proceedings, was whether he or Triloki Nath, the Maharajah's nephew (brother's son), whose title was founded on the deceased having executed a will in 1864, was entitled to the taluks. The late talukdar's name had been entered in lists II and V under the Oudh Estates Act, I of 1869(1). By the will of 1864 the Maharajah gave all his estates to his widow, the Maharani Subhao Kuar, with power to appoint his successor, and this power she exercised on the 16th August 1872 by appointing Triloki Nath. But, as was decided in the judgment of their Lordships, of 19th July 1877, in the suit which was brought by Pertab Narain (making Triloki Nath, then a minor, a party), that will was orally revoked by the Maharajah in the month of January preceding his death.

* 15 Cowell's Ind. Ap. 113; 16 Calc., 808.

(1) Mehdama was the Maharajah's ancestral taluk. The confiscated taluk of Gonda was given to him by the Government after the events of 1857-1858.

The Maharajah's estates, which had, at his request, been brought under the management of the Court of Wards, were, on the petition of the Maharani Subhao Kuar, whose name was substituted in the Collectorate records for that of her deceased husband on the 27th January 1871, brought under management in pursuance of Act XXIV of 1870, the Oudh Talukdars' Relief Act, and so remained until the 30th September 1880, when the estates were made over to the present respondent, Pertab Narain.

Pertab Narain's suit—*Maharajah Pertab Narain Singh* v. *Maharani Subhao Kuar* (1) was brought on the 21st November 1872 for a declaration of his title to the taluks under cl. 4 of s. 22 of Act I of 1869, and for the cancellation of the alleged will of the Maharajah of 22nd April 1864. The judgment of the Judicial Committee (19th July 1877) was that the will had been revoked, and the order declared that Pertab Narain was entitled to the talukdari and whatever passed with it under the Oudh Estates Act.

On an application by Triloki Nath for a re-hearing—*Ex parte Triloki Nath Singh. In the matter of Pertab Narain Singh* v. *Maharani Subhao Kuar* (2)—it was held that the appeal could not be re-heard, unless by some accident, without any omission, or default, on the part of the party seeking to re-open it, an order had been made without his having been heard. What might be Triloki Nath's case in this respect might be raised in another suit. An order (29th June 1878) followed accordingly, dismissing the application.

Afterwards with reference to the above, Triloki Nath filed his plaint (3rd June 1879) for a declaratory decree that the proceedings in Pertab Narain's suit were not binding upon him, and that he might be declared to be the successor of the late talukdar, and entitled to all his estate, on the strength of the appointment made by the Maharani under the will of 1864.

The suit was dismissed in the first Court in August 1881; but the Judicial Commissioner, on an appeal to him, being of opinion that the will had not been revoked, made a decree (22nd July 1882) granting what was claimed. An appeal from this decree was preferred by Pertab Narain, and on the 15th August 1882 the plaint in the present suit was filed by Triloki Nath, who, alleging himself to have been duly appointed under the will executed by the Maharajah in 1864, claimed the whole of his moveable and immoveable estate, with mesne profits. The plaint stated that "the property of the late Maharajah passed into the possession of the Court of Wards on or after the 23rd April 1870, and subsequently it was placed in the hands of a Manager appointed under Act XXIV of 1870, who retained possession thereof from the 3rd June 1871 till the 30th September 1880, when the debts of the said estate having been liquidated, plaintiff, as heir and successor to the said late Maharajah, became entitled to possession thereof, but the defendant obtained wrongful possession of the property in suit on the aforesaid date, and has retained unlawful possession of the same ever since; consequently the cause of action as to possession accrued to plaintiff on the 30th September 1880." With the plaint were filed copies of the deed of appointment executed by the Maharani on the 16th August 1872, and of another deed dated 20th May 1875, executed by her, and purporting to make over the proprietary possession in all the "property, moveable as well as immoveable, belonging to the Maharajah and myself."

Pertab Narain's defence in the main was that the order of Her Majesty in Council (13th August 1877), following the judgment of the Judicial Committee of that year, which established the

(1) L. R., 4 I. A. 224; I. L. R., 3 Calc., 626; 3 P. C. J., 740.

(2) L. R. 5 I. A., 177; I. L. R., 4 Calc., 184; 3 P. C. J., 840.

revocation of the will, was final and conclusive, bearing the present suit.

The District Judge held the suit not barred, and decreed to the plaintiff possession of the late Maharajah's estate with all accretions.

From this decree Pertab Narain appealed to the Court of the Officiating Judicial Commissioner, Mr. T. B. Tracy, on the 8th October 1882, but as the Judicial Commissioner's decree (22nd July 1882) in Triloki Nath's claim for a declaration of his right was pending on appeal to Her Majesty in Council, the hearing was postponed until the arrival of the decision of their Lordships (23rd July 1884). This reversed the Judicial Commissioner's decree—see *Pertab Narain Singh* v. *Triloki Nath Singh* (1)—holding that the Maharani was the full representative of the estate in the former suit.

The Judicial Commissioner, with the latter judgment before him, decided as follows: "It is obvious that the present suit was brought in consequence of the declaratory decree passed in July 1882, and as this judgment has been reversed, the present decree awarding possession of the Maharajah's estate to Triloki Nath cannot possibly be maintained. It is, therefore, useless to consider whether the suit was barred by ss. 12, 13, 43, or 373 of the Civil Procedure Code."

"The plaintiff-respondent's Counsel have contended *inter alia* that the judgment of the Privy Council has reference only to the talukdari estate, and does not concern the personal estate of the late Maharajah. It seems a sufficient answer to this that the plaintiff-respondent claimed the entire estate, both moveable and immoveable property, as the successor appointed under the will of the late Maharajah Sir Man Singh, and that it has been held by their Lordships of the Privy Council that the will was revoked by the Maharajah. The plaintiff-respondent's title to the moveable property is worth no more than his title to the talukdari estate."

"The appeal is allowed, and the judgment and decree of the lower Court are set aside."

On this appeal,—

Mr. *R. V. Doyne* appeared for the appellant.

Mr. *J. Graham, Q.C.*, Mr. *J. Rigby, Q.C.*, and Mr. *J. H. A. Branson* for the respondent.

In the argument for the appellant reference was made to the judgments above referred to, and it was argued that the judgment of 19th July 1877 gave no title to the respondent to have possession delivered to him. The manager who had been in possession under Act XXIV of 1870, was not authorized to make over the estates to any other than the Maharani or her transferee; and the appellant was entitled to all the residue of Man Singh's estate beyond that which was governed by Act I of 1869, by reason of the Maharani having by her deed of 20th May 1875 conveyed to him her interest therein.

Counsel for the respondent were not called upon.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR BARNES PEACOCK.

This is an appeal from a decision of the Judicial Commissioner of Oudh given on the 26th November 1884, and the question is whether that decision is correct with reference to the course of proceedings which had been previously taken in the various Courts of Oudh and also before Her Majesty in Council.

Sir Man Singh, who was one of the great talukdars of Oudh, died on the 11th October 1870. He left a widow, the Maharani Subhao Kunwar, and a daughter named Brij Raj Kunwar, by a deceased wife, and also a son of that daughter, Pertab Narain Singh, the present respondent.

The Maharajah made a will by which he gave all his property, moveable and immoveable, to his widow, with power to

(1) L. R., 11 I. A., 197; I. L. R., 11 Calc., 186; 4 P. C. J., 567.

her to appoint a successor. Pertab Narain Singh, who was the son of the daughter, considering that he was entitled to the estates of the late Maharajah according to the rules of descent established by Act I of 1869, commenced a declaratory suit against the Maharani, and also against Triloki Nath, the present appellant, who had been appointed by the Maharani to be her successor, to have it declared that the will of the late Maharajah had been revoked by him, and consequently that the widow had no right to appoint Triloki Nath. In that suit the first Court decided that the will had not been revoked, and the Judicial Commissioner upheld that decision; but upon appeal to Her Majesty in Council it was held that the Maharajah had revoked the will, and that, consequently, the widow had no power to appoint Triloki Nath. That decision was in July 1877, and is reported in the 4th volume of the Indian Appeals, page 228. It is there said: "It is now admitted on all sides, if it were ever seriously disputed, that the appellant"—that is, the Maharajah Pertab Narain Singh, the present respondent—"can only succeed in his suit by establishing both the following propositions: (*a*) that the testamentary disposition which the Maharajah unquestionably had power to make and did make in April 1864 was revoked or became inoperative in his lifetime; (*b*) that the appellant is entitled to succeed to the taluk as the son of a daughter of the Maharajah, who had been treated by him in all respects as his own son, within the meaning of the 4th clause of s. 22 of Act I of 1869, it being clear that as a mere grandson by a daughter he would not be the heir *ab intestato* to the taluk under the special canon of succession to intestate talukdars established by that section of the statute." Their Lordships then came to the conclusion that Pertab Narain Singh was the son of a daughter, and that he had been treated by the late Maharajah in all respects as his own son. They accordingly decided in his favour and said: "Upon the whole, then, their Lordships are of opinion that the Maharajah died, as he intended to die, intestate; that the appellant is the person who, under cl. 4 of s, 22 of Act I of 1869, was entitled to succeed to the taluk; and that he has made out his claim for a declaratory decree to that effect." But then they add: "The declaration, however, must, their Lordships think, be limited to the taluk and what passes with it. If the Maharajah had personal or other property not properly parcel of the talukdari estate, that would seem to be descendible according to the ordinary law of succession." Their Lordships therefore merely declared Pertab Narain Singh's title to the taluks and whatever descended under Act I of 1869. As to other property which was not included in that Act, Pertab Narain would not have been the heir to the Maharajah during the lifetime of the widow. She would have taken the widow's estate in all property except that which was governed by Act I of 1869.

Subsequently, Triloki Nath applied to Her Majesty in Council for a review of that judgment, or for a re-hearing, his ground being that he had not been properly represented in the former suit, that the person who had appeared as guardian for him had not been properly appointed his guardian. Their Lordships refused to advise Her Majesty to grant a review of the judgment, and stated that the only remedy which Triloki Nath had was to bring another suit, to try whether he was bound by the decision. Accordingly, in 1879, he brought a suit to have it declared that he was entitled to all the property, moveable and immoveable, of the late Maharajah. Previously to the commencement of that suit, however, the widow had made a second appointment under the will, assuming it to be in force, appointing Triloki Nath to take the estate at once. It has been contended that that appointment vested in Triloki Nath not only the taluks, but also the right to the property to which the widow had succeeded upon the death of her husband. Whether that

is so or not is not material. Triloki Nath brought his suit and he made reference to that document in the plaint. In that plaint he stated: "So far as the now plaintiff is aware, no further steps were taken in the prosecution of the said appeal until September 1875, and in the meantime,—that is to say, on the 20th of May 1875,—the Maharani executed another document recognising the now plaintiff as successor to the said Maharajah Sir Man Singh, and on the 31st August 1875 the revenue authorities substituted the now plaintiff's name as the proprietor of the estates in place of the Maharani."

In the same record there is this statement: "The Counsel for the defendant asks the plaintiff as a preliminary whether 'he is suing on the appointment executed by the Maharani on the 16th August 1872, or that mentioned in his 33rd paragraph of 20th of May 1875.' The Counsel for plaintiff answers without reservation 'that of the 16th August 1872.'" It is however to be remarked that in that suit, whether he was relying upon the document of 1872 or that of 1875, he asked to have it declared that he was entitled to the whole of the property, moveable and immoveable, of the Maharajah.

The Judge by whom the second suit was tried found that the will had been revoked, following the decision of Her Majesty in Council, and dismissed the suit. On appeal to the Judicial Commissioner certain points were laid down as those upon which the Judicial Commissioner was to decide, the second of which was: "Supposing the plaintiff-appellant to be confined to the document executed in his favour by the Maharani Subhao Kunwar on the 16th of August 1872 as the basis of his suit, has he, or has he not, any present *locus standi* in Court?" Then, thirdly: "Supposing the plaintiff-appellant not to be confined to the document of the 16th August 1872 as the basis of his suit, then has there, or has there not, been any such valid appointment of the plaintiff-appellant under the power conferred upon the Maharani by the will of the Maharajah as to give to the plaintiff-appellant cause of action?" Upon that the Judicial Commissioner decided that the will had not been revoked, and he held that the plaintiff was entitled to a declaration in his favour. The decree is stated as follows: "Claim for declaration of right of the talukdari estates and all property, moveable and immoveable, belonging to the late Maharajah Sir Man Singh." He therefore treated the suit of 1879 as a suit relating not merely to the talukdari but to all the property, moveable and immoveable, of the late Maharajah. He found that the will had not been revoked, and decreed "that the plaintiff-appellant be, and he is hereby declared to be, the appointed successor of the late Maharajah Sir Man Singh, and to be absolutely entitled to the said Maharajah's estates." There is no doubt that the second suit of 1879 was brought for a declaration of the right of Triloki Nath to the whole of the estates of the Maharajah, talukdari as well as non-talukdari, and that the decree of the Judicial Commissioner gave him a right to that property.

An appeal was preferred to Her Majesty in Council against that decision, but pending that appeal Triloki Nath, on the 15th August 1882, brought another suit, which is the suit now under consideration. In that suit he asked for possession of all the property of the late Maharajah. "Claim for possession of moveable and immoveable property left by the Maharajah Sir Man Singh, deceased. That case coming on for trial, the first Judge followed the decision of the Judicial Commissioner in the second suit, and held that the will had not been revoked. An appeal was thereupon preferred to the Judicial Commissioner, but he very properly postponed delivering his judgment upon the appeal until after the decision of Her Majesty in Council upon the appeal which was then pending in the second suit. Upon that appeal, in which judgment was delivered in July 1884, Her Majesty in Council reversed

the decision of the Judicial Commissioner and dismissed the suit of 1879. The judgment of their Lordships is reported in the 11th Vol. of the Indian Appeals, 197, and at page 210 they say: "In the result their Lordships will humbly advise Her Majesty to reverse the judgment appealed from, and to order that the suit of the respondent be dismissed, and that he pay the costs in the Courts below."

It therefore appears that Triloki Nath, the present appellant, has never claimed the property except under an appointment made by the widow in pursuance of an unrevoked will. He has never claimed to be entitled to the estate or any part of it as having been conveyed to him by the Maharani by the appointment of 1875 as property which had descended to her in consequence of the Maharajah's having died intestate. The second suit was brought in respect of the whole of the property upon the ground that the will had not been revoked, and that the Maharani had appointed the property to him. That suit was dismissed by Her Majesty in Council upon the ground that the plaintiff had no title to the whole or any part of the property in respect of which he was suing in that suit. The decree of Her Majesty in Council, in the suit in which Triloki Nath asked for a decree declaring that he was entitled to the whole of the property, must be and is binding in this suit, in which he is asking, not merely for a declaratory decree, but to be put into possession of the whole property.

The claim of the plaintiff in the present suit is founded entirely upon the will of the late Maharajah. Upon the strength of that will he is now asking to be put into possession of property to which Her Majesty in Council has decided that he has no title. It appears to their Lordships that Triloki Nath is bound by the decision of Her Majesty in Council of 1884, and that the Judicial Commissioner was perfectly right in acting upon that decision and dismissing the present suit.

Their Lordships will therefore humbly advise Her Majesty to affirm the decision of the Judicial Commissioner and to dismiss the appeal. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Burton, Yeates, Hart & Burton.*

Solicitors for the respondent: Messrs. *Watkins Lattey.*

20th and 23rd March, 19th, 21st and 24th, April, and 23rd June 1888.

PRESENT.

Members of the *Judicial Committee*,—The Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock and the Right Hon. Sir Richard Couch.

On appeal from the High Court in Bengal.

MAHOMED ABDUL KADIR AND OTHERS* ... } *Defendants,*

and

AMTAL KARIM BANU .. *Plaintiff.*

Acquiescence—Ratification of transfer of Property—Limitation Act (XV of 1877), s. 10—Trust.

A solehnama in 1847, to which were parties the sons, daughters, and widow of a deceased Mahomedan proprietor, transferred the shares of two minor daughters, in their father's estate, having been executed by their mother, the widow, on their behalf. On the question, whether the solehnama should be set aside, at the instance of the two daughters, on the ground of its having been beyond their mother's power to bind them, and of the instruments having been prejudicial to their interests, the evidence showed that it had been acted on and followed by possession, and that the daughters had, after attaining full age, allowed a lengthened period of twenty years to elapse without taking proceedings to dispute it; *Held* that, if the mother had exceeded her powers in executing the solehnama on their behalf, and if they might, at one time, have had it set aside, their long acquiescence was sufficient to show ratification of the transaction; and the solehnama was upheld.

* 15 Cowell's Ind. Ap, 220, 16 Calc., 161.

As to limitation, it was not to be inferred from the evidence that the sons, by reason of their having managed their late father's estate, should be regarded as trustees, at the time of the execution of the solehnama, for the daughters; and therefore, s. 10 of Act XV of 1877 was inapplicable. So that, as regarded the property included in the solehnama, suits instituted in 1882 by the daughters would have been barred by time.

CONSOLIDATED appeals from two decrees (13th April 1885) following one judgment of the High Court, varying two decrees (20th November 1883) following one judgment of the Subordinate Judge of Dacca in two suits, heard together.

The suits out of which these consolidated appeals arose were brought on the 7th July 1882 by two sisters against their two brothers, each sister suing separately and including the other sister as a co-defendant. The suits were heard together, and in the Courts below one judgment was given in both, the claims resting on similar grounds. The sisters were now severally respondents in the two appeals preferred by the brothers. The general question raised was, whether the respondents, daughters of a Mahomedan proprietor, deceased in 1845, were entitled to possession with an account of past profits of their respective shares in his estate against their two brothers, who, after the father's death, had received the rents and profits of the estate; the respondents having parted with the shares to the brothers by transfers which they now sought to have set aside.

The facts are stated in their Lordships' judgment.

On the death of the father Mahomed Idris Khan in 1845, the plaintiffs, their father's widow Khadija, mother of the latter, and two sons of the deceased by a former wife, also another daughter, represented on this record, became entitled to proportionate shares in his estate.

The question between the parties involved the right of Khadija's daughters to have set aside the following documents of transfer alleged to have been executed on their behalf. The first was a solehnama, or deed of settlement of disputes, dated 6th January 1847, executed by Khadija for herself, and as guardian of her then minor daughters, and by Abdul Kadir, the eldest son, on his own behalf and on that of his then minor brother, and two other minor sisters.

The second was a daemi miras ijara, or perpetual hereditary lease, dated 26th August 1864, purporting to have been executed by a mukhtar, Pran Nath Chuckerbutty, on behalf of the sisters, now plaintiffs in favour of their brothers, in consideration of receiving Rs. 600 a year each. This they did receive till 1881.

As to the plaintiff's right to have these instruments set aside, and to recover possession of their shares, and to have an account taken from the time of Mahomed Idris's death in 1845, the Courts below differed; the first Court holding that the instruments in question were binding on the plaintiffs, and that these suits were also barred by limitation; the High Court holding on the contrary, that neither of these instruments had been established against the respondents, and that limitation did not bar the suits.

The High Court (FIELD and BEVERLEY, JJ.), as to the solehnama of 1847, were of opinion that Khadija's execution of it was not binding upon the minors: her interests being adverse to theirs. As to the daemi miras potta, which purported to have been executed on 26th August 1864 by the mukhtar Pran Nath Chuckerbutty, the Court was not satisfied with the evidence of his having been duly empowered. That being so, the daemi miras potta must fall to the ground. The Court also held that, even if the authority to the mukhtar had been proved, the defendants had not shown that the sisters understood the transaction which the mukhtarnama authorized, or that they had proper advice before entering into the transaction, which was not for their benefit.

As regards limitation, the Judges were of opinion that, less than two years before the suits were brought, the defendants were, as agents and trustees on behalf of the plaintiffs, managing and in

possession of the property, both before and after 1864. It was only when the plaintiffs endeavoured to obtain an increase of the Rs. 60 per annum each, that the defendants set up an adverse title based on the miras potta of 1864, of which instrument the plaintiffs were not aware till the month of Aughran preceding the institution of these suits; which, accordingly were not barred. The High Court directed an account of the plaintiffs' shares in Mahomed Idris's estate from the date of his death in 1845 to be taken.

On this appeal, Mr. *R. V. Doyne*, for the appellants, argued that the grounds on which the High Court had reversed the decision of the Subordinate Judge were insufficient.

The solehnama of 1849 had been executed by Khadija, as mother and guardian of her minor daughters, and the High Court had not drawn a correct inference from the evidence in finding that the daughters' interests had been injured. Whatever might have been urged at one time on behalf of the daughters against the instrument, their claim to set it aside could not be maintained after the lapse of twenty years from the time of their attaining full age. This long acquiescence amounted to a ratification by the daughters themselves. So also in regard to the daemi miras ijara of 1864, the plaintiffs had been for many years receiving the annuities for which it provided, and thus it was not a correct conclusion that the ijara must fall with the mukhtarnama.

The plaintiff's knowledge of the nature of the then intended lease was established by the evidence, and the plaintiffs had not shown any sufficient reason for setting aside their own act. Again, the High Court had erred in considering the law of limitation to be inapplicable. The possession of the appellants as lessees under the ijara of 1864 for more than twelve years before the institution of these suits had been shown, and thus the suits were barred.

The High Court say that the appellants' possession and management rendered them agents and trustees on behalf of the sisters. But this is incorrect. In regard to the solehnama, at all events, by which the taluks were separated, the brothers had no charge whatever of the shares or interests of the sisters, each daughter had become entitled to her share, and the mother (not the brother) was her guardian. There was no trusteeship as between the brother and the sisters. The suits were barred by Act XV of 1877, unless it should be held that the provisions of s. 10, relating to trusts for specific purposes excepted them from the operation of the general law. But it was clear that no such trust was involved by the brothers having, as manager, collected rents; and money actually received by the managers for the plaintiffs' use must be sued for within three years: see Art. 62, which prescribed that period counting from the date of the receipt of the money. Reference was made to Arts. 109, 120, 123, 127 and 144. In order to constitute the manager a trustee within s. 10, the property must have been vested in him; but it was not vested in him, nor had he accepted any such trust. Reference was made to the introduction of this exception into the law of limitation; and Reg. III of 1793, Acts XIV of 1859, s. 2, IX of 1871, and XV of 1877, s. 10, were referred to. Also, it was not sufficient to show a bare fiduciary relationship. *Ahmed Mahomed Pattel* v. *Adjein Dooply* (1) *Kherodemoney Dassee* v, *Doorgamoney Dassee* (2), *Greender Chunder Ghose* v. *Makintosh* (3), *Sarodapershad Chattopadhya* v. *Brojo Nath Buttacharjee* (4), *Manicavelu Mudali* v. *Arbuthnot & Co.* (5) *Arunachala Pillai* v. *Ramasamiya Pillai* (6), were cited in reference to s. 10. Reference was made

(1) I. L. R., 2 Calc., 323.
(2) I. L. R., 4 Calc., 455.
(3) I. L. R., 4 Calc., 897.
(4) I L. R., 5 Calc., 910, 915, 921.
(5) I. L. R., 4 Mad., 404.
(6) I. L. R., 6 Mad., 402.

to Lewin on the Law of Trusts, Chap. XXX, s. 1, p. 863; Darby and Bosanquet on the Law of Limitation, p. 183.

Mr. *J. Graham, QC.*, and Mr. *J. H. A. Branson*, for the respondents, argued that, in accordance with the judgment of the High Court, which was correct, neither the solehnama of 1849, nor the daemi miras potta of 1864, should be maintained against them. In regard to the former, the mother was not entitled to convey as she had purported to do, nor was she authorized by her position with reference to her daughters to convey; and the transfer was in disregard of the interest of infants.

As to the miras potta, the finding of the High Court that there was no satisfactory evidence of the execution of the muktarnama authorizing Pran Nath Chuckerbutty to sign for the sisters, was correct. And both the Courts below had been right in finding that the nature of the transaction had not been explained to them as it should have been.

Again, the judgment of the High Court had correctly proceeded upon their opinion of the law of limitation being inapplicable. The collection of rents by the managing member of the family estates did, as soon as they were in his hands, constitute him a trustee on behalf of the sharers. He was liable to account to them in respect of their shares. He was their agent to collect for the family, and this relation once established, the liability to account followed.

As to what would establish a liability to account, reference was made to *Wall* v. *Stanwick* (1), *Hobbs* v. *Wade* (2) *Thomas* v. *Thomas* (3), *Hurrocomaree Dassee* v. *Tarine Churn Bysack* (4), *Durga Prasad* v. *Asa Ram* (5).

As to a suit against a managing member of a Hindu family, reference was made to *Obhoy Chunder Roy Chowdhry* v. *Pearee Mohun Gooho* (1).

As to the guardianship of the minor sisters, Macnaghten's Mahomedan Law, p. 62, and Tagore Law Lectures, 1873, p. 477, were referred to.

Mr. *R. V. Doyne* replied.

On June 23rd their Lordships' judgment was delivered by

THE RIGHT HON. SIR RICHARD COUCH :—

These are consolidated appeals in two suits brought by the respondents respectively against the appellants, in which one judgment was given by the lower Courts and a similar decree made in each suit. The respondents (the plaintiffs) are the daughters of Moulvi Mahomed Idris, who died at Dacca in December 1845, by his second wife, Khadija, who survived him. The appellants, Abdul Kadir and Abdur Rahman, are his sons by his first wife, Biju, who died before him. By her he had also two daughters, Amatulla and Amtal Rahman, who survived him. At the time of their father's decease the respondents were living with him at Dacca, and, almost immediately afterwards, they left Dacca with their mother Khadija, and went to live at the house of their maternal grandfather, and continued to live there until Khadija married again. From there, soon after her second marriage, the respondents were removed by their brothers and were taken to the house of the brothers in Sylhet, where they lived until 1864. At that time, they being about 22 or 23 and 20 or 21 years of age, respectively, arrangements were made by their brothers for their marriages, and they were taken to Dacca, and, 15 or 20 days after their arrival there, were married to their present husbands. From the death of Mahomed Idris the property left by him was managed by the elder brother, the first appellant, and apparently by the younger, the second appellant, also, after he came of age, and the brothers received the rents and profits of the property.

(1) L. R., 34 Ch. D., 763.
(2) L. R., 36 Ch. D., 553.
(3) 2 K. & J., 79.
(4) I. L. R., 8 Calc., 766.
(5) I. L. R., 2 All., 361.

(1) 13 W. R., F. B., 75; 5 B. L. R., 347.

In each of the suits the plaintiff claimed possession of a 1 anna 15 gundahs share of the immoveable properties mentioned in the schedules to the plaint, and to have an account taken and payment of the balance found due. The first schedule contained the properties left by Mahomed Idris, and the second contained properties alleged to have been acquired after his death from the profits of the properties left by him.

There were two grounds of defence. One, as to properties called in the plaint taluks Nos. 3 and 4, was founded upon a solehnama, dated the 6th of January 1847, made between Abdul Kadir for himself and as guardian of his minor brother Abdur Rahman and his minor sisters Amatulla and Amtal Rahman, and Khadija for herself as guardian of her minor daughters Amtal Karim and Amtal Kadir. By this, after reciting that there was a dispute in respect of the immoveable property left by Mahomed Idris, for settling the dispute between them the parties made an amicable settlement to the effect that out of the taluks which were left by Mahomed Idris, and detailed in a schedule, the taluk No. 3, Alum Reza, bearing a jamma of Rs 1,293-3-8, and jammai land with nankur and khanabari (homestead land) appertaining thereto, and taluk No. 4, Asadar Reza, bearing a jamma of Rs. 1,400-11-11, with jammai land and nankur khanabari appertaining thereto in Joar Baniachung, Zillah Nabigunge, and two annas share of the houses described, were given in lieu of a sum of Rs. 11,250, with interest, on account of the dower of the deceased mother of Abdul Kadir and his minor brother and sisters which was due to them from their father, by Khadija on her own account and as guardian of her daughters, and the said property was made over to them; and taluk No. 9, Mahomed Manwar, bearing a jamma of Rs. 343-12-3, and the jammai land and nankur khanabari in proportion to the aforesaid jamma, and taluk No. 11, Mahomed Mansoor, bearing a jamma of Rs. 168-1-8, with jammai land and nankur khanabari appertaining thereto in Pergunnah Langla which were covered by the kabinnama of Khadija, were given to her by Abdul Kadir, and other land in the taluks mentioned, was divided by giving to Abdul Kadir and his minor brother and sisters 10½ sixteenths as their share, and to Khadija and her daughters 5½ sixteenths as their share.

The other ground of defence was that the plaintiffs having been married and settled to live permanently at Dacca, they made a proposal to the brothers to give them a daemi mirasi ijara for ever, at a permanently fixed jamma, of their shares of the properties left by their father, and the brothers (the appellants) agreed to take it on the condition of paying Rs. 100 a month, Rs. 50 being paid to each of the plaintiffs.

Their Lordships will first take the case of the solehnama. It is dated the 6th of January 1847, and thus was made two years after the death of Mahomed Idris. It was found by the Subordinate Judge to have been executed by Najumul Hossein, the father of Khadija, and that he had power to execute it on her behalf. It was argued by the learned Counsel for the respondents that Khadija had no authority to convey the shares of her daughters. In the view their Lordships have taken, it is not necessary to give an opinion upon this question, and the learned Counsel for the appellants having been relieved from replying upon this part of the appeal, he has not been heard upon this objection. The Subordinate Judge was of opinion that Khadija had had the benefit of good and independent advice, but that the defendants had failed to prove that the solehnama was beneficial to the plaintiffs. He held, however, that the plaintiffs having allowed 20 years to elapse, even after attaining their majority, without taking any steps to set it aside, it was too late for them to question the validity of the transaction on the ground of its having been prejudicial to their interest. The High Court, on appeal from the decrees which he made, held that the transaction was not binding

on the plaintiffs, especially in the absence of evidence to show that it was the best arrangement which could under the circumstances be made in their interest.

In their Lordships' opinion, the High Court, in deciding that the solehnama did not bar the right of the plaintiffs, did not give proper effect to the lapse of time between 1847 and the bringing the suit in 1882, and the inference which should be drawn from the evidence in the suit that possession was had in accordance with it. That Khadija took possession was proved by her having subsequently made an alienation of part of the property assigned to her. There is, indeed, no direct evidence as to what the brothers did with the taluks Nos. 3 and 4, but it may be fairly inferred that they did not treat them as part of the joint property in which the plaintiffs had shares, and that they received the rents of them as property which belonged only to themselves and their minor sisters. Assuming that Khadija had no power to transfer the plaintiffs' shares, or that they might have had the solehnama set aside, their making no objection to it for so many years after they attained majority is sufficient evidence that they ratified and adopted it. There was also the defence of the law of limitation. The High Court, in dealing with this, made no distinction between the taluks No. 3 and 4 and the other property. They said that up to a period less than two years before the institution of the suits the defendants were as agents and trustees in possession of and managing the property on behalf of the plaintiffs. This may have been the case after Khadija's second marriage and the plaintiffs being taken to the brothers' house, but there is no evidence that the brother should be regarded as trustees for the plaintiffs at the time of the execution of the solehnama. Section 10 of Act XV of 1887 is, therefore, not applicable, and it is unnecessary for their Lordships to put a construction upon this section. It appears to them, if it were necessary to decide it, that, as regards the property included in the solehnama, the suits are barred by the law of limitation.

The defence under the daemi miras ijara-potta, or perpetual lease, has now to be considered. The case of the defendants is that the plaintiffs executed a mukhtarnama, dated the 7th Bhadro 1271 (22nd August 1864), by which, reciting that they had inherited from their father 3½ annas share of the property named in it, and the same was being let out in perpetual miras ijara to the brothers Abdul Kadir and Abdur Rahman, they appointed Moonshi Pran Nath Chuckerbutty as a mukhtar for the purpose of signing their names on the perpetual miras ijara-potta and causing registration of the same. And that, on the 26th of August 1864, Pran Nath Chuckerbutty signed their names to a daemi miras ijara-potta of the taluks mentioned in the schedule to it, at an annual rent of Rs. 1,200, namely, Rs. 600 on account of the share of each, to be paid by instalments of Rs. 600, and the document was registered.

There is now no dispute as to the execution of the potta by Pran Nath Chuckerbutty. The material question is whether the mukhtarnama was executed by the plaintiffs. It is attested by five witnesses, of whom only two were examined, and the absence of the others was not in any way accounted for. Of one of the witnesses examined, Chamu Bibi, the Subordinate Judge said: "I find it difficult to believe that she could, without any assistance, recollect the execution of the mukhtarnama so circumstantially as it was described by her. It seems to me as very probable that her knowledge of the details was not derived entirely from her memory. That circumstance, together with the dependence of the witness on the defendants, makes her evidence unreliable, unless corroborated by other evidence." The other witness, Masudar Reza, had been in the service of the defendants for many years, but had left it five or six years before the trial, and did not appear to have then any connection with them. He said: "The Bibis

put their marks on that mukhtarnama. I saw the aforesaid Bibis putting their marks. Remaining behind a screen they put their marks by extending their hands. I saw it. From respectable people there I ascertained and believed that the aforesaid Bibis put their marks. I do not recollect the names of the persons from whom I ascertained it." This witness is described in the attestation as resident of Kumartoli, and one of witnesses not examined is described as inhabitant of Kumartoli in Dacca. The potta is attested by nine witnesses, three of whom are described as of Kumartoli, and others as being at Dacca. If the mukhtarnama was really executed as described, it is singular that it was not attested by some of these persons or of "the respectable people there," of whom Masudar Reza spoke.

The other evidence to prove its genuineness consisted of an order, dated the 22nd of August 1864, signed by Mr. Pennington, Principal Sudder Amin, on the back of the mukhtarnama, stating that it had been produced "to-day" by Moonshi Giasuddin, Mohurir, and, as an inquiry was necessary, ordering the Nazir to make it; and a report of the Nazir, also on the back of it, dated the 23rd of August, which stated that he went to the residence of the plaintiffs, and that they were identified by their relations Khaja Abdulla, Khaja Abdul Wajed, and Khaja Abdul Nubbi, and admitted the execution of the mukhtarnama and agreed to its terms. Mahomed Yusuf, the Nazir, was examined, and said he did not recollect anything about the inquiry, and that the signature at the foot of the report resembled his writing, but he could not swear it to be genuine or not. On the next day, the 23rd, the mukhtarnama was ordered to be given back to the man who presented it, namely Giasuddin. As Principal Sudder Amin, Mr. Pennington had no authority to order the inquiry to be made. Giasuddin was a Mohurir of the Court of the First Subordinate Judge and general mukhtar of the defendants, and Mr. Pennington may have thought that the mukhtarnama was for business in the Court. The High Court properly held that the report was not by itself evidence of the facts stated in it. Khaja Abdulla and Abdul Wajed were examined. On the testimony of the former the Subordinate Judge said he placed little reliance. The latter deposed to seeing rent being paid and received on twelve or fourteen occasions, and that receipts were granted for it, and he saw them signed. It was said by Khaja Abdulla that Pran Nath Chuckerbutty was present when the mark signatures were put and when the Nazir made the inquiry, and yet he was not called as a witness, although he appeared to be living and might have been examined. Their Lordships are not satisfied that the Nazir ever made the inquiry.

It remains to notice a fact which, though possibly consistent with the truth of the defendants' case, raises a strong suspicion against it. A number of receipts were produced by the defendants appearing to be given by Amtal Kadir each for sums of Rs. 50. They contained a statement that she had given a lease in perpetuity to her brother Abdul Kadir and others in lieu of a salary or allowance of Rs. 50 as malikana money, and acknowledged the receipt of Rs. 50 as allowance for the month mentioned in the receipt. They seem to have been worded so as to support the case set up in the defendants' written statement. They were rejected by both Courts as not genuine. No other receipts were produced, nor any accounts showing that rent had been paid to the plaintiffs. Thus Abdul Wajed's evidence as to receipts being signed appeared to be false. The High Court, differing from the Subordinate Judge, said they were not satisfied that the defendants had succeeded in proving the execution of the mukhtarnama, and the evidence does not satisfy their Lordships that it was executed.

The Subordinate Judge found that certain properties in one of the schedules

to the plaint did not appear to be covered by the miras potta, and he gave the plaintiffs a decree for those properties with proportionate costs, and dismissed the suit as regards the remainder of their claims. The High Court reversed that decree, and declared that, in addition to the shares of the properties decreed to the plaintiffs by the lower Court, they were entitled to shares of the remaining properties other than the taluks Nos. 9 and 11, which were allotted to Khadija by the solehnama, and had been sold and were in the possession of persons who were not parties to the suits, and they were also entitled to shares of such property or properties specified in the second schedule to the plaint as upon the making of the inquiry thereinafter directed might be found to have been purchased out of the surplus profits of the properties other than the said two taluks, and to a share of the surplus profits of the properties in the first schedule, other than the said two taluks, from December 1845 to the date of delivery of possession, and they ordered accounts to be taken from that date. As to the accounts, it appeared that the plaintiffs had, up to November 1881, been receiving Rs. 1,200 annually. Their Lordships think the evidence of Abdul Wahed, the husband of Amtal Karim, shows that this sum was agreed to be taken as the plaintiffs' share of the profits, and was so received by them until they asked, in November 1881, to have their allowance increased, from which time they refused to receive it. Their Lordships, therefore, consider that the accounts decreed by the High Court should only be taken from November 1881. The result is that, in their opinion, the decree of the High Court should be varied by omitting therefrom the taluks Nos. 3 and 4, which were included in the solehnama, and ordering the accounts to be taken from November 1881 instead of December 1845. They will humbly advise Her Majesty accordingly. As to the costs of these appeals, they think the partial success of the appellants does not entitle them to the costs, and they order that the parties bear their own costs.

Decree varied.

Solicitors for the appellants : Messrs. *Wrentmore* and *Swinhoe.*

Solicitors for the respondents : Messrs. *Watkins* and *Lattey.*

24th and 26th April 1888.

PRESENT :

Members of the *Judicial Committee*,—The Right Hon. Lord Watson, the Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

On appeal from the High Court in Bengal.

CHANDI CHURN BARUA AND OTHERS* ... ... } *Plaintiffs,*

and

SIDHESWARI DEBI ... *Defendant.*

Grant, Construction of—Invalidity of grant, or covenant by grantor, in favor of persons unborn, upon a condition which may never arise—Restraint upon grantor's own power of alienating—Hindu law.

A Hindu owner cannot make a conditional grant of a future interest in property in favor of persons unborn, who may happen at a future time to be the living descendants of the grantees named, to take effect upon the occurrence of an event which may never occur. That they would thereby impose a restraint contrary to the principles of Hindu law, upon his own power of alienating his estate, discharged of such future interest, is a reason for the invalidity of such a grant.

The purpose was to oblige the grantor and his successors in a Raj estate to give in some way or other maintenance to all the descendants of four persons living at the date of the grant, by declaring that on the failure of the Raja of the day, at any future time to maintain such descendants, the latter were to have an immediate right to four of the Raj villages. This might be regarded as importing a present assignment to

* 15 Cowell's Ind. Ap., 159 ; 16 Calc., 71.

persons not yet in existence, subject to a suspensive condition, which might prevent its ever taking effect; or it might be regarded as a covenant intended to run with the Raj estate, in favor of non-existing covenantees, to give the villages to them in the event specified. *Held*, that in either view, it was equally ineffectual.

Held, also, that the High Court had correctly construed the instrument in holding that the words, "if ever in the time of my descendant you are not provided with means of maintenance," formed a condition; which also was unfulfilled—the descendants being in possession of villages granted to them by the Raja, other than those claimed, more than sufficient for their maintenance.

APPEAL from a decree (8th July 1884) of the High Court, reversing a decree (21st September 1881) of the Subordinate Judge of the Goalpara District.

The appellants, who were plaintiffs in the suit, were a family named Barua, of the Kayest caste, which for many generations had members in the service of the Rajas of Bijni. The respondent was the widow of the late Raja, who died after the institution of this suit against him, and who represented him on this appeal.

Of the Raj estate, that part, within which the villages now claimed were situate, had been in British territory since 1765, and the villages were settled in the pergunnah named Khutaghat; the rest of the Raj estate having, since the annexation in 1864 of the Eastern Dooars, formed, like that pergunnah, part of the Goalpara district. Before 1765, the Baruas were in possession of three other villages under grant from the Rajas. They now claimed further possession of four villages in addition, under an instrument purporting to have been executed on the 15th Pous, of the Pergunnah year 1185 (December 1778), by the then Raja of Bijni, Mukund Narain Bhup. This purported to be in favor of the undermentioned Baruas, besides others of the family, who had died childless, *viz.*, Dharamsil Barua, grandfather of the plaintiff, Nandkumár Barua, and Kamlakant Barua, grandfather of the plaintiffs Chandi Churn, Jagarnath, and Chunder Madhub, agreeing that the three mouzahs, Kaitpara, Shamraipara, and Mauriagaon, that were at that time in the possession of the ancestors of the plaintiffs, should remain in their possession from generation to generation; that the sons, grandsons, heirs and representatives of the Raja Bahadoor should in future maintain the sons, grandsons and heirs of the persons in whose favor the gift was made; and that in default of this, they should relinquish to them the possession of other four mouzahs, namely, Bhotgaon, Dingaon, Daborgaon, and Salbari; and the heirs of the persons in whose favor the gift was made should be at liberty to take possession of these mouzahs, and to enjoy and possess the same as rent-free properties, by paying annually Rs. 190 as *mangon* to the estate of the Raja. And the plaintiffs alleged that in breach of that undertaking to support them by service from generation to generation, the Raja in April 1876 dismissed the first plaintiff from his service, and did not provide the other plaintiffs with service, though they were fit and proper persons and made application. And on that ground they claimed possession of the four villages.

For the defence, the genuineness of the instrument was denied, as also the plaintiffs' allegation that they were competent for the Raja's service. It was also contended for the defence that, supposing the plaintiffs to have any right to maintenance out of the defendant's estate, the profits of the three mouzahs, already in their possession, were sufficient.

Issues were fixed by the Subordinate Judge, who found the instrument to be genuine, and held that the plaintiffs were entitled to have possession, according to the presumable intention of the parties, of the four villages. On the issue fixed by the Judge as to whether there had been any breach of the terms of the document of 1776, his decision was as follows:—

"In this document, Raja Mukund Narain recites that the grantees have, from the days of his ancestors, been supported (*parwarish*) in various ways (*har shurate*), such as by service in the

kingdom, *and* by grants of villages and lands. The various ways in which they have been supported are explained to be by 'service in my kingdom *and* (not *or*) by grants of villages and lands.' The *parwarish* consisted of these two things; not of one or the other, but of both. Mukund then goes on to say that he also supports them (*pratipalan*) in the same manner (*shei mate*), *i.e.*, by service *and* by grants of villages and lands. The word *pratipalan* has clearly the same meaning as the word *parwarish*. The expression *shei mate* places this fact beyond doubt. A pure Bengali word is substituted for a Hindustani word. The Raja then says that in case in his time, or in the time of his descendants, they or their descendants should not be supported (*pratipalan*) in various ways (*har shurate*), he then and there assigns to them these seven villages as a permanent remuneration or allowance. We have already seen what the *pratipalan har shurate* means. After having thus assigned to the grantees these villages, he goes on to revoke the assignment, saying that, as they were at that time being supported (*pratipalan*) by the profits of three of the villages *and* by other means, he will not make over to them the other four villages. That they are to continue to hold the three villages on the terms they were then holding them on. He then goes on to say,—'If ever in the time of my descendants you are not provided with the means of maintenance (*pratipalan nd kare*), then let those descendants of yours who may be living at that time (*i.e.*, when there is failure of *pratipalan*) produce this deed and hold all the seven villages at a quit rent of Rs. 100.

"Now, what is this maintenance (*pratipalan-parwarish*), the failure to continue which by his descendants is contemplated by Mukund? It is clearly the *pratipalan*, the *parwarish* by various ways, *i.e.*, by service *and* by grants of land. This maintenance, as I have shown, consisted of two things, and a failure to give service, or a failure to give grants of lands, or both, would each and all constitute a breach of the terms of the document. And as no member of the Barua family is now maintained by service in the raj, although the family still hold the three villages stated by Mukund to be in their possession in 1185 Perganati, there has been a breach of the terms of the document. This breach took place on the 1st Bysack 1283 B. E., when Chandi Churn was dismissed by the defendant. This dismissal is admitted."

The Subordinate Judge, accordingly, decreed in favor of the plaintiffs.

This, however, was reversed by the High Court on appeal. A Division Bench (GARTH, C. J., and BEVERLEY, J.), after expressing doubts as to the genuineness of the instrument, gave judgment on its terms as follows:—

"Assuming that there is a sufficient consideration for the Raja's promise (about which there may be some doubt), in whose favor is the deed made?

"Is it a provision for all the Barua family in perpetuity, however many hundreds or thousands they may number?

"Does the continuance of the grant depend upon the whole Barua family continuing to serve the Raja or to reside within his jurisdiction?

"Would the grant be valid, although all the Barua family, or the large majority of them, deserted the Raja's territories, and those three or four only, or some or one of them, continued in his service?

"Or would the grant be valid if any of the Barua family refused to remain in the Raja's service at all, or proved themselves faithless or incompetent?

"All these points have been raised before us, and they present very serious difficulties, and we much doubt whether in point of law the instrument, if genuine, is enforceable at all. But assuming that it might be so under a different state of circumstances, and that the present plaintiffs were in a position to enforce it, can it now be said that the Raja has committed any breach of the

contract, or that he is liable in any way to the present plaintiffs?

"We are clearly of opinion that he is not, and our reason for that opinion seems so unanswerable that we think it needless to deal with the other points in the case, which might perhaps present more difficulty.

"The plaintiffs' case is that one of them, Chandi Churn Barua, has been dismissed from the Raja's service, and that the other have not been employed by the Raja, although they are competent men, and willing to be so employed. This the plaintiffs contend is such a breach of the Raja's contract as entitles them to be placed in possession of the four other villages, Bhotegaon, Kaitpara, Daborgaon, and Salbari.

"The Raja says that as a matter of fact the plaintiff No. 1 was dismissed because he proved a faithless servant, and he also says that the other plaintiffs are incompetent men. But whether he is right or wrong in this, what possible ground is there for the plaintiffs' present claim?

"It is clear that by the terms of the agreement the Raja Mukund Narain does not undertake to keep the whole Barua family in his service, nor any particular member or members of that family. All he undertakes to do is to support them, and it is only in case of the family not being supported that the four additional villages were to be placed at their disposal."

The suit was accordingly dismissed.

On an appeal by the plaintiffs,—

Mr. *J. D. Manye* and Mr. *C. W. Arathoon*, for the appellants, argued that the interpretation placed on the terms of the instrument of 1778 A.D. by the Subordinate Judge was a sound one, and that it was a genuine document. That Judge had correctly construed the Bengali words referred to in his judgment, as denoting that the maintenance was to consist of two things, service and grants of land, not merely means of subsistence, from their own or other resources. Moreover no issue had been fixed on the question whether the possession of the villages formerly given to the Baruas was a sufficient maintenance for all the family; and the conclusion of the High Court on this point was disputed by the appellants. Even if the descendants had not been shown to be without any means of support, still, upon the correct construction of the grant, the suit had been rightly decreed by the Subordinate Judge; and the judgment of the High Court should be reversed.

Mr. *R. V. Doyne* for the respondent was not called upon.

Afterwards, on April 26th, their Lordships' judgment was delivered by

THE RIGHT HON. LORD WATSON:—

This suit was brought by the appellants in the year 1880, before the Court of the Subordinate Judge at Goalpara, for possession of the four mouzahs of Daborgaon, Salbari, Dingaon, and Bhotegaon, which are part of the Bijni Raj estate in Assam. The original defendant was the late Raja Kumud Narain; and since his death the estate has been represented by his widow, the Ranee Sidheswari Debi, who is respondent in this appeal. The foundation of the appellants' claim is a deed alleged to have been executed by the Raja Mukund Narain, the ancestor of the defendant, in 1185 Perganati (1778 A.D.) in favor of certain members of the Barua family, to which the appellants belong. The document, according to the translation made by the Subordinate Judge, to which no exception has been taken by either of the parties, is in these terms:—

"Let peace and health rest upon your dwelling, O Kasi Nath Barua, dewan, O Ram Nath Barua, O Dharmasil Barua, O Komlakant Barua, O Ram Jibun Barua. Inasmuch as because of my having caused the daughter of Kasi Nath Barua, dewan, to lose caste by taking her away, you and all your connexions having become low in your minds, have conceived the design of abandoning my service and of withdrawing from my jurisdiction and going elsewhere, and

inasmuch as from the days of the Maharajas, my deceased ancestors, you have all along been supported in various ways (*such as*) by service in my kingdom and by (*grants of*) villages and lands; and as I too am supporting you in the same manner, and as you have now become dispirited and (*therefore it is proper*) that I should show you even greater kindness, (*I have determined that*) a means of support, that is, a perpetual wage, should be given to you; and in case in my time or in the time of my descendants, you or your descendants should not be supported in various ways (*by me or by my descendants*), then, as a means of maintenance, that is to say as wages, I do hereby assign to you seven villages, namely, Shamraipara, Mauriagram, Daborgaon, Salbari, Kaitpara, Dingaon, and Bhotegaon in the nature of a fixed (*perpetual*) remuneration. However, as you are now being supported by (*the profits derived from*) three villages and by other means, for this reason four villages have not been made over to you. Those three villages that are now in your possession by virtue of farming leases, of leases for a fixed period, and of charitable grants (*you will now hold*), and you will pay rent for them, and other dues on account of them, as you have done from heretofore. If ever in the time of my descendants you are not provided with the means of maintenance (*by them*), then let those descendants of yours who may be living at that time produce this deed, and taking possession of the three above-mentioned villages, and also of the four villages (*now held*) khas (*by me*), enjoy possession of them rent-free from generation to generation. But you will have to pay to the estate a yearly quit rent of Rs. 100. Beyond this amount I will not call upon you to pay any cesses or exactions of any kind whatsoever. These seven villages will in no way appertain to my kingdom."

It is not now disputed that Kasi Nath and Ram Jibun, two of the four grantees named in the deed, died without issue; and that the appellants are the living representatives of the other two, *viz.* Dharmasil and Komolkant Barua. They are still in possession of the three mouzahs of Shamraipara, Mauriagram, and Kaitpara, which their four ancestors held in 1778, by virtue of farming leases or other tenures, and which were presently assigned to them by the deed; and these mouzahs now yield an annual return of 4,000*l* sterling. As might be expected in these circumstances, the appellants do not allege in their plaint, and they do not now contend, that they have not been already provided with ample means for their support. The case which they present is, that by the terms of the deed each successive Raja was under an obligation, either to maintain them, and that not merely by grants of land, but by employing them on his estate and paying them wages, or to give them the four villages in question; and accordingly, that the conditional grant to descendants became at once operative in their favour, when the late Raja dismissed Chandi Churn from his service in 1876, and declined to employ either him or any other of the appellants.

The real controversy between the parties turns upon the third issue adjusted in the District Court: "Is the document filed genuine, and are the plaintiffs entitled to any relief under it?" Besides disputing its genuineness, the respondent argues that the deed, in so far as concerns the disposition of the four villages claimed, is void in law; that at any rate the contingency upon which it depends is the failure of the Raja to provide maintenance, and that no claim can lie so long as the appellants have sufficient means of maintenance derived from her predecessors in the Raj.

The Subordinate Judge gave the appellants a decree in terms of their plaint. He found as matter of fact that the deed was genuine, and he held as matter of law that the conditional grant to descendants is valid and effectual, and that it became operative whenever the Raja failed to support them by giving employment as well as land. On appeal the

High Court reversed his decree, and dismissed the suit with costs. The learned Judges (GARTH, C.J., and BEVERLEY, J.) held that the onus being upon them, the appellants had not satisfactorily established the authenticity of the deed. Without deciding the point, they expressed grave doubts whether, if genuine, it was enforceable in law; but, on the assumption that it was both genuine and enforceable, they held that the descendants of the four Baruas named in it have, according to the just construction of the instrument, no right to the four mouzahs so long as they are sufficiently maintained from any source whatever provided by the grantor or his successors.

Their Lordships have not found it necessary to consider the evidence bearing upon the question whether the deed of 1778 is or is not a genuine document. On the assumption that it is, they agree with the construction which the learned Judges of the High Court have put upon the words: "If ever in the time of my descendants you are not provided with the means of maintenance." It attributes to these words their primary and natural meaning; and there is nothing in the context which suggests that the condition which they express must be qualified by the previous narrative of the means by which the four Baruas had actually been supported. There is an antecedent promise that these Baruas and their descendants shall in future be "suported in various ways." It may be plausibly argued that the condition was intended to compel the fulfilment of that promise; but support "in various ways" simply signifies support "in some way or other"; and if the words were imported into the condition, they would not alter its meaning.

These considerations are sufficient to dispose of this appeal; but their Lordships desire to rest their judgment upon broader grounds. They are of opinion that the conditional grant of the four mouzahs to persons yet unborn, who may happen to be the living descendants of the grantees named, at some future and indefinite period, upon the occurrence of an event, which may possibly never occur, is altogether void and ineffectual.

The manifest purpose of the deed was to fasten upon the grantor, and his successors in the Raj, a perpetual duty of giving, in some way or other, the means of maintenance to all the descendants of four persons who were in life at its date. It does not directly impose an obligation of that singular and unprecedented description; but on the failure of the then Raja, at any future time, to maintain these descendants, however numerous, the latter are to have immediate right to four of his villages, which thenceforth are not to "appertain to his kingdom."

Apart from the condition upon which it is made dependent, the grant of these four villages is expressed in language which, according to Hindu law, imports a present assignment to the grantees. It appears to their Lordships that two alternative views may be taken of its real character. It may be regarded as a present assignment to persons not yet in existence, subject to a suspensive condition, which may prevent its taking effect at all or (as in the present case) for generations to come, or it may be regarded as a contract, not a mere personal contract but a covenant running with the Raj estate, and binding its possessor to give the villages to those persons in the event specified. It was hardly contended that a present grant to persons unborn, and who may never come into existence, is effectual; and a covenant of that nature in favour of non-existing covenantees is open to the same obections. It is immaterial in what way an interest such as the appellants' claim is created. If it prevents the owner from alienating his estate, discharged of such future interest, before the emergence of the condition, and that event may possibly never occur, it imposes a restraint upon alienation which is contrary to the principles of Hindu law.

Their Lordships are accordingly of

opinion that the judgment of the High Court must be affirmed and the appeal dismissed; and they will humbly advise Her Majesty to that effect.

The appellants must pay the costs of this appeal.

Appeal dismissed with costs.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Watkins & Lattey.*

26th, 27th and 28th April, and 23rd June 1888.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Watson, the Right Hon. Lord Hobhouse, and the Right Hon. Sir Richard Couch.

On appeal from the High Court in Bengal.

KALI KRISHNA TAGORE* ... *Plaintiff*,

and

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND ANOTHER ... ... *Defendants.*

Res judicata—Civil Procedure Code (Act XIV of 1882), s. 13,—Act IX of 1847—Alluvion.

To apply the law of estoppel by judgment, stated in s. 6 of Act XII of 1879 and in s. 13 of Act XIV of 1882, it must be seen what has been directly and substantially in issue in the suit, and whether that has been heard and finally decided; for which purpose the judgment must be looked at. The decree is usually insufficient for showing this: as, according to the Code, it only states the relief granted, if any, or other disposal of the suit, without the ground of decision, and without affording information as to what may have been in issue and decided.

This suit was to establish a right to land, and for possession, against two defendants, who alleged their rights respectively. The claimant had previously obtained a decree against one of the defendants, and in that decree the land now claimed had been excepted.

Held, that the matter now in issue, not having been directly and substantially in issue in the prior suit, the present suit was not barred under s. 13, Act XIV of 1882 Civil Procedure Code.

APPEAL from a decree (4th March 1885) of the High Court, varying, on cross-appeals, a decree (20th August 1883) of the Subordinate Judge of the Backergunj District.

On this appeal the first question was whether, between the parties to this suit, there had been a hearing and adjudication of the matters now directly and substantially in issue. Both suits related to the ownership of land gained by alluvion of the river Arial Khan in the Backergunj District, between two river-bordering zemindaries,—the one, Nazirpur, belonging to the plaintiff, and the other, Saistabad, belonging to the second defendant. On these estates land was washed away by the river between the years 1830 and 1841, and afterwards, by its recession, five churs were formed separated by *dones*, or streams. It then was disputed to which zemindari part of them belonged, as being formations on the original site of the land lost by diluvion. Also the right of the Government to assess and settle new formations in the channel came into question.

In 1841, as the result of proceedings before the Special Commissioner of Murshedabad, a chur named Gopalpur was made over to Gopal Lal Tagore, then the owner of Nazirpur; and another chur, named Chatua, was made over to the owner of Saistabad. In after years the river Arial Khan made channels through both these churs; and the changes took place, which are described in their Lordships' judgment.

In 1860 a survey was made, under orders of the Revenue authorities, in pursuance of Act IX of 1847 (regarding the assessment of lands gained by alluvion or dereliction). Also, in 1868, the accretions were mapped in a Thak survey. Further formations by alluvion took place about 1871; and, in 1873, Mauzzem Hossein took possession of a portion which he alleged to be an accretion to

* 15 Cowell's Ind. Ap., 186; 16 Calc. 173.

his chur Chatua. But the officers of the Diara Survey, taking a different view, measured it as excess land of Chatua, and it was represented in the Diara Survey map of 1881 as beyond the boundary of that mauza. On the 24th September 1879 Muazzem's claim to this was heard and rejected by the Superintendent of Diara Surveys, whose order was, on the 6th February 1881, supported by the Commissioner of the Dacca Division, it being found that the newly-formed lands claimed by the owner of Chatua were not accretions to it, or part of it. Muazzem then, without resorting to the Civil Courts to dispute the order of the Revenue Courts, accepted a settlement of the land as in excess of Chatua; and an amulnamah was granted by the authorities enabling him to receive the rents of the cultivators located on it.

Meantime, the plaintiff, who was not a party to the proceedings taken by the Diara Survey officers, filed a suit (No. 1 of 1881), in the Court of the Subordinate Judge, against Muazzem, claiming the land as a formation on the original site of land lost by diluvion from his chur Gopalpur. He alleged that it had appeard gradually since 1873, having become cultivable since 1877. For his defence Muazzem, besides alleging that the land was an accretion to his chur Chatua insisted that it could not be decreed to the plaintiff as against the Government, through whom he had a title to the possession of the land measured as excess The judgment of the Subordinate Judge (23rd February 1882) was in favour of the plaintiff as to a portion of the disputed of lands. He found that it was included in the Thak of 1868 as part of Gopalpur. Excepting the 300 bigahs marked D on a map made by an Amin of his Court, that being the land settled as the excess of Chatua, the decree was for the plaintiff. But as to plot D, his judgment was that so long as the order of the Superintendent of Diara Surveys, directing that this should be measured as excess of chur Chatua, remained in force, "the plaintiffs right to it must be held to be either extinguished, or in abeyance." The decree dismissed the suit as to this plot, and from that decree the plaintiff did not appeal. The defendant Muazzem appealed to the High Court, and his appeal stood over until it was heard along with the appeal in the present suit in March 1885. The plaintiff then filed the present suit (9th January 1883) against the Government, represented by the Collector of the District, the first defendant, and making Muazzem the second defendant. He claimed a declaration of his proprietory right in, and possession of, the 300 bighas (maked D on the Amin's map), as being "re-formation on the original site of land within his zemindari," describing it in para. 12 of his plaint by reference to the survey maps. He referred to his previous suit, No. 1 of 1881, and the exception of D. from the decree of 23rd February 1882; and he claimed mesne profits.

The defence of the Government was that the suit, contesting the proceedings of the Diara Survey officers, could not be maintained; and that the land in dispute belonged in fact to neither of the zemindars, having been formed by the drying up of a navigable *done* which existed during the time of the first survey. The defendant Muazzem alleged his right through the Government, as well as independently.

The Subordinate Judge was of opinion that the question had been determined in favour of the plaintiff by the decision of 23rd February 1882, and decreed the claim, save as to the 300 bighas (marked D on the Amin's map), with mesne profits, for three years, against Muazzem.

From this judgment both the zemindars (plaintiff and defendant) appealed to the High Court; but the Government did not appeal, and accordingly was made respondent in both appeals. The appeals were heard by a Divison Bench (PIGOT and O'KINEALY, JJ.), together with the appeal in the suit No. 1 of 1881 by consent of parties, and one judgment (4th March 1885) was delivered

in the three appeals, or in both suits. In the appeal in the suit No. 1 of 1881 the High Court was of opinion that the evidence was in favour of the plaintiff, and they dismissed the appeal.

In considering the present suit, the Judges observed that the first question was as to the effect of the decree in the prior suit, No. 1 of 1881; and in their opinion that decree defined the limit of the estoppel arising from the proceedings. Upon the question, whether the plaintiff was entitled to any relief as against the Secretary of State, the judgment was that a declaratory decree should be refused. The result was a decree dismissing the present suit.

On this appeal, Mr. *J. D. Mayne* and Mr. *C. W. Arathoon* for the appellant argued that the High Court was wrong in holding that the decree of the Subordinate Judge of 23rd February 1882, in the suit of 1881, barred the present suit. In deciding that the plaintiff in the suit of 1881 had made good his claim to the land which was adjudged to him, the judgment had not so defined the quantity as to preclude the plaintiff's recovering what he now sued for, on his making proper parties to the suit; and the decree in that suit should have been read with the judgment on which it was based. Also, there was a difference in the issues now raised from those in the former suit, the Government being a party on the present record. A reference to the judgment showed at once that there had not been in the former suit any final decision against the plaintiff's claiming the lands now in suit, *viz.*, the 300 bigahs excluded from the decree in the former suit; because the reason given for the exclusion was that the order of the Superintendent of Diara Surveys, dated 24th September 1879, remained in force treating the land as excess lands. That order could be set aside in proceedings against the Government. There was, therefore, only the decision that the 300 bigahs (marked D on the Amin's map), could not be recovered in that suit. Neither of the respondents had raised the question of estoppel in their written statements, nor had an issue on this point been framed, or disposed of in the Court of first instance.

Reference was made to Act XII of 1879, s. 6; and to the Civil Procedure Codes (Act X of 1877, s. 13, and Act XIV of 1882, s. 13).

It was also contended that the finding of the Subordinate Judge as to the *done*, or stream, in which the accretion was formed, not having been shown in the earlier maps as included within the plaintiff's land, was an error on his part.

Mr. *R. V. Doyne* and Mr. *J. H. A. Branson* appeared for the first respondent, the Secretary of State for India in Council. They contended that the plaintiff's suit was barred by the decision of 23rd February 1882, as *res judicata*. The plaintiff had put forward in the present suit the same claim that he made in the former. The defence in the former suit was that it was for him to make the Government a party, as to the 300 bighas in question. The plaintiff, thereupon, should have applied for leave to make it a party or for leave to abandon that part of his claim which contravened the orders of the Diara Survey Superintendent and the Commissioner of the Dacca Division, with liberty to bring a fresh suit. He made neither the one application nor the other; and his suit, as to this part of his claim, was dismissed by a Court competent to give relief between the parties, or those who should have been made parties. No new circumstances had since arisen. The test was not whether there had been an adjudication, or not, upon a title then put forward; but whether, but for the plaintiff's own conduct, there would not have been an adjudication. They referred to the explanations, 2 and 3, under s. 13, Civil Procedure Code.

Mr *J. D. Mayne* replied.

On a subsequent day (23rd June) their Lordships' judgment was delivered by

THE RIGHT HON. SIR RICHARD COUCH:—

This is an appeal in a suit brought by

the appellant against the Secretary of State for India in Council (represented by the Collector for the district of Backergunj), and Maulvi Syed Muazzem Hossein Chowdhry, to obtain possession of about 300 bighas of land (described as marked D in a map prepared by the Civil Court Amin in a previous suit) being re-formation on the original site of the plaintiff's zemindari, and to have it declared that the proceedings and orders in connection with the Diara Revenue survey of the disputed lands, by which the land had been attached as liable to be assessed for revenue, and a temporary settlement of it made with the defendant Muazzem Hossein Chowdhry, could not stand against the plaintiff's right, and were not binding on him.

The written statement of the Collector of Backergunj denied that the land in dispute was a re-formation on the original site of the plaintiff's land, and asserted that it was not included in the old Thakbust or Survey boundaries as plaintiff's estate. It also stated that the boundary between the plaintiff's land called Gopalpur, thakked in No. 1585, and the defendant Muazzem Hossein's land called Chatua, thakked in No. 1625, was not a line during the time of the Thakbust or Survey measurement, but a big and navigable *done* (or stream), the bed of which was the property of no individual, and as such was at the disposal of the Government under the present law; that the land in dispute was formed by the drying up of the big and navigable *done* which existed at the time of the first survey between Gopalpur and Chatua, and as such was assessable as surplus under the existing law. Muazzem Hossein in his written statement relied upon the proceedings of the revenue authorities with regard to the diara as being final, and also claimed the land as re-formation on the original site of his lands.

The appellant and Muazzem Hossein are proprietors of two contiguous estates, *viz.*, Nazirpur and Saistabad respectively. Some time before 1842 considerable portions of these estates were diluviated by the river Arial Khan. On the reappearance of the land, in the shape of five churs separated from each other by *dones*, resumption proceedings were instituted by the Government, but ultimately the churs were released, and an Amin named Sumbhu Nath was deputed by the Collector to make over to the proprietors the different portions of the re-formed land appertaining to their estates. In 1842 the Amin, after making a measurement of the lands, prepared separate chittas and a sketch map assigning different portions of the land to the several proprietors. The lands assigned to the ancestor of Muazzem Hossein were named chur Chatua, and those released to the appellant's father, Gopal Lal Tagore, were called chur Gopalpur. Some years after, but it is not clear when, the river again changed its course, and, flowing through Chatua and Gopalpur, washed away portions of these two mouzas. In 1868 a Thak survey was made, and after that the river gradually receded towards the east, and is now flowing through the appellant's land of Gopalpur. The land in dispute, which the appellant claims, is the newly-formed land on the west of the river, in contiguity with the lands of Chatua. After this last re-formation the western portion of the land in dispute, together with some other land, was measured by the Diara Survey authorities in 1879 as excess lands of Chatua. Muazzem Hossein objected to this, and claimed the land as re-formations on the site of the diluviated land of his mouza Chatua. The objection being disallowed, instead of bringing a suit to set aside the order of the revenue authorities, he accepted a settlement of the land from the Government as an accretion to his mouza In 1881 the appellant sued him for this and other lands, and he pleaded that the land claimed was a re-formation of the diluviated land of Chatua, and also claimed to hold as before of the Government. An issue was settled, "whether the land in dispute is a re-formation the site of the plaintiff's chur Gopalpur, or on the site of the land of chur Chatua,

released to the defendant." The Court found this issue in favour of the plaintiff (the present appellant), but went on to say that so long as the order of the Superintendent of Diara Surveys remained in force and was not set aside, "the plaintiff's right to the portion of the disputed land measured as surplus accretion to Chatua, and settled with the defendant, must be considered as either extinguished or in abeyance. Consequently the plaintiff is not entitled to recover it *now*." It was ordered that the plaintiff should recover possession of a portion of land described by reference to a map prepared by the Amin, excluding therefrom the portion covered by the plot marked by the Court as D in the map. This plot is the land which is the subject of this appeal.

By the Act IX of 1847, "An Act regarding the assessment of lands gained from the sea or from rivers by alluvion or dereliction in the Provinces of Bengal, Behar and Orissa," it is enacted that the Government of Bengal, in all districts or parts of districts of which a revenue survey may have been completed and approved by Government, may direct from time to time, whenever ten years from the approval of any such survey shall have expired, a new survey of lands on the banks of rivers and on the shores of the sea, in order to ascertain the changes that may have taken place since the date of the last previous survey, and cause new maps to be made according to such new survey. In 1860 a survey was made under this Act.

It is said by the Subordinate Judge in his judgment in this suit that, on comparision of the Thak and Survey maps by the Civil Court Amin, it has been found beyond doubt that the land in dispute was then thakked as part of the plaintiff's mouza Gopalpur, and that the assertion of the defendants to the contrary was erroneous. And he held the map to be an admission by the Government of the plaintiff's title. It could not be disputed that it made a *primâ facie* case against the Government. However the case of the appellant was not rested only upon this admission. The proceedings in 1842 were put in evidence by him, and from an examination of these their Lordships have come to a conclusion in his favour. The decision of the Special Commissioner of Murshedabad and Calcutta, dated the 15th December 1841, contains a history of the proceedings for assessment of Government revenue on the five churs which appear to have begun in 1833. It is stated that the Collector decreed the case in favour of the Government, and, on an appeal from his decision, it was set aside by the Special Commissioner, and it was ordered that whatever accreted lands might, on investigation, be found to have accreted to the original site by the Government officers, should be released from the claim of the Government.

In October 1842 Sumbhu Nath, the Amin who, as has been stated, was deputed to make over to the proprietors the different portions of the released lands, made two reports, one relating to 14,359 bighas 14 cottahs 3 dhoors of land, and the other to 6,792 bighas 16 cottahs 6 dhoors. In the former of these reports is the following passage:—"The measurement by Anund Chunder Mookerji and Joychunder Chatterji "(a measurement made in the year before the decree of the Special Commissioner), "shows that there were 20,391 bighas 13 cottahs of land inclusive of *done* in the five plots of chur. The lands in those five plots of chur, inclusive of khal and *done*, amount, by my measurement, to 21,152 bighas 10 cottahs 9 dhoors of land in all, and so there is an excess of 760 bighas 17 cottahs 9 dhoors of land measured by me in the five plots of chur." In the other report, where he speaks of the quantity of land being relinquished to other parties than the appellant's ancestor, Gopal Lal Tagore, he says "including khals and *dones*." Thus the *dones* appear to have been included in the plots. At page 61 of the record there is a document described as the measurement chitta of

the lands in five plots of chur included in the Haria and Chaola rivers being the subject of dispute between the Government and Gopal Lal Tagore in cases Nos. 1474 and 1555 pending trial.

In several places a *done* is mentioned as included in the quantity of land. In the Amin's sketch map, which accompanied the reports, the *done* in question appears to run between Dag. 8 in the 3rd plot and Dag. 15 in the 4th plot, the latter being described as land of Nazirpur. The description of Dag. 15 in the chitta is "north of the lands formed by alluvion after diluvion of mouza Kala" (worm-eaten), "to which the appellants Kumla D" (worm-eaten), "and others named in the decree No." (worm-eaten) "are entitled east of Dag. 8, west of the *done* to the west of the 5th plot and south of the lands of Jharna Bhanga chur, 4th plot." Thus on the opposite side to where the *done* in question was situate, we have a *done* between the 4th and 5th plot given as the boundary, but, on the other side, Dag. 8, and not the *done*, is given as the boundary, and in the description of Dag. 8 it is said to be west of the 4th plot. In the summary at p. 84 of the land of Nazirpur, the zemindari of Gopal Lal Tagore, the total quantity, including the 4th plot, is given, and of this quantity all the plots, except the first, appear in a column headed "Waste land with *done*." It appears to their Lordships that in 1842 the whole of the land and water within the ambit of the five plots or churs was measured and released by the Government, and no part of the *dones* was reserved. The evidence of what was done at that time, instead of rebutting the evidence of the map of 1860, supports it. The finding of the Subordinate Judge, that the part of the *done* which in 1842 covered the disputed land was not given to any of the parties to whom lands were allotted by Sumbhu Nath, is, in their Lordships' opinion, opposed to the evidence.

The Subordinate Judge refused to make a decree, against the Secretary of State, and made a decree, which was unnecessary, that the appellant should recover possession of the land of which possession was decreed in the former suit. The present appellant and Muazzem Hossein both appealed to the High Court, the latter having also appealed against the decree in the former suit. The three appeals were heard together. The appeal in the suit of 1881 was dismissed. In the other appeals the High Court did not give any judgment upon the facts. They said the first question was as to the effect of the decree in the suit of 1881; that the claim of the plaintiff in respect of the portion marked D in the map "was dismissed, that is to say, the relief prayed for by him in respect of it was not granted. Whatever were the reasons which led the Lower Court to take that course and not to grant the plaintiff any relief in respect of that portion of the property, the decree as it stands constitutes the record of the rights of the parties, and is the source that defines the limits of the estoppel arising from the proceedings. We cannot look to the judgment as we were asked to do in order to qualify the effect of the decree, . . it must be treated as a decree binding as between him and the 2nd defendant, the effect being that there is no claim against the defendant in respect of that property." Thus the High Court have given to the decree an effect directly opposed to what was intended by the Subordinate Judge, it being clear that he only intended to decide that the plaintiff was not then entitled to possession. The law as to estoppel by a judgment is stated in s. 6 of Act XII of 1879, and s. 13 of Act XIV of 1882. It is, that the matter must have been directly and substantially in issue in the former suit, and have been heard and finally decided. In order to see what was in issue in a suit, or what has been heard and decided, the judgment must be looked at. The decree, according to the Code of Procedure, is only to state the relief granted, or other determination of the suit. The

determination may be on various grounds; but the decree does not show on what ground, and does not afford any information as to the matters which were in issue or have been decided. Even if the judgment is not to be looked at, the High Court have given to the decree a greater effect than it is entitled to. The decree is only that in that suit the plaintiff is not entitled to the relief prayed for. It does not follow, as the learned Judges of the High Court think, that he can never have any claim against the defendant in respect of the property.

Upon the question, whether the plaintiff was entitled to any relief as against the Secretary of State, the High Court, having thus decided as to the estoppel, considered it was not a case in which, in the exercise of their discretion, a declaratory decree should be made. Whether they were right in this or not is not now material, the appellant being, in their Lordships' opinion, entitled to more than a declaratory decree. The appeal of the present appellant to the High Court was dismissed, and that of Muazzem Hossein in this suit was allowed, the result being that the suit was entirely dismissed.

Their Lordships have given their reasons for their opinion that a decree should have been made in favour of the plaintiff, and they will humbly advise Her Majesty to reverse the decrees of the Lower Courts, and to make a decree awarding possession to the plaintiff of the lands mentioned in the 12th paragraph of the plaint with mesne profits for three years previous to the institution of the suit, and from that until the delivery of possession or until the expiration of three years from the date of the decree, whichever first occurs.

As to the costs of the suit, their Lordships observe that the Subordinate Judge says he declined to award to the plaintiff the costs incurred by him in recovering the land, inasmuch as he could have obtained this relief in the suit of 1881 if he had not committed an error in his plaint in that suit, and full costs were given to him in that suit. This, they think, is a sufficient reason for the costs of this suit in the Subordinate Court not being now awarded to the plaintiff, but he ought to have his costs of the appeals to the High Court, Nos. 25 and 26 of 1884, in which, according to their Lordships' opinion, the judgment should have been given in his favour. Their Lordships will humbly advise Her Majesty to make an order accordingly. The costs of this appeal will be paid by the Secretary of State.

Appeal allowed.

Solicitors for the appellant: Messrs. *T. R. Wilson & Co.*

Solicitors for the respondent, the Secretary of State for India in Council. The *Solicitor, India Office*, Mr. *R. T. Treasure.*

2nd May 1888.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Watson, the Right Hon. Lord Hobhouse, and the Right Hon. Sir Richard Couch.

CHAND KOUR AND ANOTHER* ... } *Defendants,*

and

PARTAB SING AND OTHERS ... } *Plaintiffs.*

On appeal from the Chief Court of the Punjab.

Res-judicata—Dismissal of suit for default—Difference in causes of action—Civil Procedure Code, ss. 13, 102, 103.

The dismissal of a suit in terms of s. 102, Civil Procedure Code, is not intended to operate in favor of the defendant as *res-judicata*. When read with s. 103, it precludes a fresh suit in respect of the same cause of action, referring, irrespectively of the defence or the relief prayed; entirely to the grounds, or alleged *media*, on which the plaintiff asks the Court to decide in his favor.

* 15 Cowell's Ind. Ap., 156; 16 Calc., 98.

Brother's sons, as nearest agnates of a deceased proprietor, sued for a decree, declaring that a gift, before then made by the widow in favor of her daughter's son, of the estate of her late husband, would not operate against their right of succession on her death. A prior suit, before the date of the gift, brought by two of the plaintiffs for a declaratory decree, and an injunction restraining the widow from alienating the same estate, had been dismissed under the provisions of ss. 102 and 103 (Act X of 1887), Civil Procedure Code.

Held, that the causes of action in the two suits were not identical, and the fresh suit was not precluded by s. 103, the gift having afforded the new ground of claim, which also had subsequently arisen.

APPEAL from a decree (16th May 1884) of the Chief Court, modifying a decree (2nd January 1883) of the Commissioner of the Jullundur division, varying after a remand to the Judicial Assistant Commissioner of the Gurdaspur district, and a return thereto (30th September 1882), a decree (16th May 1882) of the latter Judge.

The suit out of which this appeal arose was brought on the 11th February 1882 by the heirs, brother's sons, of a proprietor deceased in 1848, for a declaration that a gift made in 1879 by his widow, who had succeeded to his estate, would be inoperative as against their rights of inheritance whenever she should die. But the only question on this appeal was as to the application of ss. 102 and 103, Civil Procedure Code.

Mussamut Chand Kour, the donor, was the widow of Sirdar Kahan Singh, who having gone, with his only son by her, to Multan, in 1849, was there killed, and the son also. Kahan Singh was a sharer to the extent of rather more than 200 ghumaos in villages Aliwal and Man Sandwal in the Gurdaspur district, where the widow remained; and his only other child was a daughter, who in after years had one son, Perak Singh. The widow, on the 29th March 1879, executed the deed of gift, now disputed by the sons of Kahan Singh's brothers, who in this suit claimed a declaration that it should not affect their rights to accrue on the death of the widow. The deed declared: "As I have kept with me my daughter's son, Perak Singh, son of Beja Singh of Majitha, now residing at village Man, from his birth, and have brought him up like a son, therefore I have, without any receipt of money, made a gift in his favor of the following property:" giving a list of Kahan Singh's holdings, according to the *khewat* of the villages above named.

Before this gift was made, on the 1st August 1878, two of the plaintiffs in the present suit, *viz.*, Partab Singh and Golab Singh, sued the widow claiming a declaratory decree, and an injunction forbidding the alienation of Kahan Singh's property. A further petition was filed on 30th August by them, asking that she might be restrained from selling or mortgaging pending the decision of that suit. The plaintiffs failed to appear at the hearing, and the result was that, on the 7th October 1878, the Judicial Assistant Commissioner made the order, which is set forth in their Lordships' judgment, dismissing the suit under s. 102, Civil Procedure Code.

For the defence of the present suit, it was set up that the order, dismissing the former one, barred it. The widow also alleged her right to make the gift to her daughter's son, who had, as she maintained, been adopted by her to Kahan Singh, under a power given to her by him on departing.

The Judicial Assistant Commissioner decreed in favor of the plaintiffs, holding that the present suit was not barred under s. 13, nor was within the provisions of ss. 102, 103; there not having been, in the former suit, any claim to set aside an existing gift. He also found that the alleged power to adopt was not proved; and held that the custom of descent, giving the inheritance to the brother's sons, as being nearer than a daughter's sons, could not be set aside.

The Commissioner, after a remand for further evidence, found the authority to adopt had not been established. He supported the gift only so far as it might relate to the widow's own estate. The decree of the lower Court was accordingly, in the main, upheld.

Both parties appealed to the Chief Court. That Court (Baden-Powell and Burney, JJ.) held that the suit was not brought upon the same cause of action as the previous one had been; the gift having been a new and subsequent act. The suit might, therefore, be maintained. As to the alleged adoption, the Judges were of opinion that, though something might have been said by the Sirdar, on his going on military service with his son, about the succession in the event of his death, no such proof of definite authority to adopt had been given as would be necessary before the ordinary course of succession could be set aside.

The result was a decree in the plaintiffs' favor, declaring that the deed of gift of 29th March 1879 was void and of no effect in respect of all the lands which it purported to convey to Perak Singh, as against the plaintiffs' reversionary interests.

On this appeal,—

Mr. *J. D. Mayne*, and Mr. *C. W. Arathoon*, for the appellants, argued that the suit of 1878, having been dismissed under s. 102, the present suit fell within the prohibition of s. 103. The claim then made was more general than the present, having in view any mode of alienation by the widow, which it sought to have prohibited. The widow's making a deed of gift was included in the general term alienation. If a claim or ground arose out of, and depended upon, the same right as that which was in question in the former suit, it would come under s. 13 as *res-judicata*. *Hunter* v. *Stewart*(1), *Thakur Shankar Baksh* v. *Daya Shankar* (2) were referred to.

The respondents did not appear.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD WATSON:—

In this case the defendants in the original suit, who bring this appeal, are: (1) Mussamut Chand Kour, widow of the late Kahan Singh; and (2) Perak Singh, to whom the first appellant in 1879 made over by deed of gift the fee of her deceased husband's estate. The plaintiffs and respondents are the four nearest agnates of Kahan Singh, and the present suit was instituted by them for the purpose, *inter alia*, of obtaining a declaration that the widow's gift is inoperative and cannot affect their reversionary rights. It is admitted that Chand Kour has merely a widow's interest in the estate; and it is also admitted that Perak Singh, in whose favor she executed the deed of gift, is a stranger to the succession. The only point which has been argued on behalf of the appellants is, that the suit is barred by certain proceedings in a suit which was begun and concluded, in the Court of the Judicial Assistant Commissioner, before the date of the deed of gift. That action was instituted by two of the respondents, Partab Singh and Golab Singh, and their plaint prayed for a declaratory decree, and for an injunction forbidding alienation of the moveable and immoveable property of the deceased which was then in the possession of his widow. The plea in bar can only affect these two respondents, and cannot exclude the other respondents from obtaining a declaratory decree in this suit, which will have the effect of protecting the reversionary interests of themselves and of their lineal descendants.

The proceedings which followed upon the plaint in the suit referred to were these: A defence was lodged for the widow, and on the 7th October 1878 the Judicial Assistant Commissioner pronounced this order, which has become final: "As the plaintiff has not appeared, though waited for up to the rising of the Court, and as the defendant, who is represented by her agent, denies the plaintiff's claim, it is ordered that the case be struck off under s. 102, Civil Procedure Code."

The provisions of ss. 102 and 103 of Act X of 1877 require therefore to be considered. The dismissal of a suit in terms of s. 102 was plainly not intended

(1) 13 L. J. Ch., 349.
(2) L. R., 15 I. A., 66; I. L. R., 15 Calc., 422.

to operate in favour of the defendant as *res judicata*. It imposes, however, when read along with s. 103, a certain disability upon the plaintiff whose suit has been dismissed. He is thereby precluded from bringing a fresh suit in respect of the same cause of action. Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the *media* upon which the plaintiff asks the Court to arrive at a conclusion in his favour.

The Judge of first instance, the Assistant Commissioner, held that the cause of action set forth in the present plaint is not the same with that disclosed in the plaint of 1878. The Commissioner differed from that view, but it was upheld by two Judges of the Chief Court of the Punjab upon appeal. Their Lordships are of opinion that the decision of the Assistant Commissioner and of the Chief Court is in accordance with the Statute. The ground of action in the plaint of 1878 is an alleged intention on the part of the widow to affect the estate to which the plaintiffs had a reversionary right by selling it, in whole or in part, or by affecting it with mortgages. The cause of action set forth in the present plaint is not mere matter of intention, and it does not refer to either sale or mortgage. It consists in an allegation that the first defendant has in point of fact made a *de præsenti* gift of their whole interest to a third party, who is the second defendant. That of itself is a good cause of action if the appellants' right is what they allege. It is a cause of action which did not arise, and could not arise until the deed of gift was executed, and its execution followed the conclusion of the proceedings of 1878.

It appears to their Lordships that the two grounds of action, even if they had both existed at the time, are different. If there had been a deed of gift in 1878 it might have afforded another and separate ground for granting the remedy which was prayed in that suit; but in point of fact it did not exist; and it is impossible to say that a cause of action, which did not exist at the time when the previous action was dismissed, can be regarded as other than a new cause of action subsequently arising.

Under these circumstances their Lordships are of opinion that the judgment appealed from ought to be affirmed, and the appeal dismissed, and they will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

3rd May 1888.

PRESENT:

Members of the *Judicial Committee*—The Right Hon. Lord Watson, the Right Hon. Lord Hobhouse and the Right Hon. Sir Richard Couch.

KAMINI DEBI* ... *Plaintiff,*

and

ASUTOSH MUKERJI AND OTHERS ... *Defendants.*

ASUTOSH MUKERJI AND OTHERS* ... *Defendants,*

and

KAMINI DEBI ... *Plaintiff.*

On appeal from the High Court in Bengal.

Res judicata—Civil Procedure Code, s. 13—Substantial matters in issue decided in a former suit—Right of shebait-ship of a family deb-sheba under a will.

A testator, who died leaving widows and a daughter, also three surviving brothers, bequeathed all the residue, after certain legacies, of

* 15 Cowell's Ind. Ap., 159; 16 Calc., 103.

his acquired estate to maintain the worship of a family deity, appointing his three brothers and his eldest widow to be shebaits, and providing that "the family of us five brothers shall be supported from the *prosad*, "offerings to the deity."

One or other of the brothers then for some years managed the estate as shebaits, and the survivor of them was succeeded by his son, one of the defendants in the present suit, which was brought by the testator's only daughter as heiress to his estate, claiming that the Court should determine "those provisions, which were valid and lawful, and those which were invalid and illegal." She claimed possession and an account, and also to be the shebait.

In a previous suit the present shebait had obtained a decree, to which the daughter, now plaintiff, was a party defendant, affirming the validity of the will and the rights of the members of the family to be maintained under it.

Held, that the question of the validity of all the provisions of the will having been substantially decided in the decree in the former suit which pronounced that the will was wholly valid, passing the entire estate of the testator to the *deb sheba*, and maintaining the rights of members of the family under the will, this suit was barred under s. 13 of Act X of 1877 as to all but the claim to be shebait. The plaintiff's claim to a preferential title to this office depended on a sentence in the will, constituting, as construed by the Courts below, to be shebait the senior in age of the heirs of the original shebaits, the defendant now holding the office coming within this provision according to the judgments of both Courts. As to this no reason had been shown in appeal for a different conclusion.

APPEAL and cross-appeal from a decree (15th September 1883) of the High Court, in part varying, and in part affirming, a decree (3rd September 1881) of the Subordinate Judge of the District of the 24-Pergunnahs.

The main question on these appeals was whether the validity of provisions in a will constituting a family *deb-sheba*, and providing for the maintenance of the members of the testator's family, had been directly and substantially affirmed by a decree in a suit in which the present plaintiff, claiming as the daughter and heiress of the testator, was a party defendant, those who were plaintiffs in the former suit being now defendants.

The object of the present suit, which was instituted on the 6th May 1880 by the only daughter of the testator, the late Ramkomul Mukerji, was to obtain from the Court the proper construction of his will; to have it declared what provisions in it were lawful and valid, and which of them were invalid; to have declared the rights of the several parties entitled to the estate; to obtain possession of such part of the estate as she might be entitled to, and to have an account directed; to have ascertained and declared what was the nature and interest of the religious foundation, or *deb-sheba*; to have partition of that part of the testator's estate in respect of which it should be determined that the members of the family had joint rights, if any. Lastly, Kamini Debi claimed that a proper person should be appointed shebait, whether the plaintiff or any one else.

The will was dated 23rd Magh 1251, or 4th February 1845, and was registered. It was addressed to the testator's eldest wife, Baroda Sunderi, and to his brothers Ramkumar, Modhu Sudun, and Chunder Mohun.

After reciting that his properties, consisting of lands, houses, money and Government promissory notes, were his own and self-acquired, and directing the payment of his debts and the maintenance of his father, a resident of Benares, and the payment of the expenses of the marriage of this appellant and of the gift of a house and certain lands to her, and of the payment of certain further sums to her and her widowed sister, and to the testator's three wives, and to the widow and daughters of his deceased brother Dino Nath, and to Kamini Debi, the testator's daughter, the will continued thus:—

"All that remains after the above legacies, &c., are paid, I give unto the Thakur Gopaljiu, consecrated by my mother. You four are hereby appointed as shebaits. The daily worship of Gopaljiu and Sridhur and Baulinga (Siva) having been performed out of the above estate, the family of us, five brothers, shall be supported from the *prosad* (offerings to the deity), and you will also observe in honor of the deity Iswarjiu

(Gopal) the ceremonies of Dole-jartra, Doorga-puja, Ras, Hindola, Nundotsab and all casual and daily ceremonies, &c., that is to say, the marriage ceremonies of your sons and daughters, the investiture of sons with the sacred thread, and the sradhs (offerings of funeral cakes) of father and mother. You are to pay to my *paratpar* (spiritual guide) an allowance of Rs. 5 every month and Rs. 20 for the expenses of the family at Bakulia. You are authorized under this will to draw out, on giving receipts for, my Government promissory notes, which are deposited in the Collectorate of the 24-Pergunnahs as security for both of you, my second brother Ramkumar Mukerji, and for you, my third brother, Modhu Sudon Mukerji, and to carry out all the provisions aforementioned. You are further empowered to take back those promissory notes on giving receipts for the same, to draw the interest accruing thereon. and to sell them, &c., if necessary. All my ornaments and utensils of gold, silver, brass, pewter, &c., shall be divided equally among my three widows. You shall continue to reside with the family from generation to generation in those apartments of the dwelling house at Kidderpore in which you live at present. To you, my eldest wife, Baroda Sunderi Debi, I have given a separate deed of permission to adopt a son in order to secure for myself the Jal-pinda; and should you die before adopting a son as aforesaid, my second wife, Srimati Doorgamoni Debi, shall have the power to adopt a son, and on her death my third wife, Koilasbasini, is authorized to do so. The said adopted son shall, when he arrives at majority, be a manager in addition to the four mentioned above, that is to say, he shall make the management in the same way as you four shall do. Of the four persons aforesaid, should you and your heirs, as well as the adopted son when he arrives at majority, act contrary to the true religion of my ancestors, he shall be forthwith removed from the management mentioned in this my will. My three nephews (sisters' sons), namely, the three brothers Gonesh Chunder Banerji, Rango Lal Banerji and Hurri Mohun Banerji, of whom Hurri Mohun is a minor, shall get their food and raiment as they are doing at present; and when they shall build their separate houses, they shall get the house formerly belonging to Jagamohun Shaha, which has been purchased benami in the name of Anund Chunder Banerji. My brothers and the others shall use my horses and carriages, &c., and keep (the latter) in repair in the same manner as they are now doing, and on your death these responsibilities shall similarly devolve on your heirs in the order of seniority, if they adhere to the ancient religion. No one shall have power to alienate the aforesaid properties by sale, gift, *hiba* or otherwise."

The testator died on the 1st of August 1845.

On the 11th September 1846 a certificate under Act XX of 1841 was granted to Ramkumar Mukerji alone, who continued to manage until his death in December 1859, when his brother Modhu Sudon succeeded him, retaining the management till his departure to Benares, about April 1878, at which place he died in October of the following year. His son Asutosh, one of the defendants in the present suit, managed the estate after his father's departure as his agent, and on his death assumed the office of shebait and manager of the estate of the deceased Ramkomul. The defendants in this suit were the heirs and representatives of Modhu Sudon, Nos. 1 to 7; 8, Damayanti Debi, the widow and heiress of the youngest brother Chunder Mohun; 9 and 10, the daughters of the fourth brother Dinonath, who died before the testator; 11 to 16 the representatives of the second brother Ramkumar. They all supported the will. Defendants 17 to 22 were the plaintiff's children, and 23 was her sister, a childless widow.

The defendants, besides supporting the will, urged that the suit was barred, as *res judicata*, by the decision in a previous suit instituted by Asutosh and his two brothers, defendants 1, 2 and 3 in the present suit, in which suit the present plaintiff was, among others, a defendant.

Damayanti Debi, No. 8, disclaimed the office of shebait in favor of the respodnent Asutosh, who was, as she said, senior to all the other members of the family. He by his statement claimed as senior member of the family to be entitled, in accordance with the terms of the will, to the office.

Munmohini alleged that she, if the office was to go by seniority, was the eldest member of her father's family.

The suit, in which was made the decree on which the present respondents and cross-appellants relied as a conclusive adjudication barring the present suit, was brought on the 15th July 1863. In that suit the plaintiffs were Asutosh

Mukerji and his two brothers; and the defendants were the then shebait Modhu Sudon, Kamini Debi (the present appellant), with her husband (to whom she had been married after her father's death) Adhur Chunder Banerji, and also Bissambher Mukerji, with other members of the family. The plaint charged waste against the widow Baroda Sunderi and Modhu Sudon, two of the shebaits named in the will, in that they, in March 1862, had sold to the defendant Adhur Chunder Banerji one of the properties which had passed under the will, and asked to have that sale set aside; complaining also of the defendant Bissambher that he was wrongly obtaining the issue of attachments on the property. No specific relief was claimed against the defendant Kamini. She, however, answered in her written statement that the will was not genuine, and had never been acted on, claiming her father's estate by inheritance. The issues recorded in that suit questioned the genuineness of the will, the right of the plaintiffs to sue, and the validity of the sale. The Court of first instance, the Principal Sudder Ameen, held that the plaintiffs had a cause of action; that the will was genuine; and that the testator had effectively ordained that all the members of his family, as well as those of his brothers' families, should be maintained out of the *prosad*, instead of directing a more general distribution. He referred to *Sonatun Bysack* v *Juggut Soonderee Dossee*(1). His decree declared that the sale to Adhur Chunder Banerji was invalid, and that Bissambher Mukerji had no right to have a judgment, obtained by him against Ramkumar, satisfied out of the testator's estate which had passed under his will.

Kamini Debi and Bissambher appealed to the High Court, and a judgment of a Divisional Bench dismissing their appeals was delivered on 25th May 1865. The conclusion of that judgment was as follows:—

"On the whole, then, we are of opinion that the will is genuine and untainted by fraud; that it has been carried into effect by the devisees; that the endowment is both religious and secular, and that the wishes of the testator have been departed from; that the plaintiff, as having a vested interest in the will, has a right to sue to protect that interest; that the sale to Adhur Chunder, who had every reason to know the circumstances of the family, and who never impugned the will for years, was improper and should be set aside; that the lien attempted to be made out by Bissambher fails on every ground; and that the decision of the Principal Sudder Ameen is in every point of view fit for confirmation."

The first of the issues fixed in the present suit in the Court of the First Subordinate Judge, Baboo Bhubun Chunder Mukerji, was whether the suit was barred under s. 13 of the Civil Procedure Code by the previous adjudication of the subject-matter. Having also fixed issues on other questions, among them, as to the validity of the will, and the construction to be placed on its provisions, he gave judgment to the effect that the decree in the suit of 1863 was a final determination of the matters in issue in the present suit. He considered that the testator's whole property was absolutely vested in the Thakur, and dismissed the plaintiff's claim by right of inheritance to the estate of her father, as well as her claim to be the sole preferential shebait.

His decree further ordered that the property having been vested in the Thakur, the plaintiff's claim to a partition be dismissed, and that the heirs and descendants of the five brothers, specifying them, "who are by Hindu law entitled to maintenance from the said five persons, shall be entitled to participate in the daily *prosad* of Gopaljiu Thakur as well as to reside in the Kidderpore dwelling-house." The will continued:—

"It is further declared that the expenses of the religious portion only of the ceremonies of sradh of the parents of the aforesaid persons, of the marriages of their sons and daughters, and of the jagnapobita ceremonies, shall be defrayed out of the income of the debutter estate, but on no account shall the said income be used in feasting Brahmins, &c., and other secular offices in connection with these ceremonies. It is

(1) 8 Moore's I. A., 69; 1 P. C. J., 721.

hereby also declared that the said dwelling house, along with the other properties of the testator, shall be under the control and management of the shebait for the time being, who shall look to the necessary repairs of the building as next in importance to the daily worship of Gopaljiu Thakur and distribution of *prosad* to the members of the family. The shebait for the time being shall strictly carry out the other provisions of the will concerning Doorga-puja, the celebration of Dole-jatra, Ras, Hindola and Nundotasb. If sufficient funds should not be forthcoming from the estate for their due celebration, then the religious portion of the ceremonies, *viz.*, the Pujas, *&c.*, shall alone be performed. The defendant Damayanti Debi, who has the preferential right to be shebait, having declined to accept the duties of shebait, the defendant Asutosh Mukerji, as the next senior member of the family, shall conduct all the duties in terms of the will."

On an appeal preferred by the plaintiff to the High Court a Divisional Bench (Sir R. GARTH, C.J., and W. MACPHERSON, J.) gave judgment on the construction of the will without referring to the issue in regard to the suit of 1863. The judgment referred to *Sonatun Bysack* v. *Juggut Soonderee Dossee*(1) and to *Ashutosh Dutt* v. *Doorgachurn Chatterjee*(2), and did not support the opinion that the property of Ramkomul had absolutely vested in the Thakur, though the worship was a charge on the estate. The judgment proceeded thus :—

"It is clear that nothing was further from the intentions of the testator than that the plaintiff (and her sister) should, subject to the debutter trusts, absorb the whole family property. It would also seem foreign to the wishes of the testator that those members of his family only who were living at his death should take the whole of those proceeds to the exclusion of those who might come into existence after his death. We think his intention evidently was, that his own family and the families of his four brothers should all be maintained in perpetuity out of the *prosad* or surplus proceeds after providing for the festivals and services of the idol, and the specific bequests mentioned in the will. We take it to be clear, however, that according to the doctrine laid down in the *Tagore case* (3), such a trust as this in perpetuity would be contrary to Hindu law. But we think that, if possible, we are bound to carry out the intentions of the testator in so far as they can be carried out in a legal manner; and we consider that this may best be done by construing the will as a devise of the surplus proceeds for the benefit of the heirs of the testator himself and of his four brothers in equal shares, so that the heirs of each of the five should be entitled to one-fifth of those proceeds.

"The next question is, whether the plaintiff is entitled under the circumstances to ask for a partition; and we think she is. A commissioner or commissioners must be appointed to carry out the partition; and if the parties cannot agree amongst themselves to appoint a commissioner or commissioners, the Court below will make the appointment."

The decree of the High Court was as follows :—

"It is ordered that the decree of the Court below, except in so far as it declares that the defendant Asutosh Mukerji is entitled to carry on the worship, be set aside, and this Court doth direct that an ample portion of the family property be set apart for the worship, festivals, &c., as provided in the will, and that the residue be partitioned into five shares to the heirs of the five brothers respectively, each section of the family holding their one-fifth share jointly, but subject to partition *inter se* if any of them should take proceedings for that purpose. And it is decreed that the Court below do appoint a commissioner or commissioners with a view to carry out the directions given above. And it is further ordered and decreed, in accordance with the finding of the Court below, that the defendant Asutosh Mukerji do continue to be shebait, and as shebait hold such portion of the family property as will be set apart for the worship, festivals, &c."

The present appeal having been filed by Kamini Debi, the defendants Asutosh and the others obtained leave to cross-appeal with reference to the effect of the decision in the suit of 1863, which the judgment of the High Court omitted to notice.

Mr. *R. V. Doyne*, for the appellant.—The plaintiff did not seek to bring into question the genuineness of the will, or to dispute that the maintenance of the *deb-sheba* was a charge on the testator's estate, in whatever form the charge might be expressed; and she was not precluded by the decree of 1865, establishing those matters, from contending that there was no valid disposition in the will of the surplus proceeds of the estate. The High Court had rightly

(1) 8 Moore's I. A., 69; 1 P. C. J., 721.
(2) I. L. R., 5 Calc., 438; 5 C. L. R., 266.
(3) L. R., I. A. Sup. Vol., 47; 9 B. L. R., 377; 3 P. C. J., 82.

held that the testator's real object was to provide for the members of his family in perpetuity, and to prevent alienation; but the result should have been, not that at which the High Court had arrived, but that this object failed, as tending to a perpetuity, in a manner contrary to the principle of Hindu law on this subject. The true conclusion was, that the provisions of the will could not be carried out, except as to the maintenance of the *deb-sheba;* and that the plaintiff, subject to the latter provision, was entitled to the surplus and residue of the estate by her hereditary title. There had been no such effective devise, as had been supposed by the High Court, of the surplus proceeds for the benefit of the heirs of the testator and of his four brothers in equal shares; and if attempted it would have been too remote and ineffectual for the reasons explained in the *Tagore case*(1). Supposing that Asutosh came in as shebait, giving maintenance to all the members of the families respectively, how long was that state of things to last? And, as addressed only to the point of *res judicata*, these questions were not such as had arisen when the suit of 1863 was before the Courts. Circumstances had varied the position of the parties since the judgment of 1865. That decision it was not sought to dispute. But the estate with the accumulations of after years could not have vested in its entirety. The judgment in *Sonatun Bysack* v. *Juggut Soonderee Dossee*(2) did not completely decide the question. If it were contended that this should have been brought forward by the present plaintiff when defendant in the suit of 1863, the answer was that the state of things now existing had not then arisen. He referred to the judgment in *Soorjeemoney Dassee* v. *Denobundo Mullick*(3).

Mr. *J. D. Mayne* and Mr. *C. W. Arathoon*, for the respondents and cross-appellants, were not called upon.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD HOBHOUSE:—

Their Lordships do not think it necessary to call upon counsel for the respondents; but they are of opinion, after hearing the very elaborate and careful argument of Mr. Doyne, that they are bound to decide that the greater portion of the matter comprised in these appeals has been decided in a former suit.

The question arises under the will of the testator Ramkomul, which contains a gift of the residue of his estate to a family idol. Then he appoints four persons, his three brothers and one of his wives, to be shebaits of the idol, and he directs them to perform certain matters of ceremony and worship, and after that he says, "the family of us five brothers shall be supported from the *prosad*," which is translated "the offerings to the deity." That is the whole of the will that contains any gift, excepting specific and pecuniary legacies, to the members of his family.

The testator died in the year 1845, and the property was managed apparently in accordance with the will by one or other of his brothers, who were shebaits until October 1879. The survivor of the brothers was named Modhu Sudon, and he remained in the management for a great number of years. He died in 1879, and then his son Asutosh, the defendant in the present suit, took the office of shebaitship and the management of the estate, and has managed it ever since. There seems to have been no quarrel or litigation in the family until the year 1863, when the plaintiff's mother, who was one of the shebaits, died, and the plaintiff became the heir-at-law of the testator. Immediately after that event she applied for a certificate of the usual kind authorising her to collect the assets of the testator, on the ground that she was entitled to the

(1) L. R., I. A., Sup. Vol., 47; 9 B. L. R., 377, 3 P. C. J., 82.
(2) 8 Moore's I. A., 69; 1 P. C. J., 721.
(3) 6 Moore's I. A., 526, 1 P. C. J., 526.

property; that is to say she challenged the validity of the will. This and other causes seem to have led to the suit of 1863, which is the suit that bears on the present case.

Now the construction of that suit was in this fashion. The then shebait was Modhu Sudon. The sons of Modhu Sudon, of whom the principal appears to have been the present principal defendant Asutosh, complained that he had made improperly a sale of part of the testator's property to one Adhur Chunder Banerji. They also complained that a person of the name of Bissambher, who was an execution-creditor of Ramkomul, was improperly attaching his assets, and they made Modhu Sudon, Adhur Chunder, and Bissambher defendants to the suit, attacking the purchase of Adhur Chunder and the execution proceedings of Bissambher. But they also made the present plaintiff, the heir-at-law, and the other members of the family, parties to the suit, and the suit was in effect one for establishing the will against everybody concerned. The prayer was, "that the Court on giving effect to the above will may be pleased to set aside the purchase by the defendant Adhur," release the items attached by the decree-holder, and prohibit the defendant Modhu Sudon "from infringing the terms of the will hereafter."

The present plaintiff appeared to defend that suit, and in her defence she raised the question of the genuineness of the will. She prayed the Court "to dismiss this unjust claim and uphold rights which I have to the properties left by my deceased father." She claimed as heir-at-law, and on the face of her written statement there does not appear to be any ground stated excepting the charge as to the genuineness of the will. But when the issues came to be stated a wider question was propounded. There was not only an issue as to the genuineness of the will, but a further issue whether or no the plaintiffs had any right to have instituted the suit. That is a very vague issue, and might mean much or little, but what it did mean is plain from the judgment delivered in the suit. In dealing with that particular issue the Principal Sudder Ameen says this: "The Court is decidedly of opinion that the plaintiffs have a right of action, inasmuch as their vested right has been infringed upon by the acts of the trustees," that is, of the shebaits; and, again, "that the plaintiffs have as well a vested right of maintenance from the *prosad* of the idol, as a contingent one of superintendence and management of the endowed property cannot, if the will is genuine, be doubted for a moment." That is to say, he held that the plaintiffs had a right of action, not because anything was given directly to them, but because they had a right of maintenance through the *prosad* of the idol. If they had not that right they could not have sued, but he maintains the gift to the family which is made through the sides of the idol from the offerings given to the idol. To support his finding upon that issue he has to examine the will very elaborately. He does so, and examines the authorities which are applicable to the case, and the conclusion he arrives at is this. It is stated several times over in the judgment, but it is only necessary to quote one passage from the record. "The gravamen of the defendant's contention now is, that the endowment was illegal, as far as the Hindu law was concerned, and it was only nominal, it being got up by the brothers of the testator, who were chiefly interested in giving effect to the will. On carefully weighing these objections, and considering all the surrounding circumstances of the case, I am of opinion that the provisions of the will are no more repugnant to the principles of the Hindu law than was the endowment created by it nominal." Then he refers to a decision of this Board, and in applying it to the present case goes on: "The will under review, after providing for legacies, created an endowment on behalf of the family idol, and directed to appropriate the surplusage, if any, for

the benefit of the children of the trustees. Viewing then the will in its true light, and analysing its provisions with reference to the principle recognized in the above authoritative ruling, I am of opinion that the will is perfectly legal," and he decrees accordingly: "That the suit be decreed; that the will be declared genuine," and so forth and he gave costs against the present plaintiff. He could not have decreed that suit unless he had held that there was, first, a valid gift to the idol, and, secondly, that the plaintiffs in that suit, who were not heirs of the testator and had nothing given to them excepting through the idol, had a valid gift made to them.

The present plaintiff was not satisfied with that decree, and she appealed to the High Court, and one of the grounds of appeal was thus stated: "The alleged will of Ramkomul Mukerji, even if genuine, was revoked by his conduct, and is invalid under the Hindu law, and indefinite and incapable of being carried out with reference to the different provisions of it, the trust being nominal," that is, illusory. Another ground was, "that the rights of all parties under the will, if genuine, have not been properly interpreted." Upon that the High Court again examined the question of the validity of the will. It appears to have been argued on behalf of the defendant Bissambher more than on behalf of the defendant Kamini, the present plaintiff, but it was argued before them "that, while holding the will to have been really signed and registered by Ramkomul, we should consider it as a scheme for retaining property which was in reality joint in the hands of all the members, and for holding the creditors of the estate or of any member of the family at defiance." They examine the arguments against the validity as distinguished from the genuineness of the will, and hold that it is valid, and they sum up thus: "On the whole then we think that the arguments both for Kamini and for Bissambher, that the will is either a nullity or a disguise to throw dust in the eyes of creditors, fail when weighed against" the considerations that they mention; and they conclude "that the decision of the Principal Sudder Ameen is in every point of view fit for confirmation." They therefore dismiss the appeal with costs.

Their Lordships take that to be a decision that the will contains a gift of the entire property to the idol; that the members of the family take only maintenance from the offerings made to the idol; and that it is a legal and valid gift in every respect.

Now what is the present suit? The present suit appears to their Lordships to be founded upon the total, or at least the partial, invalidity of the will. The first prayer of the plaint is "That upon a proper interpretation of the will of the said Ramkomul Mukerji the Court will be pleased to determine and settle those provisions which are valid and lawful, and those which are illegal and invalid." Unless something in the will is illegal and invalid the plaintiff has no title whatever to get accounts or possession, or to do anything but to make a claim to the shebait-ship. That she may do on the supposition of the entire validity of the will. It is not alleged that she has not received proper maintenance out of the offerings to the idol. She sues on the ground that there is some invalidity somewhere in the will, and that she, as heir-at-law, is entitled to take advantage of it.

Upon that view of the suit the Subordinate Judge held that the matter must be taken to be *res judicata*, having regard to the issues decided in the suit of 1863, and he ordered that the plaintiff's claim to get the estate of her deceased father by right of inheritance be dismissed. He also dismissed the plaintiff's claim for a partition, and he declared that the heirs and descendants of the five brothers, "who are by Hindu law entitled to maintenance from them, shall be entitled to participate in the daily *prosad* of" the idol, and to reside in a certain dwelling-house which was another

matter in dispute. Her claim to be the preferential shebait of the idol was dismissed, not as *res judicata*, but as not warranted by the will.

An appeal was preferred from that decree to the High Court which differed in opinion from the Subordinate Judge. On reading the judgment of the High Court it does not appear that they noticed the suit of 1863 at all. They do notice the plaintiff's application for a certificate in 1863, but the suit they leave entirely unnoticed. Why that happened is not explained, but it is a matter complained of in the cross-appeal presented by Asutosh. Their Lordships are left without any means of understanding how it was that the judgment came to be delivered without any observation upon the suit of 1863. However, the matter has been fully argued now, and their Lordships are of opinion that the view of the Subordinate Judge was right.

The case is governed by s. 13 of X of 1877, and the question is whether the point now raised is a point heard and decided by the Court in 1863, in a suit in which the present plaintiff was defendant, and the present defendants were plaintiffs. Their Lordships' reasons have been assigned for thinking that the question of the invalidity of the will was a point decided in that suit; that it was decided that the will was wholly valid, and passed the entire estate to the idol; and that the same question cannot now be raised.

Their Lordships express no opinion whatever whether they agree or disagree with the High Court on the construction of the will of Ramkomul. It may be that the opinion of the High Court now expressed is preferable to the opinion of the High Court expressed in the suit of 1863, but they consider that that question is not open to them. The matter was decided between the parties and never can be re-opened.

Then there remains only one question to be decided in the suit, and that is whether the plaintiff has a preferential title to be shebait. That depends upon one sentence in the will, which was written in Bengali, and their Lordships have only the English translation. The English translation is by no means easy to interpret. It seems there is some difficulty also in the Bengali original, but the Subordinate Judge was able to criticise the Bengali grammar, and he delivered as his opinion that the effect of the will was to constitute as shebait the senior in age of the heirs of the original shebaits. The actual senior has disclaimed. The defendant Asutosh is the next senior in age, and therefore the Subordinate Judge held that Asutosh is the proper shebait. The High Court, without discussing the matter, have agreed with him, and their Lordships, being unable to appreciate the exact sense of the Bengali sentence, can only say that no reason has been assigned to them why they should differ from the opinion of both the Courts below.

The result is that the appeal of the plaintiff wholly fails and the cross-appeal wholly succeeds. The High Court, in their Lordships' opinion, ought to have dismissed the appeal to them with costs, and their Lordships will now humbly advise Her Majesty to make a decree to that effect, and the usual consequences will follow. The appellant Kamini must pay the costs of the appeal and the cross-appeal.

Appeal dismissed, cross-appeal allowed.

Solicitors for the appellant: Messrs. *Barrow & Rogers.*

Solicitors for the respondents and cross-appellants: Messrs. *T. L. Wilson & Co.*

3rd and 4th May, and 23rd June 1888.

PRESENT:

Members of the *Judicial Committee*,—The Right Hon. Lord Macnaghten, the Right Hon. Lord Hobhouse, and the Right Hon. Sir Richard Couch.

APPASAMI ODAYAR AND OTHERS* ... } *Plaintiffs,*

and

SUBRAMANYA ODAYAR AND OTHERS ... } *Defendants.*

On appeal from the High Court at Madras.

Limitation Act, 1859, s. 1, cl. 13—Partition suit for share of joint family estate —Failure to prove participation in the family coparcenary within the period.

In a suit brought in 1881 for a share of joint family estate, the question whether the plaintiffs' right to sue was barred by limitation under Act XIV of 1859, s. 1, cl. 13, depended on whether there had been any participation of profits between the plaintiffs' father and the defendants, who with him were co-descendants from a common ancestor, after 1837 down to which year the family was certainly joint. If in 1871 the period of limitation had expired, the Act IX of that year and the later Acts need not be referred to; for, if they altered the law, they would not revive the right of suit.

Upon the evidence it was found that whatever might have been the father's intention when he settled in another village in 1837, the effect of what had been since done, or omitted, on both sides, was that in due time the right of suit had become barred under the first limitation Act.

APPEAL from a decree (1st April 1884) of the High Court reversing a decree (13th April 1882) of the Subordinate Judge of Kumbakonam.

The appellants, plaintiffs in the suit, and the respondents, who were defendants, belonged to branches of a family whose gentile name was Odayar and who were mirasidars, the former being residents of Karuppattimulai, in Mannargudi taluk, and the latter living on the family land at Aravur in Kumbakonam.

The question on this appeal was whether the plaintiffs had a still subsisting right to sue, notwithstanding the law of limitation, as members of an undivided family, to have partition made of estate, alleged to be ancestral and joint, and to hold their share in severalty from the defendants, their alleged coparceners, who were in possession, or the coparcenary had ceased for so long a time as that the claim had become barred by limitation.

The plaint (25th July 1881) claimed one-fourth of the family property at Aravur, land, houses, and appurtenances, setting forth the descent of the parties in the manner stated in their Lordships' judgment. The plaintiffs alleged that down to 1877 they had not been excluded from joint enjoyment of the profits of the lands at Aravur to which they were entitled, but that since that year their share had been denied to them. As to their own lands at Karuppattimulai, these had been partly obtained by their mother as stridhanam and inherited by them from her, and partly had been purchased out of income, so that they were not joint property of the family in general.

The defendants alleged that the branch of the family to which they belonged had been separate as to food, residence, and property since the time of the defendants' grandfather, Thoppai, who died in 1838 or 1839; and that he and Chidambara, who died in 1868, the father of the first defendant, had themselves acquired the properties in suit after the cessation of joint living on the part of the plaintiffs' father. They also relied on the law of limitation.

The issues were: 1st, whether the parties were members of an undivided or divided family, and if the latter, when and how divided, and down to what period did the coparcenary last? 2ndly, whether the claim was barred by limitation? 3rdly, whether the property claimed was acquired as alleged for the defence?

The Subordinate Judge found that there had been no partition, and that

* 15 Cowell's Ind. Ap., 167; 12 Mad., 26.

the property claimed was not the self-acquisition of the defendants or of any of them. He found that the coparcenary had continued down to 1877. He, therefore, made a decree for partition in favour of the plaintiffs.

On appeal the High Court (Turner C.J., and Muttusami Ayyar, J.) reversed the decree of the Subordinate Judge. Their judgment was as follows:—

"It is scarcely possible, upon the evidence before us, to resist the conclusion that for upwards of 45 years there has been no participation on the part of the plaintiffs' branch in the beneficial enjoyment of the property in question. There is a great deal of documentary evidence to show that from 1835 the plaintiffs and their father have lived at Karuppattimulai, whilst the first defendant and his father and the second defendant and his branch of the family have always lived in their ancestral village Aravur. The plaintiffs' fourth witness, Kuppu Odayar, to whose evidence the Subordinate Judge attaches weight, and who is certainly not biassed in favour of the defendants, has deposed that the joint family at Aravur was reduced in circumstances at the time of the father Palaniappa Odayar's marriage; that upon his marriage a moiety of the village of Karupattimulai was granted to his wife as stridhanam, and that he then removed to that village and lived and died there. Documentary evidence shows that this was about 1837, and that the property which Palaniappa Odayar or his wife then acquired consisted of 14 velis 12 mas $44\frac{1}{16}$ kulis of land. It is also in evidence that subsequently to 1837 the members of the family at Aravur bought lands, from time to time, extending to nearly 85 velis, while the total extent now belonging to the defendant's branch is nearly 120 velis. This affords a reasonable ground for the inference that when the father left Aravur to take up his residence at Karuppattimulai, the joint family probably owned about 35 velis of land, of which his quarter share would have amounted to $8\frac{3}{4}$ velis if a division had then been effected. This fact and the evidence of witness Kuppu Odayar to the effect that the family at Aravur was then in reduced circumstances convey the impression that Palaniappa Odayar, who acquired by marriage considerable separate property, did not probably intend or care to claim a share from his coparceners, who were considered to be worse off than himself, either from the unproductiveness of the family property or from the number of members in the family who had to be supported.

"It was suggested for the defendants at the trial in the Court below, and also mentioned at the hearing of this appeal, that, at or before this time, there was a partition or some arrangement which determined the coparcenary between the two branches of the family. On referring to the evidence, however, it appears that this suggestion is made more in reference to the subsequent conduct of the parties than to any express agreement between the plaintiffs' father and his coparceners. Although the second defendant spoke of his having heard of a formal division from the deceased members of his family between the plaintiffs' grand-father Karuttasami Odayar and the defendants' father Chidambara Odayar, we cannot rely on his evidence as it is inconsistent with the rest of the evidence, which discloses that Palaniappa Odayar had lived in coparcenary with the defendants' branch until his marriage. It is also inconsistent with the defendants' statement that he knew of no formal partition in the family at any time. The other evidence bearing on the question of division is only an opinion founded on separate residence and separate enjoyment for a considerable length of time We are therefore not prepared to hold that the Subordinate Judge was in error in declining to accept the plea of formal division or any other express agreement equivalent to it. Neither do we see reason to doubt the propriety of the finding that were the plaintiffs entitled to

claim partition, the plea of self-acquisition set up by the defendants could not be upheld. The effect of the evidence on this point is that there were about 35 velis of land in the family when Palaniappa Odayar separated from it, while there was no other ostensible source of income to which subsequent acquisitions might be reasonably traced. There may have been good husbandry, thrift and care on the part of those who managed the affairs of the family at Aravur subsequently to 1837, or the property itself may have become more productive. In the absence of clear evidence disclosing an independent source of income and an independent means of acquisition, we cannot hold that the later acquisitions have been made otherwise than with the aid of family property. The material question, therefore, is whether the relation of coparcenary was continued after Palaniappa Odayar's separation, and if it was not, what is its legal effect upon the plaintiffs' claim.

"It does not appear that the plaintiffs' or their father ever received part of the income derived from the family property. The first plaintiff no doubt deposed that at one time he took some money from the family house at Aravur. But his statement is not corroborated, and as he is an interested party, it cannot be accepted without corroboration. It was next alleged by the plaintiffs that the first plaintiff had lived at Aravur until four years ago and that his joint residence was a continuation of the coparcenary."

In regard to this subject, the Court found that in some of the written transactions of the family between 1864 and 1881, the defendants were described without exception as residing at Karuppattimulai. The Court considered it unlikely that Palaniappa would have lived at Aravur without taking part in the family affairs. In regard to money said to have been received by the defendants for marriage expenses, the Court said that the evidence of its having been paid was doubtful, and added "were we to accept it, these payments would not show that the plaintiffs' father had not already virtually relinquished his interest in the joint property. It occasionally happens, when even divided cousins are married at one time in the same house and there is an elderly member in either branch, that that member bears the whole cost more from family affection and pride than in acknowledgment of a subsisting coparcenary. If the coparcenary had continued, the managing coparceners would have ordinarily interfered in the case of every marriage in the plaintiffs' branch and paid its expenses from family funds. The only other matters mentioned as evidence of coparcenary are that Chidambara Odayar, the defendants' father, lighted the funeral pyre when Ponnammal, the plaintiffs' paternal grandmother, died, and that the daughters of Ayyadorai Odayar, the second defendant's cousin, are still living at Karuppattimulai with the plaintiffs. As to the first, it proves nothing more than that Chidambara Odayar acted as proxy for the first plaintiff, on whom the duty of setting fire to the funeral pyre devolved in consequence of his father having predeceased his grandmother. If the evidence is intended, as seems to be the case, to convey the impression that Chidambara Odayar lighted the funeral pyre, because there was coparcenary, such an effect cannot be attached to it under the ceremonial law. Whether the family is joint or divided, it is the duty of the son, and, in his absence, of the grandson to perform the funeral obsequies; and when he is too ill or too young to undertake the duty, some elderly member, either an undivided or divided uncle or granduncle, acts as his substitute. As to the residence of Ayyadorai's daughters in the plaintiffs' house at Karuppattimulai, it may be owing to their junior paternal aunt living there, and it cannot be accepted as evidence of coparcenary."

The judgment concluded thus:—

"The conclusion we come to upon the whole evidence is that from 1837, when the plaintiffs' father went to Karuppatti-

mulai, the two branches have acted as if they had no community of interest, and that the plaintiffs' branch has neither directly nor indirectly participated in the beneficial enjoyment of the property in dispute. In this view of the facts of the case the suit was clearly barred when Act XIV of 1859 was in force. By s. 1, cl. 13, there must be a participation in the family income, or some act equivalent to it, within twelve years, from which a joint interest may reasonably be inferred, and the evidence on record discloses neither the one nor the other.

"It has been held that what is necessary to bar the claim is proof of possession and enjoyment of the property as the possessor's separate property, to the absolute exclusion of the person suing to enforce the right to a share, for more than twelve years. We are of opinion that the appeal must be decreed; that the decree of the Subordinate Judge must be set aside, and the suit dismissed with all costs."

On this appeal Mr. *T. H. Cowie* and Mr. *R. V. Doyne* for the appellants argued that the judgment of the High Court was not completely consistent with the case set up for the defence. A case of abandonment by Palaniappa of his joint interest, after 1837, should have been proved by definite acts, or omissions, on his part, of which there had been no sufficient evidence. Moreover, as regards the immovable property of the family, upon the construction of cl. 13, s. 1, of Act XIV of 1859, the claimant, in order that a bar might be constituted, must have been entirely out of possession, from which he must have been excluded altogether by those former coparceners against whom he claimed. *Govindan Pillai* v. *Chidambara Pillai*(1). But here the evidence showed no such entire exclusion. Again, although Act XIV of 1859, s. 1, cl. 13, required a plaintiff to prove possession on his part within twelve years, the corresponding enactment in Act IX of 1871 required adverse possession on the part of the defendant. Reference was made to *Lakshman Dada Naik* v. *Ramchandra Dada Naik*(2) and *Rao Karan Singh* v. *Raja Bakar Alikhan*(3).

Mr. *J. D. Mayne* and Mr. *G. P. Johnstone* for the respondents were not called upon.

On a subsequent day (June 23rd) their Lordships' judgment was delivered by

THE RIHGT HON. SIR RICHARD COUCH:—

This is a suit between the members of a Hindu family, of which the common ancestor was one Ramalinga Odayar. He had two sons, Kutti Odayar and Subramanya Odayar. Kutti had an only son, Thoppai, who had three sons, one of whom died without issue, another, Subba, had three sons who have died without leaving issue, and the third, Sabhapati, left an only son, the second defendant Sami Odayar. Subramanya had two sons, Karuttasami and Chidambara. Karuttasami had an only son, Palaniappa, the father of the three plaintiffs, and Chidambara left an only son, the first defendant Subramanya. At the time the suit was instituted the plaintiffs and defendants were the only remaining members of the family. The share of the plaintiffs would be one-fourth if they are entitled to any part of the property claimed in the suit. They sued for possession of that share. The first defendant Subramanya, in his written statement, said that the plaintiffs and defendants were not members of an undivided family; that no portion of the property sued for was ancestral property of Chidambara and Thoppai; that they lived jointly and acquired some property through their own exertions, and the properties in litigation consisted of such self-acquisitions and of property subsequently acquired by their descendants, including the defendants.

Palaniappa, the father of the plaintiffs, was married in 1837, and there is no doubt that up to that time the descendants of Ramalinga were a joint family.

(1) 3 M. H. C. R., 99.

(2) L. R., 7 I. A., 181; 4 P. C. J., 173.

(3) L. R., 9 I. A., 99, 4 P. C. J., 382.

The material questions are whether Palaniappa then separated himself from the family in respect of the family property, or if he did not, whether he afterwards participated in the profits of it. It appeared from the evidence of Kuppu Odayar, who was connected by marriages of his own and his younger brother's daughter with both the plaintiffs and defendants, that Palaniappa married the daughter of Kuppu's paternal uncle, and on his marriage went to live at Karuppattimulai, the village of that family, which is about ten miles distant from Aravur, the residence of the Ramalinga family. At that time the family at Aravur was reduced in circumstances, and a moiety of the village of Karuppattimulai was given to his wife by her family. Palaniappa continued to live at Karuppattimulai and died there. The property thus acquired by him consisted of rather more than 14 velis of land, and it is said by the High Court that the family at Aravur probably owned about 35 velis, of which Palaniappa's share would have amounted to 8¾ velis. The High Court say that this fact and the evidence of Kuppu Odayar as to the circumstances of the family at Aravur, convey the impression that Palaniappa did not probably intend or care to claim a share from his coparceners. It may be that he did not, but in order to see whether he lost his right to a share, what was done afterwards must be considered.

By sec. 1, clause 13, of Act XIV of 1859, a suit for a share of the family property not brought within twelve years from the date of the last participation in the profits of it would be barred. This Act continued in force until the 1st of July, 1871, when Act IX of 1871 came into force. Consequently if there was no participation of profits between 1837 and 1871, the suit would be barred, and the later Acts for limitation of suits need not be referred to. If they altered the law they would not revive the right of suit.

The plaintiffs sought to avoid the law of limitation by evidence of the actual receipt of money, by payments of marriage expenses by Chidambara and Sabhapati, and by residence in the family house at Aravur. Appasami, the 1st plaintiff, in his evidence said that about fifteen years ago he took from Aravur Rs. 2000 or Rs. 3000. This, if true (and he was not corroborated), would not avail to prevent the operation of Act XIV of 1859.

There was evidence of the payment by Chidambara of the expenses of the marriages of members of the plaintiffs' family, when there was at the same time a marriage in his own family. The High Court justly say that this evidence is vague and unsatisfactory. Even if true it cannot be said to prove a participation in the profits of the estate received by Chidambara as manager for the family. As to the residence, their Lordships have been carefully referred by Mr. Doyne to all the evidence on this subject. It is conflicting, and the evidence of Ramu Odayar, one of the defendants' witnesses, is, that the plaintiffs would come to Aravur on marriages and deaths, and take their meals either in the old or new house, and would either come alone or with their family. This would explain what residence there was, and is more probable than the plaintiffs' case, that the eldest member of their branch of the family resided at Aravur as a member of the joint family. Looking at the whole of the evidence it appears to their Lordships that whatever may have been Palaniappa's intention when he left Aravur, a suit for his share of the family property became barred by the law of limitation. This was the decision of the High Court, which reversed the decree of the Subordinate Judge and dismissed the suit. Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court, and dismiss the appeal. The appellants will pay the costs of it. *Appeal dismissed.*

Solicitors for the appellants: *Burton, Yeates, Hart & Burton.*

Solicitors for the respondents: *Gregory, Rowcliffes & Co.*

21st June and 7th July 1888.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. the Earl of Selborne, the Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, the Right Hon Sir Barnes Peacock and the Right Hon. Sir Richard Couch.

BASSU KUAR AND OTHERS* ...*Plaintiffs,*

and

DHUM SINGH .*Defendant.*

On appeal from the High Court for the North-Western Provinces.

Act XV of 1877 (Limitation Act) sch. ii, Nos. 64 and 97—Act IX of 1872, (Contract Act) s. 65.

Money due on an account stated which would, as such, have been barred in three years from the statement, under Act XV of 1877, sch. ii, art. 64, becomes, for purposes of limitation, a debt of another character, when, it having been the subject of an arrangement whereby it was to be retained by the debtor as part of the consideration upon a proposed sale of land, that arrangement failed, the sale not being specifically enforceable, and so declared by decree.

In contemplation of a sale of land by the debtor to the creditor, it was agreed that the book debt should be retained by the former in satisfaction of part of the price, but the parties failing to agree as to certain other terms, a suit, brought by the intending vendor for specific performance, was dismissed, on the ground that no effectual agreement had been made.

Held, that this decree brought about a new state of things, and imposed a new obligation on the debtor, who could no longer allege that he was absolved by the creditors being entitled to the land instead of the money. He became bound to pay that which he had retained in payment of his land, the date of the decree giving the date of the failure of an existing consideration, within the meaning of art 97.

The matter might also be regarded as falling under s 65 of the Contract Act, IX of 1872, under which, when the agreement was decreed ineffectual, the debtor, having previously received an advantage under it, was made liable "to restore" that advantage, or "to make compensation for it."

APPEAL from a decree (12th March, 1886,) of the High Court, reversing a decree (26th March, 1885,) of the Subordinate Judge of Saharanpur.

The suit out of which this appeal arose was commenced by Lala Baru Mal, lately a Shraf at Saharanpur, with his wife Musammat Bassu Kuar, against Lala Dhum Singh. Baru Mal died pending the suit, and his sons having been joined with the widow as plaintiffs, were now appellants with her.

In 1879, Dhum Singh owing money to Baru Mal, they entered upon an arrangement that Baru Mal, buying villages of Dhum Singh, for Rs. 55,000, should give credit for and write off so much as was equal to the debt, receiving only the balance in cash; it appearing from the accounts down to 1st September, 1879, that the debt was Rs. 33,359. The conveyance was to be made to Bassu Kuar, the wife. But, disputes afterwards arising, completion was refused by Baru Mal. On 3rd September, 1880, Dhum Singh sued him for specific performance; but his suit, although decreed by the Court of first instance, was dismissed by the High Court on the 14th March, 1884; that Court holding that there had been no unqualified acceptance of the terms by Baru Mal, and that no binding contract, enforceable by law, had been made between the parties (1).

The present suit was brought on the 18th September, 1884, the plaint stating that the defendant refused to refund the amount, for which an allowance in the "sale consideration" had been made, although, in consequence of his own acts, the contract of sale had been declared by the High Court, on the 14th March, 1884, not to be enforceable; and inferring that the cause of action had arisen on that date.

The defendant by his written statement set up limitation under Act XV of 1877, alleging that nothing had occurred during the transactions and litigation between the parties to alter the nature of the original debt which had accrued in 1879.

15 Cowell's Ind. Ap, 211; 11 All., 47.

(1) Weekly Notes, 1884, pr 161.

The Subordinate Judge, M. Muhum mad Maksud Ali Khan, decreed the claim for Rs. 3,359, with interest at 7 annas 9 pies per cent. per month, that being the rate at which it had been entered in the books, and in conformity with custom. This decision was reversed on appeal by the High Court in the following judgment:—

"Prior to September, 1879, there had been various transactions between the parties, and these transactions resulted in a debt due by the defendant to the plaintiff of Rs. 33,359-3-6, that being the identical amount which is claimed in the present suit. In September, 1879, the parties entered into negotiations as to the mode in which this debt should be liquidated. The defendant apparently was not in a position at that time to pay in money, but he had certain landed property and negotiations took place for the sale of this property to the plaintiffs, and the extinguishment of the old debt thereby. These negotiations proceeded so far that the purchase-money was fixed at Rs. 55,000, and it was agreed that the plaintiff should pay this amount by giving credit to the defendant to the extent of the debt due by him, and paying the balance in cash. So far the negotiations were completed, except apparently a few minor points. In the end, however, a dispute arose as to what had been settled as the actual terms of the bargain which were to be reduced into writing. The defendant brought a suit against the plaintiff for specific performance of the contract which he alleged had been settled and executed for the sale to the latter of the property in dispute. That suit was tried by the Subordinate Judge, who decreed the claim. In appeal the High Court reversed the Subordinate Judge's decree, as it appeared that the parties were never *ad idem* with reference to the contract set up by the then plaintiff. It is said now that this Court found that the true contract was not the contract set up by the then plaintiff, but was in fact the contract set up by the then defendant, who is now plaintiff. From the judgment of the Court, however, it appears that this is not what was then decided. All that the judgment shows is that the contract set up in that suit was not proved because there was no evidence that the parties had come to any agreement that that was to be the contract. That is all that was necessary for the decision of that case. The judgment in effect decided that there had been no contract, and the parties were therefore relegated to their original position. In other words, the negotiations failed, because they resulted in an agreement, and the original debt due by the present defendant to the present plaintiff always remained due and is so still. It is alleged that the contract was completed on the 1st September, 1879, and that is therefore the latest possible date we can look to in considering when the money became due. The whole amount had in fact become due before that date by reason of prior transactions, but, upon the view most favourable to the plaintiff, and assuming that an account was stated on that day, giving rise to a new period from which limitation would begin to run, it is impossible to assign the debt to a later date than that. The present suit was brought on the 18th September, 1884, that is to say much more than three years from latest possible date upon which the debt can be said to have become due. Under these circumstances the suit is barred by limitation. The plaintiff's contention is that the contract which he set up was found to have been completed, and under its terms this money having been credited in the present defendant's books, was to be treated as a payment by the present plaintiff as a deposit on account of the sale, and the present suit is therefore a suit for money had and received, upon a cause of action which did not arise until the contract had gone off, *i. e.*, when this Court decided that the contract set up by the present defendant was not, but that set up by the plaintiff was, binding. I am of opinion that this contention must fail. In the first place, by the terms of the contract itsel which is now set up by the plaintiff, no

deposit was payable, and the price was not to be paid till the completion of the contract. Secondly, in the present plaintiff's letter to the defendant demanding payment of the money, and dated the 29th September, 1879, the plaintiff did not demand the money of the defendant or ask him to return it as a deposit, but demanded it simply as the balance of the old demand. Under these circumstances it is impossible to treat the money as anything but the old balance due from the defendant to the plaintiff, and as that debt was barred by limitation at the time when this suit was brought, I am of opinion that the Subordinate Judge should have given the defendant a decree. The appeal must be decreed with costs."

Mr. *R. V. Doyne*, for the appellant, argued that the effect of the respondent's suit upon the agreement, which treated the debt as a subsisting part of the consideration, and to that amount part payment, was that the appellant's claim was not barred under article 64, as on a debt upon an account stated in 1879. Upon one view, the transaction between the parties, and the suit for specific performance, showed grounds for deduction of the period occupied by the suit. This would give an addition to the three years, as the suit lasted from 3rd August, 1880, to 14th March, 1884. Until the agreement for the sale of the land had been finally brought to an end, the appellant was in the position of a person whose claim had been satisfied by the substitution of the land for his debt, and no suit could have been successfully brought. Upon this part of the argument *Musammat Rani Surnomoyi* v. *Shoshi Mokhi Burmonia*(1) was cited, and it was argued that in another view, and if there was no such suspension of the right to sue upon the account stated, the date itself of the decree, *viz.*, 14th March, 1884, was the starting point of limitation, inasmuch as, on the dismissal of the suit, a new cause of action accrued. Also acknowledgment of liability had taken place. [Reference was made by one of their Lordships to *Rose* v. *Watson*(2) in regard to a suggestion of a temporary lien on so much of the land as would have been covered by the proportionate part of the purchase-money, represented by the debt retained for a time.] It was also argued that the claim should have been held to fall within the Contract Act, IX of 1872, s. 65. The interpretation clause, s. 2, of that Act explained a "void" agreement as being an agreement "not enforceable by law"; and it was submitted that Dhum Singh, on the dismissal of his suit on the 14th March, 1884, became bound to pay the amount of the debt previously retained; being made liable, by s. 65, to restore an advantage received under a contract that had become void.

Mr. *Charles H. Hill*, for the respondent, argued that the question raised must be disposed of upon the law of limitation as applied in the judgment of the High Court. It was the completion of the contract that alone could turn the retention of the debt into a payment, as the price of the land was not to be paid till then; and the debt remained, from first to last, the balance of the old account. Had there been a complete contract, a decree for specific performance would have followed. He referred to what was expressed in the judgment in *Lachmi Bakhsh Roy* v. *Ranjit Ram Panday*(3), showing that the law of limitation is strict and inflexible, and argued that article 64 alone could be applied. No later acknowledgment than the commencement of Dhum Singh's suit could be found, and that was too far back to be of any avail to the plaintiff. Reference was also made to the *E. I. Company* v. *Odit Churn Paul*(4), showing that on a simple contract the breach gave the date of the cause of action, from which the period of limitation commenced, not the time of the

(1) 12 Moo. I. A., 244; 2 P. C. J., 424.

(2) 10 I. L., Calc., 679.

(3) 13 B. L. R., 177.

(4) 5 Moo. I. A., 43; 1 P. C. J., 493.

refusal to perform the contract. Not till the bringing of the present suit was it ever alleged that the principal sum now claimed was other than the debt due on the 1st September, 1879. No act had been done, with effect to alter the nature of this debt, or to afford a starting point for limitation, other than that date. What was now alleged for the appellant differed from the contention of Baru Mal, in his resisting the suit for specific performance, and was inconsistent with there having been, as the Court decreed, no definite terms of contract settled.

Mr. *R. V. Doyne*, replied, arguing that the 14th March, 1884, was the starting point for the period of limitation.

Their Lordships judgment was delivered by

THE RIGHT HON. LORD HOBHOUSE :—

The question in this case is whether a debt which at one time was due from the respondent to one Baru Mal, whom the appellants represent, and which has never been paid, has been extinguished by lapse of time. The High Court, differing from the Subordinate Judge, have decided the point against the appellants, and have dismissed the suit brought by them for recovery of the debt.

Baru Mal and Dhum Singh, who were bankers in Saharanpur, had dealings together, and Dhum Singh came to owe Baru Mal Rs. 33,359-3-6. It was then agreed between them that Dhum Singh should convey to Baru Mal or to his wife, Basso Kuar, certain villages for the sum of Rs. 55,000 and that his debt should be set off against the price. On the 1st of September, 1879, he executed and delivered to Baru Mal a deed by which he acknowledged the receipt of the whole purchase-money, and conveyed the villages to Basso Kuar, and he endorsed on the deed a memorandum shewing that the balance only of the price, after allowing for the debt, was paid in cash. No money was actually paid.

On the same day Baru Mal took away the deed and signed a letter prepared by Dhum Singh, in which he agreed to register the deed and to pay the balance of the price. But very soon afterwards he found, or alleged, that the deed was not in accordance with certain conditions for which he had stipulated, and, declining to complete the purchase, he demanded what was owing to him. Dhum Singh on his part insisted that the deed was in accordance with the contract, and after an attempt at arbitration had failed, he brought a suit on the 3rd August, 1880, against Baru Mal and Basso for specific performance of the contract, praying that the deed might be registered, and that Baru Mal might be ordered to pay the balance of the Rs. 55,000 with interest after setting off the debt of Rs. 33,359-3-6.

On the 24th of February, 1881, the Subordinate Judge decided in favour of Dhum Singh's view, and gave him a decree according to his prayer. Baru Mal appealed to the High Court. After reviewing the evidence, their conclusion was that Dhum Singh did not make out to their satisfaction that the sale deed ever became a contract binding on Baru Mal, and enforceable against him in law. They therefore dismissed his suit. Their decree was made on the 14th of March, 1884 (1).

Upon that event Baru Mal renewed his demands for the payment of his debt, and not being able to get it, he, in conjunction with his wife Basso, instituted the present suit on the 10th of September, 1884. He is since dead, and his sons have been substituted for him as co-plaintiffs with the widow. In his plaint he states the deed of the 1st of September, 1879, and alleges that, in the preparation of the deed Dhum Singh took steps contrary to the engagement, that so disputes arose, that Dhum Singh unjustly brought a claim for enforcement of the contract, but that the claim was dismissed by the High Court, who held the contract to be invalid. He then claims that the amount for which Dhum Singh had given credit to him in the

(1) Weekly Notes, 1884, p.161.

sale-deed ought to be refunded, and claims interest upon it.

Dhum Singh's defence is that Baru Mal always denied the existence of a contract; that the High Court held there was no contract; that the character of the debt never was altered; and that there was nothing to save it from being barred by limitation.

The High Court hold that this defence is sound in law, and their decree dismisses the suit as being barred by limitation. They do not state under which article of Act XV of 1877 the case falls; but they consider Baru Mal's claim to be for nothing but the old balance due from Dhum Singh. Probably they would hold it to fall, as was argued at their Lordships' bar, under art. 64 (in the second schedule); therefore, as none of the statutory provisions by which the time for suing is enlarged can be applied to this case, except that which relates to acknowledgment, and as no written acknowledgment can be found later than the plaint filed by Dhum Singh in the specific performance suit, Baru Mal's right to sue would be barred at latest long before he sued.

Their Lordships find themselves unable to agree with the High Court as to the nature of the claim. They think that it is substantially put upon the right ground in the plaint. It must be remembered that it has throughout been common ground to both disputants, that there was a contract made between them, and that among its terms were the sale of the villages for Rs. 55,000, the retention by Dhum Singh of his debt of Rs. 33,359-3-6 as part payment, and the payment by Baru Mal of the balance. Their quarrel was about other matters. Dhum Singh alleged that the terms just mentioned were all the terms of the contract, and he claimed its completion on that footing. Baru Mal alleged that there were other terms, accused Dhum Singh of dishonesty, and after a time claimed the right of receding from the bargain altogether. But the Subordinate Judge took the view of Dhum Singh, and decreed completion of the contract according to that view. Up to the date of the Subordinate Judge's decree in 1881, Dhum Singh retained the amount of his debt as of right, and in accordance with the contract alleged by him. After the decree of 1881 he still retained it as of right, and with a title which could not be disputed in any Court of Justice, except by the one mode of appeal from the decree of 1881. Baru Mal might have sued for his debt, but the utmost benefit that could have come to him from such a suit would have been to have it suspended or retained in Court till after the decision of the appeal in the specific performance suit. Dhum Singh's defence would have been that the debt was paid by virtue of the contract, and that defence must have prevailed if the suit were heard while the decree of 1881 still stood unreversed. It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not. And it would be a lamentable state of the law if it were found that a debtor who for years has been insisting that his creditor shall take payment in a particular mode, can, when it is decided that he cannot enforce that mode, turn round and say that the lapse of time has relieved him from paying at all.

In their Lordships' view the decree of the High Court in 1884 brought about a new state of things, and imposed a new obligation on Dhum Singh. He was now no longer in the position of being able to allege that his debt to Baru Mal had been wiped out by the contract, and that instead thereof Baru Mal was entitled to the villages. He became bound to pay that which he had retained in payment for his land. And the matter may be viewed in either of two ways, according to the terms of the Contract Act, IX of 1872, or according to the terms of the Limitation Act, XV of 1877.

By the 65th section of the Contract

Act "when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it." In this case there most certainly was an agreement, which, as written, was in the terms alleged by Dhum Singh. But it was held not to be enforceable by him because there were other unwritten terms which he would not admit; and the other party did not seek to enforce the agreement according to his version of it, but threw it up altogether. The agreement became wholly ineffectual, and was discovered to be so when the High Court decreed it to be so. The advantage received by Dhum Singh under it was the retention of his debt. Therefore by the terms of the statute he became bound to pay his debt on the 14th March, 1884.

Trying the case by the terms of the Limitation Act, their Lordships think that it falls within article 97. An action for money paid upon an existing consideration which afterwards fails, is not barred till three years after date of the failure. A debt retained in part payment of the purchase-money is in effect, and as between vendor and purchaser, a payment of that part; and if that were doubtful on the first retention while there was yet undecided dispute, it could no longer be doubtful when a decree of a Court of Justice authorized the retention, and in effect substituted the land for the debt. Dhum Singh retained the money, and Baru Mal lost the use of it, in consideration of the villages which formed the subject of the sale-deed. That consideration failed when the decree of 1884 was made, and it failed none the less because the failure was owing to Baru Mal's own reluctance to take it under the conditions insisted on by Dhum Singh.

The result is that in their Lordships' opinion the High Court ought to have sustained the Subordinate Judge's decree, and to have dismissed the appeal with costs, and they will now humbly advise Her Majesty to reverse the decree of the High Court, and to make an order to that effect. The respondent must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Barrow & Rogers.*

27th June 1888.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

ARUNACHELLAM* ... *Objector,*

and

ARUNACHELLAM AND ANOTHER (BY THEIR GUARDIANS) ... *Petitioners.*

On appeal from the High Court at Madras.

Civil Procedure, 1882, s. 311.—Alleged irregularity attending sale in execution—Failure to prove substantial injury resulting.

A judgment-debtor having allowed the execution-sale of immovables to be completed without objecting on the ground afterwards alleged by him, viz., insufficiency of description within the requirements of s. 287, he having been throughout aware of what the description was, the sale is not invalid on this ground alone without more.

No evidence having been given in the Court executing the decree of substantial injury having resulted by reason of such irregularity, *i.e.*, the alleged mis description:

Held, that, although the Appellate Court below had assumed that the property had been sold for less than it ought to have fetched, such substantial injury as inadequacy of price should have been proved to have occurred in order to bring the case within s. 311. *Olpherts and*

*15 Cowell's Ind. Ap., 171; 12 Mad., 19.

Macnaghten v. *Mahabir Pershad Singh*(1) referred to and followed.

APPEAL from two orders (16th October 1883) of the High Court reversing two orders (9th August 1882 and 26th September 1882) of the Subordinate Court of the Madura District.

The question now raised was whether there had been such an irregularity in a sale in execution of a money decree involving substantial injury to the judgment-debtor that it had been rightly set aside under s. 311 of the Code of Civil Procedure. The appellant was the purchaser at the sale, and the respondents were the judgment-debtors, whose property had been sold in execution, the sale having been afterwards cancelled in pursuance of the orders of the High Court.

The property sold was an estate lying within the Sivaganga zamindari, consisting of fifteen villages, of which the first, Kattanur, gave its name to the whole estate.

The family to which the respondents belonged owned one-half of Kattanur in possession, and in 1879 obtained the remaining half in mortgage to secure the sums of Rs, 2,582 and Rs. 14,000.

The decree as to which the question of its due execution had arisen was obtained on 6th January 1880 by Tolaja Rama Rao in a suit of 1879 against the present respondents besides others, and on the 30th January 1882, an application was made by Tolaja for execution of his decree by sale of the village Kattanur in satisfaction of a sum of Rs. 5,083 then due upon that decree. An order for attachment of the property was made on the 7th March, the usual proclamation of approaching sale was made on the 11th March, and on the 25th May an order for sale was made with the customary notification, the sale to take place on the 22nd July. The notification stated that "the right herein below mentioned of the defendants in the said property will be sold." Then followed the boundaries and other description of the village of Kattanur and its hamlets about to be sold. No complaint was then made to the Court that this description was insufficient. On the 27th July, several days after the village had been put up for sale, and the day before it was actually sold, these respondents presented an application praying for a postponement of the sale on the grounds that steps were being taken to set aside the decree and that the Court already held funds sufficient to satisfy the judgment-creditor. The Court refused to postpone the sale unless the debtors paid into Court the balance of the judgment-creditor's claim, and on the next day these respondents filed another petition suggesting another mode of meeting the creditor's demand. In neither of these petitions was any complaint made against the mode in which the property was described or put up for sale.

Having been put up on the 22nd July and four following days, the property was sold on the 28th to the present appellant for Rs. 20,500. And on the 29th, the judgment-debtor petitioned the Court to set aside the decree on account of irregularities causing loss. It was complained that the decree might have been satisfied by selling one hamlet only, named Pottapicheri, which it was said would have fetched about Rs. 10,000. The petition proceeded: "It is the object of law that the balance of the decree debt should be collected by selling Kattanur and its hamlets one after another. In direct contravention to it, the village of Kattanur, &c., and its hamlets were all sold together in one lot, inclusive of the said mortgage right and the proprietary right, and this fact is brought to the notice of the Court as irregular. The minors, who are the owners of the said village, have thereby sustained a heavy loss to the extent of Rs. 40,000." This petition was presented on behalf of these respondents as plaintiffs in Original Suit No. 28 of 1882.

On the 7th August an identical petition

(1) L. R., 10 I. A. 25; reported as *Macnaghten and another* v. *Mahabir Pershad Singh in* I. L. R., 9 Calc., 656; 4 P. C. J., 417.

was put in on behalf of the respondents as defendants in suit No. 44 of 1879. Both petitions were disposed of on the 9th August by an order which was one of the two orders appealed to the High Court. The order was as follows: "The village of Kattanur with its hamlets was attached as one lot and sold as such. It is now alleged that such a sale was irregular, and that it has caused substantial injury to the defendants, and that hamlet after hamlet ought to have been sold. If anybody had suggested it at the time of the sale, it could have been done; and Sabapathi Chetti, who by so many petitions protested against the sale did nothing of the kind. There is no irregularity, I think, in selling a property in the manner it was attached. Here the property was attached in one lot and was sold as such." The petition was accordingly rejected.

On the 25th September two more petitions were presented to the Subordinate Court that the sale should be set aside. On the 29th, the order was made, which was the second of the two orders appealed to the High Court, that the sale would be confirmed unless an order to the contrary should be made by the High Court within an interval allowed. That time having elapsed, and no order to the contrary having been received from the High Court, the sale was confirmed on 30th September. The specification of the property in the sale certificate was in the same terms as in the notification. Meantime, on the 9th September, an appeal had been preferred by the judgment-debtors to the High Court against the order of the 9th August on the ground of irregularity on the part of the lower Court in selling the whole estate when the sale of a part would have been sufficient, "and in not appropriating the moneys already in Court to the credit of the decree."

By the order of the Chief Justice, dated 19th September, the appeal was admitted on the ground of the "grievous and irreparable loss alleged to have accrued to the appellant," the Chief Justice observing that "he saw no irregularity."

On the 27th September 1882, an application to the High Court to direct the lower Court to postpone confirmation of the sale till the then pending appeal from the order of the 9th August should have been disposed of was rejected. Consequently the sale was confirmed by the lower Court on the 30th September, and a certificate followed as above stated.

On the 7th November 1882, the present appellant was on his own application made respondent in the two appeals then pending in the High Court. In these, the order of remand, of which the effect is stated in their Lordships' judgment, was made on 30th April 1883, and was followed by the judgment of the High Court, dated 16th October 1883. This order directed that the orders of the Subordinate Court confirming the sale and refusing to cancel it should be set aside, adding that, as the appellants to the High Court, who were the judgment-debtors, had not asked, as they might have done at the right time for the amendment of the proclamation of sale, they should pay the costs in both Courts

On this appeal Mr. *J. D. Mayne* for the appellant argued that the orders of the Subordinate Court were correct and should not have been cancelled. The High Court had set aside the sale upon a ground of objection which was for the first time suggested in the Appellate Court. There had been no insufficiency in the description nor any mis-description of the property which could have prejudiced the purchaser. Nor had any proof been given that the judgment-debtors had sustained substantial injury by reason of any irregularity in the publishing or conducting the sale. So that the mis-description, if any, had taken place was not a material irregularity within the meaning of s. 311 of the Code of Civil Procedure. He referred to *Olpherts and Macnaghten* v. *Mahabir Pershad Singh*(1).

(1) L. R., 10 I. A., 25; I. L. R., 9 Calc., 656. *nom. Macnaghten and another* v. *Mahabir Pershad.*

For the respondents, Mr. *R. V. Doyne* and Mr. *H. Cowell* argued that there had been on the part of the executing Court such a failure to comply with the provisions of the Code of Civil Procedure and of s. 287 in particular as to vitiate the sale in execution and that it had been rightly set aside.

Mr. *J. D. Mayne* was not called on to reply.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR RICHARD COUCH:—

This is an appeal against two orders and one judgment of the High Court of Madras which reversed the proceedings of the Subordinate Court of Madura in execution of a decree in a suit which had been brought in that Court. The respondents were defendants in the suit, and in execution of the decree which had been obtained against them, a village called Kattanur was sold by the order of the Court and was purchased by the appellant. The High Court, by their judgment, which is now appealed against, set aside the sale, and the grounds upon which they did so are stated by them to be that: "It is clear that the description of the properties advertised for sale was most imperfect. The judgment-debtors enjoyed not only proprietary rights in some portion of the property, but rights as mortgagees of very considerable value in other portions of the property, and there was nothing to indicate the possession by the judgment-debtors of any rights as mortgagees in the villages. The purpose of the law would be entirely defeated if a more complete description were not enforced than was given in this case."..... "It cannot be doubted that the inadequate description led to sale of property valued at upwards of Rs. 40,000 together with mortgage claim for Rs. 40,000 for Rs. 20,000." Then they say they must set aside the order confirming the sale and also another order made upon another petition by which an application to set aside the sale was refused.

It is true, as stated by the High Court, that the judgment-debtors had proprietary rights in a part of the property and were only mortgagees of the other part. The decree was obtained in January 1880, and an application was made to the Court for the execution of it, and attachment was made of the village, which contained 15 hamlets; there was the usual proclamation of the sale and notification that it was to be on the 22nd of July 1882 and the usual warrant, and apparently the judgment-debtors knew perfectly well that the whole of the village was going to be sold. They state in an application which they made that "the Kattanur village of these plaintiffs has been attached on account of the said debt, and the sale is fixed by this Court for the 22nd instant" Notwithstanding this, the first complaint which was made by them was on the 29th July 1882, and in their petition they complained that the village had several hamlets attached to it, and if one of them alone had been sold it would have been sufficient. They also complained that one moiety of the villages belonged to them by right of mortgage, and the other they had their property in, raising for the first time the objection upon which the High Court has founded its judgment. The sale was completed, and they then petitioned the High Court on the 9th September 1882. In this petition they state that the villages ought to have been sold each by itself and not all in one lot, and that the villages being separately numbered for the attachment there was no necessity for a representation that they should be separately sold.

Upon that petition an order appears to have been made by the Chief Justice in which he says: "I see no irregularity. The judgment-debtor might have applied that the sale should be made in lots." There is a distinct opinion of the Chief Justice that the judgment-debtors might, if they had considered the sale of the villages in one lot would have been unfair, have made an application to have

them sold in lots, which they did not do. However, notwithstanding the Chief Justice's opinion that there was not any irregularity, he admitted the appeal, and the High Court, when the appeal came before them, made this order: "We require the Court below to ascertain and report what is the interest enjoyed by the family in the villages; whether it intended to sell the mortgage and other rights; whether the appellants in that Court made any complaint of the insufficiency of description in the proclamation of sale; and whether any injury has occurred to the appellants from any such insufficiency." It would appear from what the High Court then directed to be ascertained and reported that they were satisfied with the opinion which had been expressed by the Chief Justice that there was no ground for saying that the sale ought to be set aside because it had not been sold in lots.

A report was made by the Subordinate Judge, and it is this: "There are four points sent down for report: (i) The interest enjoyed by the family in the villages is as stated in the judgment of their Lordships; (ii) the sale proclamation says that the right, title, and interest will be sold, and this must include the mortgage and other rights, but they were not specified; (iii) no complaint was made of the insufficiency of description in the proclamation of sale. Two petitions are relied on by the petitioners, one dated the 29th July 1882 and the other dated the 7th August 1882. The first petition is said to be before the High Court. The second petition makes no such complaint; (iv) as I find that no such complaint was made, I thought that any evidence as to any injury resulting from such insufficency was unnecessary."

Therefore, as far as regards the objection that the description was insufficient, which is relied upon, as their Lordships understand, as vitiating this sale—for that appeared to be the contention of the counsel for the respondents—the objection was not taken until the sale had been completed. The judgment-debtors knowing, as they must have known, what the description was in the proclamation, allow the whole matter to proceed until the sale is completed, and then ask to have it set aside on account of this, as they say, misdescription. It appears to come within what was laid down by this Board in the case in the 10th Indian Appeals, page 25(1), that if there was really a ground of complaint, and if the judgment-debtors would have been injured by these proceedings in attaching and selling the whole of the property whilst the interest was such as it was, they ought to have come and complained. It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold, which he knew well, but of which the execution creditor or decree-holder might be perfectly ignorant—that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated. That, in their Lordships' opinion, cannot be allowed, and on that ground the High Court ought not to have given effect to this objection.

There is another objection to this decree of the High Court. The law provides, by s. 311 of Act XIV of 1882, that an objection may be taken by the judgment-debtor to an irregularity in the sale, but then it says that no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity. The Subordinate Judge finding, as he says, that no complaint had been made of this irregularity, did not receive evidence that there was any injury occasioned by it. If he was wrong in the opinion of the

(1) Olpherts and Macnaghten v. Mahabir Pershad Singh; 4 P. C. J., 417.

High Court in doing that, they ought to have sent back the case to him to take that evidence. Instead of doing this when the case comes before them and they give judgment, they assume that there was a substantial injury and that the property, in consequence of this misdescription, had sold for less value than it would otherwise have fetched. There seems to be no ground for an assumption of that kind by the High Court, and, therefore, both as to the objection to the non-description, or not mentioning the mortgage in the attachment proceedings, and that there was no proof that any special injury was occasioned, their Lordships think that the judgment of the High Court was wrong, and that it must be reversed.

Their Lordships will, therefore, humbly advise Her Majesty that the orders of the High Court should be reversed, the appeals to the High Court dismissed with costs, the orders of the Subordinate Court, which were appealed against, affirmed, and the costs in the Subordinate Court ordered to be paid by the respondents. The respondents will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: *Lawford, Waterhouse, & Lawford.*

Selicitors for the respondents: *Rowcliffes, Rawle & Co.*

21st July 1888.

PRESENT.

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock and the Right Hon. Sir Richard Couch.

HAIDAR ALI AND ANOTHER*...*Appellants,*

and

TASSADDUK RASUL AND OTHERS ... } *Respondents.*

EX-PARTE HAIDAR ALI.

On petition from the Court of the Judicial Commissioner of Oudh.

Privy Council, Practice of—Practice relating to substitution of parties on revivor—Representative character to be ascertained by Lower Court.

On the death of a party on the record of an appeal pending before Her Majesty in Council, proof must be given in the Court from which the appeal has been preferred, of the representative character of the person or persons by or against whom revivor is sought. There ought to be some finding of the Court below; which, also, should give its own opinion as to who are the parties proper to be substituted upon the record A certificate or statement on which their Lordships can act should be made by the Court below.

PETITION to revive an appeal from a decree of the Judicial Commissioner of Oudh, that Court having made an order (17th March 1888) rejecting a petition to bring on to the record certain persons alleged to represent parties deceased.

This petition related to an appeal to Her Majesty in Council, preferred by Haidar Ali and Fazl Ali, from a decree of the Judicial Commissioner. After the admission of that appeal, the present petitioner, on 1st December 1887, applied in the Judicial Commissioner's Court stating that two of the defendant-respondents, *viz.*, Ali Khan and Ikram Khan, had died, and asking that certain persons, whom he named, might be substituted for the deceased on the record, also that a guardian *ad litem* might be appointed for such of them as were minors. On notice being given of this petition, it was opposed by the defendants-respondents as barred by time. A relation of one of the minor heirs applied to be appointed his guardian *ad litem*; and also the Agent of the Court of Wards represented that the estate of one of the respondents, a minor, had come under his charge, under ss. 161 and 162 of Act XVII of 1876.

The Judicial Commissioner rejected the petition. He was of opinion that, after the admission of the appeal to Her Majesty, he had no longer any authority

*15 Cowell's Ind. Ap., 209, 16 Calc., 184.

in the suit, his Court being, in his view of the matter, no longer competent for any judicial act relating to it.

On this petition, which stated the above facts, Mr. *R. V. Doyne* appeared. The application was to revive the suit against the persons named. The Court below could ascertain the facts as to their real relationship to the deceased parties.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD HOBHOUSE :—

Their Lordships think it is quite impossible for them to make an order upon these materials for altering the record. They have not got the facts before them, and it is very inconvenient that those facts should be tried here. There ought to be some finding of the Court below. The usual course is as laid down in Mr. Macpherson's book. He says (page 241):—"Of course in such cases the proper evidence must be given of the representative character of the persons by or against whom the revivor is sought. The title is more generally established upon petition to the Court below, which thereupon makes any inquiries which it may deem necessary, and orders the petition and proofs to be transmitted to England for such order as the Judicial Committee of the Privy Council may think fit to make."

The Court gives its own opinion as to who are the parties proper to be substituted upon the record. It has been the practice, so far as their Lordships can recollect, for a great number of years; and they now must request the Judicial Commissioner to follow that which is the ordinary practice and to make a certificate or statement on which their Lordships can act.

Solicitors for the petitioner:—Messrs. *Barrow & Rogers.*

1st November 1888.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, and the Right Hon. Sir Richard Couch.

MINAKSHI NAYUDU* ... *Defendant,*

and

IMMUDI KANAKA RAMAYA GOUNDAN ... *Plaintiff.*

On appeal from the High Court at Madras.

Execution sale—Hindu Law—Ancestral zamindari sold in execution of decree for money against the father, including the son's right of succession—Debt not immoral.

A sale in execution of a decree against a zamindar, for his debt, purported to comprise the whole estate in his zamindari. In a suit brought by his son against the purchaser, making the father also a party defendant, to obtain a declaration that the sale did not operate as against the son as heir, not affecting his interest in the estate, the evidence did not establish that the father's debt had been incurred by him for any immoral or illegal purpose:

Held, that the impeachment of the debt failing, the suit failed; and that no partial interest, but the whole estate, had passed by the sale, the debt having been one which the son was bound to pay:

Hardi Narain Sahu v. *Ruder Perkash Misser*(1) (where the sale was only of whatever right, title, and interest the father had in property), distinguished.

APPEAL from a decree (7th April 1884) of the High Court varying a decree (14th April 1883) of the Subordinate Judge of Madura (West).

The question here was whether the whole estate of inheritance in an ancestral zamindari had passed to a purchaser at a sale in execution of a money decree against the zamindar, or only such right as he held in the estate, as distinguished from his son's right of succession.

16 Cowell's Ind. Ap., 1; 12 Mad., 142.
(1) L. R., 11 I. A., 26; I. L. R., 10 Cal., 626.

The suit was brought by the son of the zamindar of Velliyakundam against his father, and the present appellant, for a declaration that a promissory note for Rs. 2,000, made by the zamindar and held by the latter, was given for a debt contracted by the zamindar for an immoral purpose; that, thus, the sale of the zamindari in execution of a decree, obtained upon the promissory note, was invalid as against the plaintiff, who, it was alleged, was entitled to succeed on the death of the present zamindar notwithstanding the sale.

For the defence it was denied that the debt was incurred for any immoral purpose, and an issue was fixed to that effect.

The decree against the father was obtained on 20th August 1879; the zamindari was sold on 30th August 1880; the son filed his objection on 4th November 1880, and brought this suit on 15th November 1882.

The acting subordinate judge (C. Purushotham) dismissed the suit on the ground that the evidence had failed to show that the debt was incurred for any immoral purpose. He cited *Gopalasami Pillai* v. *Chokalingam Pillai*(1).

On an appeal to the High Court, this decree was varied by a Division Bench (Turner, C.J., and Muttusami Ayyar, J.). Their judgment, after referring to the circumstances under which the note was made, proceeded thus:

"That consideration was paid for the promissory note was proved by the first defendant who was called as a witness by the second defendant; but, although general evidence was given that the first defendant was immoral and kept a concubine, the evidence as to the purpose for which the loan was taken was discrepant, and the subordinate judge, while he was not convinced it was taken for a family purpose, was also not satisfied that it had been taken for an immoral purpose. On this finding, in view of rulings to which he alluded, he held that the claim failed.

"We agree with the subordinate judge that the suit is not barred by limitation. There was no inquiry whether the plaintiff was entitled to resist the sale. We also agree that the evidence offered by the plaintiff was too unreliable to warrant a finding that the first defendant had contracted the debt on which the decree was obtained for an immoral purpose.

"We see no reason to think that the lease was not created for good consideration, and it is not denied that two sums of Rs. 6,000 and Rs. 3,000, respectively, have, in fact, been applied for the satisfaction of the decree in original suit No. 16 of 1863.

"The income which remained for the support of the family was not large, and although the first defendant may have been extravagant in his expenditure in proportion to his fortune and have indulged immorality, it is not shown that the loan was taken with the intention that it should be expended in immoral purposes, or that it was so expended; the lender, looking to the necessitous circumstances of the family, may well have believed the money was required for family purposes, though there is no evidence that any representation of this kind was made to him or that he lent his money on the faith of such a representation. All that is shown is that the first defendant contracted a debt. We have then to consider whether the plaintiff is entitled to the whole or any portion of the relief sought by him. He is not entitled to a declaration that the debt was contracted for immoral purposes, nor is he entitled to a declaration that the judgment-debt is not, under any circumstances, binding on him; but, in view of the recent ruling of the Privy Council that a sale in execution of a money-decree of the right, title, and interest of a Hindu father will affect only the interests of the father, the plaintiff is entitled to a declaration that the sale in execution of the decree of 1879 has affected the interests of the first defendant only and not those of the plaintiff.

(1) I. L. R., 4 Mad., 320.

"The court cannot make any order directing or prohibiting mutation of names in the revenue register. To the extent indicated the decree of the subordinate judge is reversed and the claim in part decreed, and, in modification of the order of the subordinate judge, it will be ordered that the parties do bear their own costs in both courts."

This appeal was thereupon preferred by the purchaser.

Mr. *J. D. Mayne*, for the appellant, argued that the decree of the first court dismissing the suit should be restored. By the concurrent findings of two courts, the son's suit had failed to show that the father's debt had been contracted for any immoral purpose. The debt having been contracted for no immoral purpose, the court which executed the decree of 1879 was competent to sell, and had sold, on 30th August 1880, the whole estate. As to the quantity of interest sold, the procedure in execution sales no longer restricted, since Act X of 1877 came into operation, the thing sold to the right, title, and interest of the judgment-debtor, as did Act VIII of 1859, s. 259 (sale certificate). The corresponding sections in the amended procedure of Act X of 1877, in XII of 1879, and in XIV of 1882 were adapted to the sale of all such interest in the estate itself as might be legally sold. He referred to ss. 287 and 316 of the latter Acts.

The interest of the son was liable to be sold in satisfaction of his father's debt, and the High Court Judges had apparently meant to refer to the then recent case of *Hardi Narain Sahu* v. *Ruder Perkash Misser*(1), where, however, the sale was only of the father's right, title, and interest, with the result that, for that reason, the son's interest was held not to have been sold. The general rule being that one member of a joint family could not be made liable by another member for a debt, not for the family benefit; there were exceptions, of which one was that the son was bound to pay the father's debt, and the grandson, the grandfather's, if not incurred for any immoral purpose. He referred to *Hunooman Persaud Panday* v. *Mussumat Babooee Munraj Koonweree*(2), *Girdharee Lall* v. *Kantoo Lall*(3), *Suraj Bunsi Koer* v. *Sheoproshad Singh*(4).

He referred also to *Deendyal Lal* v. *Jugdeep Narain Singh*(5) as applying the principle of the above exception to the case of executions of decree against the father binding the son's interest, unless restricted to the father's interest, where the debt was of the proper character; this being the development of the principle that the father had power, for a lawful and moral purpose, to anticipate against his son, by action taken in his own life-time; in other words to bind his interest by sale or mortgage.

He referred also to *Nanomi Babuasin* v. *Modhun Mohun*(6), *Simbhunath Pandia* v. *Golab Singh*(7), *Petticha Chettiar* v. *Sangili Vira Pandia Chinnathambiar*(8), *Bhagbut Pershad* v. *Mussumut Girja Koer*(9), and he distinguished the effect of sales of the father's right, title, and interest only from that of the sale in the present case.

In regard to the character of the property sold, he referred to *Sartaj Kuari* v. *Deoraj Kuari*(10).

The respondent did not appear. Their Lordships' judgment was delivered by

(1) L. R., 11 I. A., 26; I. L. R., 10 Cal., 626; 4 P. C. J., 510.

(2) 6 Moore I. A., 393; 1 P. C. J., 552.

(3) L. R., 1 I. A., 321; 3 P. C. J., 380.

(4) L. R., 6 I. A., 88; I. L. R., 5 Cal., 148; 4 P. C. J., 1.

(5) L. R., 4 I. A., 247; I. L. R., 3 Cal., 198; 3 P. C. J., 730.

(6) L. R., 13 I. A., 1; I. L. R., 13 Cal., 21; 4 P. C. J., 682.

(7) L. R., 14 I. A., 77; I. L. R., 14 Cal., 572; see *Anti* page, 5.

(8) L. R., 14 I. A., 84; I. L. R., 10 Mad. 241; see *Anti* page, 38.

(9) L. R., 15 I. A., 09; I. L. R., 15 Cal., 717; see *Anti* page, 186.

(10) L. R., 15 I. A., 51; See *Anti* page, 139.

THE RIGHT HON. LORD FITZGERALD :—

In this case the appellant was the decree creditor. The note for Rs. 2,000 was not originally passed to him, but he became the *bonâ fide* holder, and upon that note he obtained a money decree against the zamindar. An attempt has been made to impeach that decree which their Lordships will presently refer to. The decree creditor then took the ordinary proceedings to have the zamindari attached and sold. The son of the zamindar, who was the plaintiff in the suit now before their Lordships, intervened, and he first sought by petition an order that his interest in the zamindari should be excluded from the sale, and that the sale should be made subject to his right. It does not appear from any document before their Lordships what order, if any, was made on that petition; but their Lordships assume that the petitioner failed before the court below in obtaining that protection which he sought. Notwithstanding that petition, proceedings towards a sale went on, and upon the documents before their Lordships they must come to the conclusion that the thing professed and intended to be sold, and actually sold, was not the father's share, but the whole interest in the zamindari itself. Throughout this case the son does not appear to have ever contended that no more than his father's interest was sold. His case was that the whole zamindari was sold out and out; he impeached the debt which led to the sale, and asserted that the decree founded on it could not bind his interests. That impeachment of the debt has failed. It was said to have been for illegal and immoral purposes, and if it had been in its inception illegal and immoral, the son would not be liable to pay the debt, and the zamindari would not be the subject of sale. But that ground has entirely failed. The subordinate judge, who examined the evidence with the greatest care, correctly came to the conclusion that there was no satisfactory evidence that the debt was contracted for illegal or immoral purposes, and there is no doubt in the case that the original creditor advanced the Rs. 2,000 *bonâ fide*, and that it was a debt contracted by the father and coming within the ordinary rule of Hindu law with reference to an estate such as is now before their Lordships, that the son would be liable for the debt contracted by the father to the extent of the assets coming to him by descent from the father, and that his interest in the zamindari was liable and might be sold for the satisfaction of that debt. The son, having failed to get the protection which he sought by his petition, instituted this suit impeaching the debt and seeking to be absolutely relieved from it. He has failed entirely in that, and their Lordships quite agree with the judgment of the subordinate court that, failing in that, his whole suit failed. The plaintiff based his case upon the impeachment of the debt and upon that alone, and failing in that allegation and that impeachment, the whole suit fails. That being the case, there might have been a sale of this estate under this decree, including the whole interest or of so much as was necessary. Upon the documents their Lordships have arrived at the conclusion that the court intended to sell, and that the court did sell, the whole estate, and not any partial interest in it.

Their Lordships do not intend in any way to depart from principles which they have acted upon in prior cases. The High Court, in dealing with the case, entirely agrees with the subordinate judge in the view which he took of the evidence, and would so far confirm his ruling; but it says, "but in view of the recent ruling of the Privy Council that a sale in execution of a money decree of the right, title, and interest of an Hindu father will affect only the interests of the father, the plaintiff is entitled to a declaration that the sale in execution of the decree of 1879 has affected the interests of the first defendant only and not those of the plaintiff." The "recent ruling" referred to is probably that to

be found in *Hardi Narain Sahu* v. *Ruder Perkash Misser*(1).

The High Court seems to have acted on the rule so laid down as a rigid rule of law, apparently applicable to this particular case. But the distiction is obvious. In Hardi Narain's case all the documents showed that the court intended to sell and that it did sell nothing but the father's share—the share and interest that he would take on partition, and nothing beyond it—and this tribunal in that case puts it entirely upon the ground that everything showed that the thing sold was "whatever rights and interests the said judgment debtor had in the property" and nothing else.

Their Lordships are of opinion that the decision of the subordinate judge was entirely right, and that the decision of the High Court was wrong in holding that less than the entirety of the estate was sold.

Their Lordships therefore will humbly advise Her Majesty that the decision of the High Court varying the decision of the subordinate judge be reversed, that the appeal to the High Court be dismissed with costs, and that the decree of the subordinate judge be reinstated, and their Lordships give the appellant the costs of this appeal.

Solicitors for the appellant, *Messrs. Rowcliffs, Rawle & Co.*

1st and 2nd November 1888.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, and the Right Hon. Sir Richard Couch.

SECRETARY OF STATE FOR INDIA IN COUNCIL* ... *Defendant*,

and

LUCHMESWAR SINGH ... *Plaintiff*.

(1) L. R., 11 I. A., 26; I. L. R., 10 Cal., 626; 4 P. C. J., 510.

* 16 Cowell's Ind. Ap. 6; 16 Calc., 223.

On appeal from the High Court in Bengal.

Landlord and Tenant—Long continuance of a tenancy at a low and unvaried rent—Zemindar's right against tenant—Origin and special purpose of the tenancy—Cessation to use the land for such purpose—Burden of proving permanent tenure—Inference of tenancy-at-will, or from year to year.

The evidence having shown the origin and particular purpose of a tenancy, long continued at a low and unvaried rent, *viz.*, from 1798 until 1873, when the tenant ceased to use the land for the purpose; *held*, that it was not to be inferred from that evidence that an agreement had been made between the parties that the tenant should hold a permanent tenure; and *held*, that, on such cessation, the tenant could only resist a suit to eject him by proving, or giving grounds for the inference of, an agreement with the owner of the land that he should have something more of a lease than the ordinary tenancy-at-will, or from year to year; also, that the facts here presented did not lead to that inference.

APPEAL from a decree (20th August 1886) affirming a decree (14th July 1885) of the District Judge of Tirhoot.

The question raised by this appeal was whether or not the appellant, as representing the Government of India, had in former years obtained the perpetual tenancy of village lands, within the Zemindari of the Darbhanga Raj, at a fixed rent. The object of the plaintiff's suit was to establish his right to proprietary possession, as on the termination of a tenancy, of village Malinuggur which had been occupied at a rent, and without any written lease, by the Government of India, for the purposes of its stud at Pusa, from the year 1798, when the stud was established, to its closing in 1873. The defendant asserted a right to continue to hold the village at the same fixed rent, *viz.*, Rs. 972 per annum, which had never varied.

The issues raised questions as to the nature of the plaintiff's right, and of the defendant's possession; also whether the latter had been adverse to the former, and, if so, since when; and, generally, whether the plaintiff was

entitled to obtain possession from the defendant.

The village Malinuggur from time immemorial formed part of the Zemindari of Darbhanga. About the year 1764, before the East India Company obtained the Diwani, a jaghir for life of this village, and of others with it, was granted by the power then ruling to a Maharaja Rajbullubh, and, in February 1784, a sanad in affirmance of that grant was given to the jaghirdar by the Company. In 1798 the Company's servants arranged with him that the lands of Malinuggur, with another village, Iktiarpore, should be leased by him to the Government for the purposes of the stud then about to be established at Pusa. But, in July of the same year, before any potta was executed, the jaghirdar died; and the jaghir lands came into the possession of the Government authorities on the lapse of the jaghir.

The Zemindar of Darbhanga, Raja Madho Singh, predecessor of the respondent, whose rights as well as those of other Zemindars, to settlement of all the lands in their zemindaris, had been recognized in Regulation I of 1793, and whose lands had been made subject to the decennial settlement, arranged with the Government Officers that the lands of both the above villages should be made over to the Superintendent of the Stud at a rent.

On the 7th April 1800, the permanent settlement of the Tirhoot estates of the Darbhanga Raj was made, and an amaldastak recognizing the Raja's proprietary right in, among other estates, the resumed jaghir, was given to him. Annexed to the Raja's application for, and agreement to settlement, was a list containing the entry of Malinuggur among the villages in the Zemindari of Darbhanga at the rent then paid, *viz.*, Sicca Rs. 911. And on this paper it was that the insertion of the words, "Mokaerari Astabal Company," was made at some subsequent time.

From 1798, in respect of Malinuggur the Government made an annual payment of Rs. 972, which was not varied.

In 1860, by reason of the respondent's minority, his estates were placed under the charge of the Court of Wards, and so continued till their release in September 1879. In December 1872, the Government decided to close the stud establishment at Pusa, and the inquiries directed as to what lands connected with it were in the disposition of the Government led to the assertion by the latter of a right to hold Malinuggur as on a mokarrari tenure.

The District Judge found that, from the year 1800, the possession of the defendant had not been adverse to the plaintiff's right, and that limitation was no bar to the suit, and he referred to *Perhlad Sein* v. *Doorga Pershad*(1) as an authority to show that the plaintiff had a *primâ facie* title to the village as zamindar of the zemindari within which it was situate. He cited the observation of the Judicial Committee in that case to the following effect: "The appellant is the Zemindar. As such he has a *primâ facie* title to the gross collections from all the mouzahs within his zemindari. It lay upon the respondents to defeat this right by proving the grant of an intermediate tenure." His decree declared that the defendant had no right to permanently hold Malinuggur at a fixed annual rent, and awarded possession to the plaintiff.

On an appeal to the High Court, a Division Bench (WILSON and PORTER, J.J.) gave the following judgment:—

"Under Regulations, Government was bound to settle these villages with the proprietor, if willing to accept the terms of the settlement; and there is no evidence adduced on the part of Government to show that, at the time this village was settled with the Maharaja of Darbhanga in 1800, any arrangement was made that Government should hold the village in perpetuity at a fixed rate of rent. It is admitted that the village did remain in

(1) 12 Moore's I. A., 286 (331); 2 B. L. R., P. C., 111 (128); 2 P. C. J., 429.

the possession of Government for the purposes of the stud; but the terms on which the property was held are not apparent on the record, for we are not inclined to differ from the learned District Judge when he holds that the words 'Mokarrari Astabal Company,' in the petition for settlement of the 7th April 1800, are a subsequent insertion. Government has not produced any receipts for rent during the 73 years (1800 to 1873) the stud was in existence, although at paragraph 13 of the written statement put in on behalf of Government, it is asserted 'that from the date of the permanent settlement in 1800, the fixed annual rent of Sicca Rs. 911-10-6 has been paid to the Darbhanga Raj without variation or change.' The first evidence we can find of the payment of rent is in certain proceeding of 1876, when the Darbhanga estates were under the management of the Court of Wards. The Accountant of the Collector's Office, on being called upon for an explanation with regard to the *dastur* money payable to the Darbhanga Raja, writes, under date 8th February 1877: 'Besides the *dastur* money, Rs. 972-8 was paid on account of rent of the Government stud in Mouzah Malinuggur, Pergunnah Kusma, along with the *dastur* money, and has been so written.'

"In the following years, this money appears to have been incorporated with the *zar-dasturat*. We think that the District Judge in this case is right in holding that the onus of proving the nature of the tenancy rests with the defendant, who sets up a title adverse to the proprietor. It is a significant fact that all the other landed property acquired by the stud was held under *pottahs*; but with regard to this property no *pottah* is forthcoming, and doubts have always been expressed by the Government officers whether any proper title has been acquired thereto. It must be borne in mind that this village was acquired as an outlying farm for the purpose of pasturage and for growing oats. There can be little doubt, as pointed out by the learned Counsel for the respondent, that if the Stud Officers has found the land unsuitable for the purposes required, or if the village had been swept away by the river, Government might have given back the property to the Raja, who could not possibly have established, as against Government, any agreement to hold the village in perpetuity at a fixed rate of rent. As regards the contention that Government has expended a large sum of money in the improvement of this village, there is no evidence of this on the record. It is true that a bund was constructed to protect the village from inundation, and some trees were planted; but there is nothing to show whether that was done by Government or the tenants on the land.

"The fact that the Government has held a valuable property for more than eighty years at a very low rate of rent, and was permitted to do so without demur so long as the land was required for the public purpose for which it was originally granted, *viz.*, for the purposes of the stud, does not, now that the stud has been abolished, afford any answer to the claim of the Maharaja as proprietor of the estate to recover back his property.

"In this view of the case, we see no reason to disturb the decree of the Lower Court, and dismiss this appeal with costs."

On this appeal Mr. *W. F. Robinson*, Q. C., and Mr. *J. D. Mayne*, for the appellant, argued that the construction to be put on the whole transaction of 1798 was that the Government took possession of Malinuggur as of a tenure terminable at its pleasure only, and at a fixed annual rent. In the Courts below sufficient weight had not been given to the fact that the Government had been in possession since 1798 at a rent which had never varied, and without any proviso as to the continuance of the stud. The question was as to the inference that ought to be drawn as to the actual understanding, or agreement, that existed between Raja Madho Singh and the authorities. At the time when possession was obtained, the Government was in a posi-

tion to make terms more favorable to itself than the getting of a mere tenancy-at-will. The Government could have made another grant of the lapsed jaghir. The protection of tenancies at fixed rents came into the legislation of Regulation VIII of 1793 (see s. 49); and it was not the presumable agreement that the lands acquired for the Pusa stud, at that time established without any limit as to its duration, should be occupied for any period short of what the Government might determine. There was nothing in what was done in 1798, or 1800, to show that the Government altered their position, which originally was to take a mokarrari potta from the jaghirdar, into that of tenants-at-will to the zemindar, at a rent liable to enhancement from time to time. There was enough to shift the burden of proof on to the respondent to establish such a change in their plans.

Mr. *T. H. Cowie*, Q. C., and Mr. *R. V. Doyne*, for the respondent, argued that, upon the facts, there was no ground for the inference that the Government obtained a permanent lease at a fixed rent; and there were the findings of two Courts against it. The burden of proof was on the appellant to establish a permanent lease. As the Government might at any time, on discontinuing the stud, have relinquished the tenancy; so neither could the zemindar be held bound by the presumed grant of a permanent interest. The case cited in the judgment of the Court of first instance, *Perhlad Sein* v. *Doorga Pershad*(1) was referred to; and it was contended that is was not a tenable theory that, when the jaghir was attached in 1798 as lapsed, the Government so held the lands comprised on it as their own estate, that they could, in effect, confer upon themselves a perpetual lease, binding on the Raja, who was zemindar of Darbhanga, when he accepted the settlement. Unless carried to that extent, no argument could be founded on the lapse of the jaghir.

(1) 12 Moore's I. A., 286 (331); 2 B. L. R., P. C., 111 (128), 2 P. C. I., 429.

Mr. *J. D. Mayne* was heard in reply.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD HOBHOUSE:—

In this dispute about the village of Malinuggur, it appears that the Government of India have been in possession ever since the month of July 1798. It is not disputed that during the whole of that time, and for long before, the village was part of the *Milkiut*, that is, of the zemindari or proprietary estate of the Darbhanga Raj. The Raja now seeks to recover the property. The Government takes the ground that it has made to the Raja, in some shape or other, either as a matter of account or as a matter of actual payment, one uniform payment for 80 years before this dispute arose, and they claimed to be perpetual tenants of the village at a fixed rent. At one time, when they put in their written statement, the Government set up that there was an actual mokarrari lease granted to them, and they did so in perfect good faith, upon the ground that a document in the Collector's office, being the petition of the Raja for permanent settlement, contained a description of Malinugger as being the mokarrari property of the East India Company. It has however been found by both the Courts below that that description is an interpolation or a mistake of some kind, and that the true version of the petition is that which we have in the record, which, if their Lordships understand it rightly, is a copy of the original petition given out from the Collector's office to the Raja, and found in the duftur of the Raja. Therefore that contention is not now insisted upon; and their Lordships have it that in the petition of the Raja for a permanent settlement, which contains a list of a very large number of mouzahs, there are a considerable number, about 16, specified as being held under mokarrari grants and that the Mouzah Malinuggur is not so specified.

But then the Government say that, whether there is or is not a lease, the

true inference from the facts is that there was a binding agreement for a perpetual tenancy by them under the Darbhanga Raj. They insist very strongly that it would be irrational to suppose that for such a number of years the Raja would have gone on accepting a payment which had come to be very far below the value of the land, unless he was bound by an agreement of that kind.

That leads their Lordships to consider under what circumstances possession was first taken by the East India Company, and their payment to the Raj settled on the basis on which it has been made for so many years.

It appears that this village of Malinuggur was part of a jaghir granted to one Rajbullubh, apparently by the Nawab Nazim. It was granted certainly before the year 1764, and that was before the Diwani of Bengal, Behar, and Orissa was taken over from the Nawab Nazim by the East India Company. Therefore the British Government found the jaghirdar in possession. In the year 1784 his position was apparently confirmed by a grant from the British Government. Nothing turns upon the special language of that grant, and it is only valuable as showing what the position of the jaghirdar was at that time. It is clear that at that time the village was known to be part of the *Milkiut* of the Darbhanga Raj. What exactly the relations were between the Raja and the jaghirdar does not appear. But the jaghirdar was in possession, and of course were free of revenue.

In 1798 the Government desired to take the mouzah of Malinuggur for the purposes of a stud of horses which they were setting up, or had set up, in the immediate neighbourhood. Rajbullubh was quite willing that they should take his land, and he sent in an account of the revenues extending over 17 years with a request to know what the Government would propose to pay him, and to see the form of the potta that they proposed. Before anything further was done upon those negotiations, the jaghirdar Rajbullubh died. The next step in the transaction was that the jaghir was attached, which was done immediately, in the month of July 1798. Within a week apparently of Rajbullubh's death, the Company attached the jaghir, no doubt for the purpose of securing the revenue. Thus the Company got into possession.

The next step after that is the report of Mr. Graham, the Agent of the Company, which bears date the 27th August, 1798. After taking notice of what had passed with the jaghirdar, and of his death, and that the lands had been attached by the Government, he makes this proposal. He says :—" I now propose, as the lands (being part of the *Milkiut* of Raja Madho Singh)"—that is Darbhanga—" will continue in the hands of Government until the conclusion of the decennial settlement; that it be recommended to the Governor-General in Council to put the lands appertaining to mouzahs Malinuggur,"—and another village which we may leave out of consideration—" under charge of Captain William Frazer, the Superintendent of the Stud, at a net rent of Sicca Rs. 1,500 from the commencement of the ensuing Fusli year 1206"—that would be 1798 or 1799—" leaving it to the Collector to pay the Malikana to Raja Madho Singh," and so forth.

It would seem that what Mr. Graham advised was done. The Government were in possession; the decennial settlement was going on; their agent had come to a conclusion in his own mind what was a fair rent to pay for the village of Malinuggur; and he advises that the Superintendent of the Stud shall take possession and shall pay the amount which he had settled as fair. That seems to have been done, because, when we come to the permanent settlement, we find on the face of the Raja's petition, and again on the face of an account in the Collector's office, which shows the sums payable to Raja Madho Singh for the resumed Jaghir mehal of Rajbullubh, that those sums, so far as

they are due from Malinuggur, amount to the proportion attributable to Malinuggur of the Rs. 1,500 which Mr. Graham advised to be paid for the two villages. Upon that footing the permanent settlement was made. The Raja was the proprietor. The Company were bound by the Regulation to make the settlement with the proprietor. They did make that settlement, and, as far as their Lordships can judge, they made it exactly on the same footing on which they had been dealing with the village during the currency of the decennial settlement, that is to say, for the space of some two years before the permanent settlement was effected.

That is the whole of the contemporary evidence. There is no other evidence which bears upon the position of the parties excepting this, that we find that from that time forward up to the year 1872, matters remained in precisely the same position. The Government continued in possession of the village; they continued to use the lands for the purpose of the stud; and they continued to be charged at the same rate as was entered in the petition and in the Collector's account.

In 1872 the Government came to the conclusion that they had better give up the stud, and it was accordingly given up, and the village has been used for ordinary agricultural purposes since that time. At that time the present Maharaja of Darbhanga was an infant, and some three or four years after he attained his majority he demanded possession. The mode in which that demand was made, and the time at which it was made, have been observed on by the Counsel for the Government; but in their Lordships' opinion, nothing whatever turns upon the correspondence which took place in the years 1881 and 1883; but whatever were the rights of the parties in 1872, when the stud was given up, precisely the same rights exist now.

Under these circumstances their Lordships think there is no substantial doubt that the Courts below, who have both decided that the Government cannot establish the inference that they are perpetual tenants, are right. The Government undoubtedly are tenants of the Darbhanga Raj. It is for them to show why the landlord may not recover his property, and they can only do that by proving that there is some agreement between them and their landlord that they shall have something more than the ordinary tenancy-at-will or from year to year. All they offer is some conjecture of such an agreement founded simply on their long possession at a uniform rate of payment. If we could not find out the origin of these things, there would be strength in that argument, but as the origin of them is known the argument loses its force. In fact the possession is not difficult to explain in other ways. It is not the business of the plaintiff to explain the possession; it is the business of the defendants to show that it leads to the inference of a perpetual tenancy. But even if the *onus probandi* did not lie so clearly on the defendants, their Lordships think that the reasonable explanation has been given by the Courts below, and that there probably was some understanding which might have amounted to an agreement, that the Government should have this land for the purposes of a stud, not that they should have it for ordinary agricultural or commercial purposes to make what money they could of it. Thus the moment it ceased to be occupied for the purposes of a stud the rights of the landlord would revert, and it was he and not the Government who would have the benefit of the increased value of the land. That hypothesis seems more probable than the alternative one, and it is of course always more satisfactory when we can arrive at a reasonable explanation of the facts instead of merely resting the case upon the failure of one party to make out his case against the other.

The result is that their Lordships think the Courts below were quite right,

and that this appeal must be dismissed with costs, and they will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitor for the appellant; *The Solicitor, India Office*, Mr. *Treasure.*

Solicitors for the respondent; Messrs. *Sanderson & Holland.*

1st and 2nd November 1888.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse and the Right Hon. Sir Richard Couch.

HARI RAM AND ANOTHER* ... *Plaintiffs,*

and

SHEODAYAL MAL AND ANOTHER ... *Defendants.*

On appeal from the High Court for the North-Western Provinces.

Act VIII of 1871, Registration Act ss. 28, 64, 65, 66—Place of registration of documents.

The requirements of s. 28 of Act VIII of 1871 are fulfilled by the registration of a document relating to immoveable property in the office of the sub-registrar within whose sub-district any portion of the property is situate. The words "some portion of the property" are not to be read as meaning some substantial portion of the property. All matters of publicity which it is the object of a register to afford are provided for in this respect, by the carrying out of the provisions of ss. 64, 65 and 66.

APPEAL from a decree (9th January, 1885,) of the High Court (1) reversing a decree (24th December, 1884,) of the District Judge of Gorakhpur.

The question here was whether a mortgage deed, dated 20th May, 1873, had been sufficiently registered, with reference to the requirements of s. 28 of Act VIII of 1871, having been presented for registration, and registered, at the office of a sub-registrar in a sub-district, within which part of the property mortgaged was situate, that part having borne a very small proportion to the rest of the property.

That section (2) directs presentment for registration in the office of a sub-registrar within whose sub-district the whole, or some portion of the property, to which such document relates, is situate.

By the mortgage-deed of 20th May, 1873, Mr. R. P. Brooke, after recitals that he owed to Hari Ram and Raja Ram (the present plaintiffs) Rs. 2,59,594, and that it had been agreed that he should draw upon them down to October, 1873, to the further amount of Rs. 90,000, mortgaged to them his indigo factories and villages in the Gorakhpur district, also agricultural land in Champaran, and a plot of land, 500 yards square, in one of the mohallas in the town of Patna. This instrument was registered in the sub-registrar's office at Patna. Transactions continued between Brooke and the mortgagees, who were bankers in Patna, and who supplied him with funds, and the balance due was reduced. But in January, 1875, Brooke sold his interest in the already mortgaged estate to Sheodial Mal and Hardial Mal.

This suit was brought on the 1st June, 1878, by Hari Ram and Raja Ram to recover from Brooke Rs. 79,655, alleged to be due on balance of accounts, and to realize that sum by sale of the property mortgaged by him to the plaintiffs; also, to have declared invalid as being fraudulent and collusive, the sale of the property made by Brooke to Sheodial Mal and Hardial Mal, who were made the second and third defendants.

The latter, filing their written statements in 1879, set up limitation, and relied upon the sale to them. The first defendant Brooke who was absent from India when the suit commenced, returning

* 16 Cowell's Ind. Ap., 12; 10 All., 136.

(1) Reported I L. R., 7 All, 590.

(2) Not differing in this respect from s. 28 of Act III of 1877, the Indian Registration Act, 1877.

in 1881, admitted settlement of account, claiming certain deductions, and denied his personal liability.

Unless the instrument of 20th May, 1873, having been effectively registered, could be taken as admissible in evidence, the debt on the account stated would have been barred by lapse of time. The District Judge, however, found that the plaintiffs were entitled to recover the balance due to them under the mortgage-deed, and decreed to the plaintiff the amount claimed, less Rs. 15,104. He found that Brooke was the owner of the plot of land in Patna, and that, therefore, the mortgage had been poperly registered in the sub-registrar's office at Patna.

The defendants, Sheodial Mal and Hardial Mal, appealed from this decree to the High Court, which, on the 9th January, 1885, reversed it on the ground that the existence of property worth about Rs. 500 in Patna did not within the true meaning of section 28 of Act VIII of 1871 entitle the plaintiffs to have the mortgage-deed which had been registered in the sub-registrar's office at Patna, considered to have been effectively registered as a document relating to estate of a different nature and far more valuable, in fact, constituting the mortgaged estate, in Gorakhpur and Champaran. The decree of the High Court dismissed the suit.

The judgment is given in the report of the hearing on appeal to the High Court, at page 592 of the 7th vol. of the Indian Law Reports.

The plaintiffs appealed to Her Majesty in Council.

On this appeal,

Mr. *J. Graham, Q. C.*, and Mr. *J. H. A. Branson*, for the appellants argued that the High Court had erred in holding that the martgage-deed of 20th May, 1873, had not been duly registered as required by section 28 of Act VIII of 1871, both that Court and the Court below having found that some portion of the property, to which the deed related, *viz.*, Brooke's property in Patna, was situate within the Patna sub-registrar's sub-district. They referred to ss. 64, 65 and 66, and the provision made for the forwarding of copies of the document, endorsement, and certificate to the registrar of every district, and the sub-registrar of every sub-district, in which any part of the property might be situated, as securing the publicity which was one of the main objects of the Act, as observed in the judgment of the High Court.

Mr. *T. H. Cowie, Q. C.*, and Mr. *R. V. Doyne*, for the respondents, without relying on the proposition expressed in the judgment of the High Court that "portion" meant substantial portion, as that word was used in s. 28, contended that the registration was defective with reference to the entire disconnection between such property, on the one hand, as the indigo factory in Gorakhpur, constituting, with the other agricultural land in Champaran, the actual security given, and, on the other, the few yards of land in the town of Patna.

In regard to the merits of the suit, they also contended that the decree should be upheld on the evidence of satisfaction of the mortgage debt, examining the accounts for that purpose.

Counsel for the appellants were not called upon, either to reply as to the question of registration or to argue the subsequent matter of the accounts.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR RICHARD COUCH :—

The suit which is the subject of this appeal was brought by the plaintiffs, who are bankers, against the present respondents, who are also bankers, and against a Mr. Brooke. The plaintiffs the appellants sought to recover a sum of Rs. 79,655 as principal and interest, which they alleged to be due to them in respect of a mortgage executed by Brooke on the 20th May, 1873, the plaintiffs alleging that at that date Brooke adjusted his account and executed a mortgage for securing Rs. 3,49,504-4. There is no question that this mortgage was exe-

cuted by Brooke. The mortgage stated that there had been an adjustment of accounts between Brooke and the plaintiffs, and it was given to secure the money which was then due on the account, together with a sum of Rs. 90,000 to be advanced by the plaintiffs to Brooke for defraying necessary expenses of an indigo concern from May, 1873, to October of the said year. The defence of the present respondents, with whom alone their Lordships have now to deal, was twofold. Having become the purchasers of part of the mortgaged property, another part of it having been previously sold, they objected that this mortgage of May, 1873, was not duly registered; and they have also objected that the whole of the sum of Rs. 90,000 was not advanced before the 1st October, 1873, but a portion only was advanced, leaving a sum of about Rs. 30,000, which they say was subsequently advanced and is therefore not covered by the mortgage.

With reference to the objection as to the non-registration of the mortgage-deed, it appears from the schedule to the deed that it was a mortgage of a considerable property, only a portion of which, stated to be 500 yards of land built upon, was situate in the district of Patna; the other part, and of course much the largest part of the property, was situate in other districts. Act VIII of 1871, with regard to registration, contains this provision in s. 28:—"Save as in this part otherwise provided, every document mentioned in s. 17, clauses 1, 2, 3 and 4, and s. 18, clauses 1, 2, 3 and 4, shall be presented for registration in the office of a sub-registrar, within whose sub-district the whole or some portion of the property to which such document relates is situate." And this was an instrument which came within the provisions of this section. The registration was made in the district of Patna, where the 500 yards of land were situate. The Subordinate Judge held that this was a sufficient registration. On appeal to the High Court, the learned Judges of that Court, the Chief Justice and another Judge, held that it was not; and the ground upon which they came to that decision is stated by the Chief Justice to be this:—"In a case like the present, in which there is a large and valuable property in one sub-district, and another small piece of land situate at a distance, it seems to me that to allow registration of a document affecting both properties in the place where the smaller and less valuable is situate would be inconsistent with the implied intention of the Legislature that registration should be made with reference to the locality of the property,"—that a literal interpretation of the terms of the section ought not to be adopted; and that it was the intention of the Legislature that the registration should take place where some substantial portion of the property was situate.

It appears to their Lordships that this judgment puts a construction upon s. 28 which cannot be supported, and in fact imputes to the Legislature an intention which does not appear from the provisions of the Registration Act to have been their intention. The words, if we take them in their ordinary sense, "within whose district the whole or some portion of the property to which such document relates is situate," certainly do not show an intention that there should be any inquiry as to whether the place where the document was registered was the place where what may be called some substantial portion of the property is situate; and an inquiry of that kind might very frequently lead to considerable difficulty. But the intention of the Act is apparent from the subsequent provisions. In s. 64 it is provided that "every sub-registrar on registering a document relating to immoveable property not wholly situate in his own sub-district shall make a memorandum thereof, and of the endorsement and certificate thereon, and send the same to every other sub-registrar subordinate to the same registrar as himself in whose sub-district any part of such property is situate"; and then, "such sub-registrar shall file the memorandum in his book No. 1." S.65

and s. 66 contain similar provisions where the property is situate in more districts than one. Thus the information is conveyed to the registrars or sub-registrars of every place where the document ought to be registered, and thus all the information which it is the object of a register to afford is to be found in those different places. It appears to have been the intention of the Legislature in making those provisions that it should be sufficient that the registration be made by the parties, as is stated in s. 28, in the place where some portion of the property—not a substantial portion, but where any portion of the property is situate, leaving it to the office to do the rest. These provisions are calculated to effect that, and are in accordance with what might reasonably be supposed to be the intention of the Legislature.

Their Lordships, therefore, are of opinion that the decision of the High Court with regard to the want of registration of this mortgage cannot be supported. The consequence ordinarily would be that the decree of the High Court reversing the decree of the Judge of Gorakhpur, which was given in favour of the plaintiffs, would be reversed, and the decision of the Judge of Gorakhpur would stand. But their Lordships allowed the learned counsel for the respondents to submit to them, and argue, that the decision of the Judge of Gorakhpur was wrong, and consequently that, although the High Court had reversed it on a ground which cannot be supported, still, it ought to be reversed, and the decree reversing it ought to stand.

Now, it is to be observed that the Judge of Gorakhpur had very carefully considered the whole of the case, and had come to the conclusion that the balance which he found due to the plaintiffs, and which they were entitled to recover as mortgagees, was really due to them. The objection taken to his finding appears to be of a twofold character. It is said that only monies which had actually been advanced by the plaintiffs before the 1st of October, 1873, can be recovered by the mortgagees, and that the advances out of the Rs. 90,000 subsequent to that day did not become the subject of the mortgage. That depends upon the construction of the mortgage-deed. Their Lordships think that the mortgage was intended to cover the whole advance of the Rs. 90,000; and whether it was advanced before the 1st of October, 1873, or not, if the parties, that is Mr. Brooke and the mortgagees, thought fit between themselves to allow a portion of that Rs. 90,000 not to be immediately advanced, but to remain in the hands of the plaintiffs in a deposit account in such a way that he could draw upon them and obtain the money at any time, that it was really covered by the mortgage, and it is not an answer to the claim of the mortgagees in respect of the Rs. 90,000, that the whole of it was not advanced before the 1st October, 1873. The way in which the defendants seek to avail themselves of this objection is that they say that if they are right in that contention, and the mortgage only covered what was actually advanced before the 1st of October, 1873, the accounts show that the whole of the mortgage was satisfied, and consequently that the plaintiffs are not entitled to recover upon it as they claim. Their Lordships think that this cannot be allowed.

Then it is also contended that this money was not advanced. Mr. *Mayne* has argued that there is no evidence of it, but one of the defendants when examined said he did not deny that the money was advanced; and there cannot be any doubt the money was actually advanced.

Another answer to this contention on the part of the defendants appears to be this: On the 17th of September, 1874, Mr. Brooke, the mortgagor, settled an account with the plaintiffs, and the whole of the matters between them was gone into, and a balance was then agreed upon as due from him to the plaintiffs, including all these different items which would be the subject of the mortgage. The defendants acquired no interest in the estate till January, 1875, when they

took a conveyance from Brooke. Their Lordships are of opinion that the defendants are bound by the account which Mr. Brooke so settled, and that what he, when he settled that account, agreed to be due in respect of the mortgage, and the way in which the different payments appear to be appropriated, cannot be now disputed. They do not think it necessary to go into the evidence which Mr. Cowie, and Mr. Mayne, more especially, have referred to on the subject; but they think that if that evidence was gone into it would support the contention of the plaintiffs that the amount which the Judge of Gorakhpur has found to be due is realy due to the plaintiffs, and is the subject of the mortgage, and the plaintiffs are entitled to recover it as mortgagees in the way in which they claim.

The case appears to have been very carefully investigated by the Subordinate Judge, and unless their Lordships could see that he was wrong in the way he has dealt with the accounts, and the various facts in the case, they would not come to the conclusion that his decree ought to have been reversed by the High Court. The result is that their Lordships will humbly advise Her Majesty that the decree of the High Court should be reversed, and the appeal thereto dismissed with costs, and the decree of the Judge of Gorakhpur varied by omitting that part of it which directs the deed of sale to be cancelled. The costs of this appeal will be paid by the respondents.

Appeal allowed.

Solicitors for the appellants: Messrs. *Watkins and Lattey.*

Solicitors for the respondents: Messrs. *Barrow and Rodgers.*

6th and 24th November 1888.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, and the Right Hon. Sir Richard Couch.

KRISTOROMONI DASI* ... *Plaintiff,*

and

NARENDRO KRISHNA BAHADUR AND OTHERS } *Defendants.*

On appeal from the High Court in Bengal.

Hindu Law, Will—Construction of Will—Successive interests bequeathed—Gift over after life interest—Construction of gift to persons, and the heirs male of their bodies.

A will cannot institute a course of succession unknown to the Hindu law: and in conferring successive estates, the rule is that an estate of inheritance must be such a one as is known to the Hindu law, which an English estate tail is not. It is competent to a Hindu testator to provide for the defeasance of a prior absolute estate contingently upon the happening of a future event; but an important part of the rules relating thereto is: first, the event must be one that will happen, if at all, at latest immediately upon the close of a life in being at the time of the gift (as decided in the *Mallick case*) (1): secondly, that a defeasance, by way of gift over, must be in favour of some person in existence at the time of the gift (as laid down in the *Tagore case*)(2), the latter case deciding not only that a gift to a person unborn is invalid, but that an attempt to establish a new rule of inheritance is invalid.

A testator bequeathed the residue of his estate to his executors upon trust to pay the income to his daughter during her lifetime; and after her death in trust to convey the residue to his two half-brothers, in equal moieties, and to the heir or heirs male of their or either of their bodies, in failure of whom upon trust to give the same to the sons or son of his daughter. Both the half-brothers survived the testator. On the death of one of them, the daughter (to whom children, as well as to the half-brothers

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* 16 Cowell's. Ind. Ap. 29; 16 Calc. 313.

(1) *Soorjeemoney Dossee* v. *Denobundoo Mullick*, 9 Moore's I. A., 123; 1 P. C. J., 837.

(2) *Juttendro Mohun Tagore* v. *Ganendro Mohun Tagore*, L R., I. A., Su. Vol., 47; 9 B L. R., 377, 3 P. C J., 82.

had been born), making all persons interested parties, claimed that the trusts and limitations had become void as to one moiety of the residue bequeathed, and that she had become entitled thereto for the estate of a Hindu daughter. Of the children, all were born after the testator's death, save three sons of the surviving half-brother who were born in the testator's lifetime.

Held, that the gift of the residue, so far as it purported to confer an estate of inheritance on the half-brothers, and the heirs male of their bodies, was contrary to law and void; that the gift to the plaintiff's sons, unborn at the death of the testator, was incapable of taking effect: that each of the half-brothers took an estate for life in one moiety of the residue bequeathed, in remainder expectant on the death of the plaintiff: and that accordingly, on the death of the half-brother, who had died before this suit was brought, the inheritance of his moiety had devolved on the plaintiff, as daughter and heir of her father, and as she claimed.

APPEAL from a decree (16th December 1886) of a Division Bench of the High Court, in its Ordinary Original Civil Jurisdiction.

The question raised on this appeal was whether a bequest in the will of the late Raja Jadubindro Krishna Bahadur, deceased on the 22nd March 1852, had the effect of giving an absolute estate, or of giving an estate for life only, the testator's attempt to limit the succession to male issue of the donee failing, as contrary to Hindu law.

The appellant sued the representatives of the testator, who was her father, to have the will construed, and the rights of all parties declared under it. So much of the will, which was dated 5th March 1851, as is material appears in their Lordships' judgment.

The testator had two half-brothers who both survived him. He left no child but the plaintiff, his daughter, who was married, but had no children, when her father died, and to whom afterwards six sons, parties to this suit, were born. The deceased half-brother, Nripendro Krishna, had no son when the testator died, but two sons were born to him afterwards, *viz.*, the second and third defendants, Nil Krishna and Benoy Krishna. Narendro, the surviving half-brother, the first defendant in this suit, had three sons at the testator's death (one of them since deceased leaving a childless widow), and four sons born after the testator's death.

The plaintiff's contention was that, on the death of the half-brother Nripendro Krishna, which occurred on the 19th November 1885, as to all the moiety of the residue of the testator's estate to which Nripendro had been entitled, the trusts and limitations of the will, so far as they were legally capable of being carried out, had been satisfied and ended; and that the plaintiff, as the testator's only child, had then become entitled to that moiety, for the estate of a daughter, by the Hindu law of inheritance. This was claimed as additional to her right under the will to receive for her life the income of the whole residue.

It was contended in the written statements, filed on behalf of the second and third defendants, the sons of Nripendro Krishna deceased, that the two half-brothers took under the will an absolute interest in the testator's estate, subject to the plaintiff's life estate, and subject also to be divested in case Nripendro Krishna and Narendro Krishna should die without leaving an "heir or heirs male of their or either of their body." The second and third defendants also contended that if it should be considered that the half-brothers did not take such an absolute estate, then they, having been in existence at the death of the testator, were the proper objects of the gift in the will, *viz.*, "to the heir or heirs male of their or either of their body."

The six sons of the appellant were in the same interest with her, contending that no such estate as the testator had sought to create could legally exist. Also they contended that assuming gifts of life estates to the half-brothers with remainders to those who might answer the description of heirs male of the body, this was a gift to a class of which some members might not be capable of taking, and it was therefore void. They claimed as heirs of the testator in remainder, immediately after

the death of their mother, of all the estate not validly disposed of by the will.

The first of these contentions was allowed by the judgment of the High Court (PETHERAM, C.J., and MACPHERSON, J.) delivered by PETHERAM, C. J.,

This judgment stated that the claim of the plaintiff was that the gift of estate to her two uncles was more limited in its nature than the general law of succession would confer, and that the limiting the descent in their male line only was to attempt to create an estate repugnant to Hindu law, the latter being therefore null and void.

The judgment proceeded thus :—

"The rule of law, as established by the *Tagore case* (1) appears to be that, inasmuch as you cannot give an estate or any interest in it to a person not in existence at the death of the testator, you must give the entire estate with all its ordinary incidents of devolution to the person to whom it is to be given, because anything which is less than that limits his power of disposal over the estate, and therefore gives an interest to some particular line of succession that comes after him to the exclusion of others. This appears to be the rule, and it is said to apply to this case because the words 'to the heir or heirs male of their or either of their body,' which immediately follow the devise to the two half-brothers, are words of limitation, and that such a disposition was an attempt to create in perpetuity an estate in violation of the rule of succession according to Hindu law, somewhat similar to an estate tail, by which this property would devolve from generation to generation in the male line to the exclusion of all females ; and as that was not a gift of the entire estate to the first devisee, the devise beyond the interest of the first devisee must be limited by the ruling in the *Tagore case* to the life interest coming thereafter, and that consequently, one of the brothers who had no sons at the time of the testator's death, having died, there was an intestacy as to one moiety of the estate, and that the plaintiff is entitled to a decree as to that.

"Now, as I said before, the first question for us to consider is, whether that is the meaning of the testator, whether that is the meaning to be collected from the whole of the will. Having regard to the whole of the will, it seems to us that the testator's intention, when he made this will, was that in the event of his two half-brothers (or either of them) living at the time of his death, having male issue, the estate should go to them in equal moieties, but in the event of either of them dying, with reference to their issue, in the same condition that the testator was, that is to say, leaving no son, his own daughter should take the estate in preference to the daughters or widow of his half-brothers ; but all words, so far as we can ascertain, indicate that his intention was, that the estate, when vested in his half-brothers, should be an absolute estate and all that he had to give ; but that in the event of their not having any sons at the time of their death the estate should revert to the son or sons of his daughter, and that they should take the same estate as the testator's half-brothers would have taken in the first instance.

"Let us examine what the words are from which we come to that conclusion. It is necessary that there should be a verbal criticism of the language employed. The first devise is the devise of the income to the daughter, and as to that, as I have said before, there is no dispute ; and then comes a direction to the trustees, that upon the death of the daughter they are to pay over any cash that there may be in existence, and assign and convey the residue of the estate to his two half-brothers. It seems to us that the very use of the word 'pay' indicates that the intention of the testator was that the interest which the brothers were to take with the property so handed over to them was the entire interest in the property at the time. The fact of the trustees handing over the cash, and conveying the estate to the half-brothers of the testator is inconsistent with their handing over any thing else than the whole estate ; and therefore the use of the words 'to the heir or heirs male of their or either of their body,' is inconsistent with that view, if it has a tendency to limit that estate in any way.

"But when one comes to examine these words closely, so far from their being inconsistent with, they rather support that view of the meaning of the other words, and for this reason. As I said before, the property is to be paid and conveyed absolutely to the persons who may be found entitled to it by the first words of this clause, and it appears that the persons who, if they were living, were to be the recipients of the estate, were the two half-brothers of the testator, and then come the words 'to the heir or heirs male of their or either of their body,' but there are after these words no words of limitation or exclusion ; therefore, it appears to be pretty clear that the estate which was under any circumstances to be conveyed to the sons of the two half-brothers was to be an absolute estate, because, as I said just now, there is no attempt to limit it in any way. This shows that the intention was that whenever this estate was conveyed from his own trustees to his half-brothers who might be alive, or to their or either of their male descendants, it was to be an absolute estate as soon as it became vested in them.

"Then the question arises what effect ought to be given to the words which follow the word 'body,' 'in failure of which in trust to give the

(1) L. R., I. A. Sup. Vol., 47, 9 B. L. R., 377 ; 3 P. C. J., 88.

same to the son or sons of my said daughter', and whether if we attempt to give effect to them by giving effect to the view which we have formed of the general meaning of this devise, we shall contravene any rule of law.

"As I said before, the meaning of the first clause in our opinion is, that this estate is, upon the death of the daughter to be given absolutely to these two half-brothers of the testator, subject to anything that comes after. It appears from the *Tagore case*, as I said just now, that if that is a limited estate in the sense that it is an attempt to give anything to one then unborn, the devise to that person would be invalid. But it is established by the case of *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (1), and other cases besides, that although, according to Hindu law, it is illegal to attempt to give an estate to a person not in being, and that the estate which must be given to the first recipient must be the entire estate of the testator, it is competent to a Hindu in making his will to make a provision that the estate which he creates and gives to the recipient of his bounty may be divested or defeated by something which takes place after. That is established by this case, it is admitted by Mr. Evans and Mr. Kennedy, and may be taken as absolute law."

"Under these circumstances, it seems to us that this will may be read as carrying out what we consider to be the true intentions of the testator; which, as I have before said, we think was, that in the event of his two half-brothers having at the time of their death male descendants, they, if alive, or their families as representing them, if dead, should take the fee of this property, but that in the event of their having no male descendants at the time of their death, the estate should be divested, and go over to the son or sons of his daughter; and that we think can be carried out on the law as laid down in the case of *Bhoobun Mohini Debi* without prejudice to any rule of Hindu law.

On this appeal,—

Mr. *J. Graham, Q.C.*, and Mr. *R. V. Doyne* (Sir *Horace Davey, Q.C.*, with them) appeared for the appellant.

Mr. *T. H. Cowie, Q.C.*, and Mr. *J. Pitt-Kennedy*, for the six sons of the appellant.

Mr. *J. Rigby, Q.C.*, and Mr. *J. D. Mayne*, for the respondents, Nil Krishna and Benoy Krishna.

Mr. *J. Graham, Q.C.*, and Mr. *R. V. Doyne* for the appellant, submitted that the judgment of the High Court did not give due weight to the manifest intention of the testator to exclude in every event females from the line of succession, as shown, not only by the words "heir or heirs male of their" (*i.e.*, his half-brothers,) "or either of their body," but also by the words which followed, *viz.*, "in failure of which in trust to give the same to the son or sons of may daughter." These bequests were made with the intention of impressing on the testator's estate a mode of devolution declared in the judgment in the *Tagore case* (2) to be contrary to Hindu law, and therefore void. It was not the intention of the testator to give to his half-brothers an absolute estate subject to defeasance in the event of they or either of them dying without leaving male issue; but he intended to give them estates which should descend to their heirs male only, excluding the female line. The estate of inheritance, then, which the testator tried to create, was inconsistent with Hindu law, and the bequest could not take effect, at all events, for more than the lives of the half-brothers respectively. It would be contrary to the words of the will to make the estates of the half-brothers descend upon their heirs general, and a gift such as this, which was what in English law would be called an estate tail, must be cut down to a gift of a life estate, as it could not by any construction be expanded into a gift of the absolute estate.

They referred to the *Tagore case* (3); and *Tarakeshwar Roy* v. *Shoshi Shikareswar Roy* (4).

Mr. *T. H. Coiwe, Q.C.*, and Mr. *J. Pitt-Kennedy* for the sons of the appellant, were in the same interests, maintaining the invalidity of the bequest to the heirs male, and asking for costs out of the estate.

Mr. *J. Rigby Q.C.*, and Mr. *J. D. Mayne* contended that the Hight Court had been right in holding that the testator's half-brothers took an absolute estate defeasible only on their dying without male issue living at their deaths

(1) I. L. R. 4 Calc., 23; L. R., 5 I. A., 138.

(2) L. R., I. A., Sup. Vol., 47; 9 B. L. R., 377: 3 P. C. J., 88.

(3) L. R., 10 I. A., 51; I. L. R., 9 Calc., 952; 4 P. C. J., 439.

respectively. If effect were given to the construction for which the appellant contended, certain important words in the will would not receive their full force and meaning. Those words were directory, *viz.*, "to pay, assign, and convey," and showed that the trustees were to make over the *corpus* of the estate absolutely. Again, it was assumed, in the argument for the appellant, that the bequest, "and to the heirs male of their or either of their body", were words of limitation, and that the bequest was not one of purchase, to use a term of the English law, to the first taker. But to make this assumption was to introduce the rule in *Shelly's case* (1), a course most strongly to be deprecated in construing a Hindu will. The words "heirs male, &c.," were not words of limitation, and they should be struck out altogether; with the result that the gifts were absolute in the first instance. This case was distinguishable from the *Tagore case* (2), in which the first estate was one for life; it being here an estate to the half-brothers with a devise over to a class, *viz.*, those who might answer the description of the heirs of their body. The latter words did not qualify the estate given to the father, which was an absolute one when taken apart from the void limitation which followed it. *Tarakeswar Roy* v. *Shoshi Shikareswar Roy* (3) supported the respondents' case. The estate created in the half-brother was no unusal one, and that estate should receive effect by the will being re-moulded in accordance with the testator's views. They referred also to *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (4), and *Baker* v. *Tucker* (5).

Mr. *J. Graham, Q.C.*, replied.

Their Lordships' judgment was delivered by

(1) 1 Co. 96-a.
(2) L. R., I. A., Sup. Vol., 47; 9 B. L. R., 377; 3 P. C. J., 88.
(3) L. R., 10 I. A., 51; I. L. R., 9 Calc., 942; 4 P. C. J., 439.
(4) I. L. R., 4 Calc., 23; L. R., 5 I. A., 138; 3 P. C. J., 815.
(5) 3 H. L. C., 106.

THE RIGHT HON. LORD HOBHOUSE:—

The question in this case arises from a rather obscure passage in the will of Raja Jadubindro Krishna, who disposed of the residue of his estate in the following terms:—

"I give devise and bequeath the residue of my real and personal estate both joint and self-acquired unto my executors, in trust to pay the rents issues profits and income thereof unto my said daughter during her lifetime, and after her death in trust to pay assign and convey the residue of my estate real and personal to my half-brothers Rajas Nripendro Krishna Bahadur and Narendro Krishna Bahadur in equal moieties and to the heir or heirs male of their or either of their body, in failure of which in trust to give the same to the son or sons of my said daughter."

The will is dated 25th March 1851. The testator died in 1852. His daughter, who was his only child, is the plaintiff and appellant in this suit. She has six sons, all born after the testator's death. His brothers both survived him. One of them, Nripendro, has died, leaving only two sons, both born after the testator's death. The other, Narendro, is living. He had three sons born in the lifetime of the testator, of whom one is dead and two are living, and four other sons born after the testator's death. The defendants and respondents in this suit are Narendro, the surviving brother; his six surviving sons, and the representative of the one who has died; the two sons of Nripendro, who are also his executors; and the six sons of the plaintiff. Every person therefore who could possibly claim and interest under the residuary gift is a party to the suit.

The plaintiff contends that the residuary gift is invalid, except so far as it confers life interests on herself and her uncles, and that on the death of Nripendro the moiety of the estate designed for him or his heirs male became vested in her as her father's sole heir. The adverse contention is that the gift is made absolute to each of the testator's brothers, defeasible only in events which have not happened, *viz.*, in each case, the death of the brother without leaving male heirs of

his body then living. The High Court have adopted the latter view of the case, and have dismissed the suit. From their decree this appeal is brought.

The view of the High Court has been supported by the Counsel for the respondents, the brothers' families, who expressly stated that their argument, though endeavouring to amplify and illustrate the High Court's view, must be taken as not departing from it. The Hight Court considered that the true intention of the testator was "that in the event of his two half-brothers having at the time of their death male descendants, they, if alive, or their families as representing them if dead, should take the fee of this property; but that in the event of their having no such descendants at the time of their death, the estate should be divested and go over to the son or sons of his daughter."

This conclusion is rested, first, on the direction to the trustees to "pay, assign, and convey", which, it is said, shows that the whole estate is to be dealt with; secondly, on the circumstance that no words of limitation or exclusion are attached to the expression "heir or heirs male of his or their body;" and, thirdly, on a view of the law which is stated thus:—

"It appears from the *Tagore case* (1) as I said just now, that if that [the gift to the brothers] is a limited estate in the sense that it is an attempt to give anything to one then unborn, the devise to that person would be invalid. But it is established by the case of *Bhoobun Mohini Deba* v. *Hurrish Chunder Chowdhry* (2) and other cases besides, that although according to Hindu law it is illegal to attempt to give an estate to a person not in being, and that the estate which must be given to the first recipient must be the entire estate of the testator, it is competent to a Hindu in making his will to make a provision that the estate which he creates and gives to the recipient of his bounty may be divested or defeated by something which takes place after. That is established by this case, it is admitted by Mr. Evans and Mr. Kennedy, and may be taken as absolute law."

(1) L. R., I. A., Sup. Vol., 47; 9 B. L. R., 377; 3 P. C. J., 88.

(2) I L. R., 4 Calc., 23; L. R., 5 I. A., 138; 8 P. C. J., 815.

The rules of law thus stated do not bear directly on the decision of the High Court, because in their view the will does not, as events have turned out, purport to confer any interest on an unborn person, or any gift over on a contingency, but it leaves gifts, made absolute in the first instance, undisturbed by subsequent events. But the whole construction of the will has been argued, quite properly, with reference to these rules. It is important to have them accurately stated. And their Lordihips find that the statement of the High Court requires some qualifications.

The *Tagore case* decides not only that a devise to a person unborn is invalid, but that an attempt to establish a new rule of inheritance is invalid, which is more germane to the present case. There is no rule that the first recipient must take all the interest possessed by the testator, for limited interests are common enough. The rule is that if a Hindu donor wishes to confer an estate of inheritance, it must be such a one as is known to the Hindu law, which an English estate tail is not. In stating the rule relating to the defeasance of a prior absolute interest by a subsequent event, it is important to add, first, that the event must happen, if at all, immediately on the close of a life in being at the time of the gift, as was laid down in the *Mullick case* (1); and, secondly, that a defeasance by way of gift over must be in favour of somebody in existence at the time of the gift, as laid down in the *Tagore case*.

The *case of Bhoobun Mohini* conforms to all these rules. There was no gift over in that case. The donor made a gift to his sister Kasiswari in vernacular terms, which, though peculiar and referring only to lineal heirs, this Committee held to be identical in effect with other terms well known, and often used by Hindu donors who intend to pass the whole inheritance, though they mention

(1) Soorjeemoney Dossee v. Denobundhoo Mullick, 9 Moore's I. A., 123; 1 P. C J, 837.

only children or issue. Then he said, "No other heir shall be entitled." This was held to mean that, if Kasiswari died leaving no issue then living, her interest was to cease. In effect the construction was that, if Kasiswari left issue, the absolute interest given to her in the first instance was to remain unaffected, but if she left none, it was cut down to a life interest. In the latter case nothing had passed from the donor but the life interest, and when that was spent, he or his heir would lawfully re-enter.

Upon the construction of this will, their Lordships are unable to find anything which points to the death of the brothers as the time for ascertaining in what way the property is to be disposed of. The life of the daughter is the period for which the trust continues; it is on her death that the trustees are to pay, assign, and convey; and the question is, to whom? The payment, &c., is contemplated as a single act to be performed at one moment of time, and that time is the death of the daughter. The expression "pay, assign and convey" is important to show as much as that, but their Lordships do not enter upon any discussion, such as has taken place in England, as to the effect of such words upon the nature of the gift over. They treat the will in the same way as if the testator had said that, on his daughter's death, the property was to be held in trust for, or that it should go over to, his brothers and the other donees.

To whom then is the conveyance to be made? None is directed except to the brothers in equal moieties and to the heir or heirs male of their or either of their bodies (or, in simpler words, to the brothers and their heirs male respectively in equal shares), on failure of which to the sons of the daughter. Their Lordships cannot see where the absolute gift of the property to the brothers comes in. It is given, not to them, but to them and their heirs male. Why should the words "heirs male" be introduced at all, if an estate descendible to heirs general has previously been given? The words must mean either that the estate of inheritance given to the brothers is a qualified one, or that the heirs male are to take somehow by way of direct gift from the testator.

The latter of these two alternatives can only be reached by reading the word "and" as if it was "or." Indeed one passage of the judgment looks as if this construction was in the minds of the learned Judges. They point out that no words of limitation are attached to the words "heirs, &c." And they add, "This shows that the intention was that whenever the estate was conveyed from his own trustees to his half-brothers who might be alive, *or* to their or either of their male descendants, it was to be an absolute estate as soon as it became vested in them." This cannot refer merely to the circumstance that in making the conveyance after the daughter's death it might be necessary, if the brothers themselves were dead, to convey to their heirs, because, on the hypothesis of an absolute interest in the brothers, the conveyance would be to the heirs general, or it might be to the alienees, not to the male descendants.

The absence of words of limitation after the words "heirs, &c.," does not appear to their Lordships to be of much significance; but, as far as it goes, it rather favours the appellant's than the respondents' construction, because if "heirs, &c.," are themselves words of limitation, words of limitation attached to them would be inappropriate, otherwise they would be appropriate, and they would tend to show that the "heirs" were objects of direct gift.

But upon putting it to Mr. Rigby whether he claimed to read the word "and" in a disjunctive sense, he at once disclaimed any such contention; and, indeed, it is obvious that there are great difficulties in the way of such a construction, even if it would better the position of the respondents.

Their Lordships therefore find that the first of the two alternative constructions is the only possible one. The will is

composed in English; the draftsman seems to have had a smattering of English real property law; he clearly knew there was a difference between a son and an heir male of the body, and apparently he had English dispositions of property in his eye. This seems to be an attempt of a kind not infrequent among Bengal zemindars of late years to introduce English estates tail into Hindu property which the law will not allow. At all events their Lordships must construe the words in their plain and obvious sense; and finding no gift to the brothers, except that which orders a conveyance to them and the heirs male of their bodies, they hold that the intention was to confer on them an estate of inheritance resembling an English estate in tail male. That cannot take effect. But the testator intended to benefit his brothers personally; and his gift to them and their heirs male would, if valid, have carried with it the enjoyment by each of his share during his life. They think that this intention, though it is mixed up with the intention to give an estate tail, may lawfully take effect, as was held in the case of *Tarakeswar Roy* v. *Shoshi Shikareswar Roy* (1).

Whether the words which introduce the gift over, "in failure of which," import a general failure of the brothers' issue, is a point on which we need not speculate. It is possible that the draftsman, following English models, intended to give a remaindor after an estate tail; it is also possible that he was only thinking of the contingency that at the daughter's death, when the trustees came to convey, they might find neither brothers nor issue of brothers in existence. In the first case the gift fails with the estate tail after which it is limited; and in either case the gift fails, because the daughter's sons, being unborn at the testator's death, are incapable of taking anything from him.

It is suggested that a Court of construction may hold, in favour of the intention, that a fee simple or absolute interest is conferred by inapt words or dispositions, just as in English law an estate tail is often held to be conferred by inapt words or dispositions, because it comes nearest to effeeting the actual intention of the testator. But if this testator intended not to give an abolute interest, which their Lordships hold to be clear from his introduction of heirs male, it is impossible to say that his intention is more defeated by the law which cuts down his gift in tail to a life interest, than it would be by straining the will to give an absolute interest, in which case the property might pass away from the family to a mortgagee, or a general creditor, or a strange donee. Their Lordsdips would not be justified in taking any such liberty with the will.

The plaintiff prays for a declaration of rights, for possession of a moiety of the property, for a partition, and for the appointment of a trustee. The decree, after declaring the rights, gives directions as to the appointment of a trustee and the continuance of a receiver. Except as aforesaid it dismisses the suit. Their Lordships are of opinion that the decree should be discharged so far as it declares the rights of the parties, and so far as it dismisses the suit. Instead of the portion discharged there should be declarations that, according to the true construction of the will, the gift of the residue, so far as it purports to confer an estate of inheritance on the testator's half-brothers and the heirs male of their bodies, is contrary to law and is void; that in the events which have happened the gift to the sons of the plaintiff, the testator's daughter, is incapable of taking effect; that each of the testator's half-brothers took an estate for his life in one moiety of the residue in remainder expectant on the death of the plaintiff; and that, on the death of Raja Nripendro Krishna Bahadur, the inheritance of his moiety devolved on the plaintiff as her father's heir in remainder immediately expectant on her own life estate under the will, and she therefore became entitled

(1) L. R, 10 I. A, 51, I. L. R., 9 Calc., 952. 4 P. C. J., 439.

in possession to one moiety of the residue. The High Court should place her in possession of that moiety, and should take steps to effect a partition if either of the parties desires it.

As regards costs, the High Court thought it just that the several parties should bear their own. Their Lordships think that the rights of all parties under this perplexing will could not have been settled, as by this decree they will be, without bringing before the Court all parties for whom the will expressly designed gifts, or who, by a reasonable construction, could claim them. The suit, or some like suit, was absolutely necessary, and it is not too extensively framed. The case is one in which it is just to pay the costs of all parties out of the residue in dispute. The decree therefore should be varied on this point also. In all other respects it should be affirmed. Their Lordships will deal in the same way with the costs of this appeal.

They will humbly advise Her Majesty in accordance with this opinion.

Appeal allowed.

Solicitors for the appeallant : Messrs. *Watkins & Lattey.*

Solicitors for the respondents, the Coomars—Nilkrishna and Benoy Krishna : Messrs. *Lawford Waterhouse & Lawford.*

Solicitors for the respondents, the Mittras (sons of the appellant) : Messrs. *Watkins & Lattey.*

7th and 9th November, 1st. December 1888.

PRESENT :

Members of the *Judicial Committee.*—The Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten and the Right Hon. Sir Richard Couch.

BHUGWAN DAS* ... *Plaintiff,*

and

THE NETHERLANDS INDIA SEA AND FIRE INSURANCE COMPANY OF BATAVIA. } *Defendants.*

On appeal from the Court of the Additional Recorder of Rangoon.

Insurance—Marine Insurance—Open cover—Proposal to issue policy—Acceptance—Refusal to issue policy in terms of open cover.

An open cover to an amount stated for insurance on cargo to be shipped for a voyage in a ship (afterwards lost on that voyage) was given by the agent of the defendant company to the owner of the ship in order that he might give it to the charterer, and it was a proposal to insure. The owner transferred the open cover to the plaintiff, who, under charter with him, shipped rice and applied for policies to the amount stated in the open cover. The defendants' agent then refused to issue any policy on the rice so shipped.

Held, that the open cover, as given to the owner, constituted a subsisting proposal to insure, and as soon as application for the policy under it was made to the defendant's agent by the shipper, to whom the open cover had been transferred, there was a binding contract that a policy should be issued in its terms. That the shipper asked for two policies did not, under the circumstances, prevent there being an acceptance, there having been a refusal to issue any policy.

Appeal from a decree (23rd July 1886) of the Additional Recorder of Rangoon.

The suit out of which this appeal arose was brought by the appellant for the specific performances of a contract alleged to have been made by the respondents, through their agents to issue to the plaintiff a policy, of insurance on cargo shipped from Rangoon to Calcutta, there

* 16 Cowell's Ind. Ap., 60 ; 16 Calc., 564.

having been a refusal to issue the policy. and the ship having been lost on the voyage.

The plaint, filed 18th August 1885, alleged that on the preceding 8th March, the plaintiff agreed with Mr. James Macrory of Rangoon for a charter from the latter as owner of the ship *Copeland Isle* from Rangoon to Bombay, the latter undertaking to obtain insurance for such goods as the plaintiff should ship by her; that the plaintiff required Macrory to obtain insurance for Rs. 15,000 upon 1,000 bags of rice which he intended to ship, and disbursements on account of the vessel; and that Macrory applied to the agents of the defendant company at Rangoon to take an insurance risk to that extent, which the agents agreed to do, and in due course issued an open cover for the same. This open cover Macrory endorsed and made over to the plaintiff, in accordance with custom, and the plaintiff thereupon executed a charter-party. He afterwards shipped 1,000, bags of rice on the *Copeland Isle*, and disbursed on her Rs. 4,000, writing on 31st March 1885 to the agents requesting them to declare policies of insurance on 1,000 bags of rice, value Rs. 10,000; also on the disbursement of the vessel from Rangoon to Bombay, Rs. 5,000; and enclosed the premium. The plaint further alleged that the defendants refused to issue the policy; and lastly, the total loss of the *Copeland Isle*, and claimed specific performance.

The defendants by their answer denied that the open cover was given to Macrory as such, but alleged that it was given in answer to his question whether the Company was prepared to insure rice by that ship, and in order to be shown to other insurance agents as indicating that they considered the ship a fair risk. The form was not signed by the agents, nor registered by them in the Company's books, as it would have been had it been issued as a preliminary to granting a policy. They further alleged that the plaintiff was informed of the facts before the sailing of the ship; and that the open cover made no mention of disbursements: also that the indorsement and transfer took place without their knowledge, or notice to them; and they denied the alleged custom as to transfer of open covers: stating that Macrory had no insurable interest in the rice shipped and that the Company was not liable for the amounts claimed.

Issues were fixed raising the principal questions whether the open cover was a contract which the plaintiff could claim to have specially performed; under what circumstances it was granted to Macrory; and whether it was transferable or assignable by him.

The Additional Recorder found that what took place at the issue of the open cover was the following:—

"Macrory wanting to get a charter for his ship applied to the plaintiff who entered into negotiations with him and approved of the terms of the proposed charter-party: the plaintiff, however, made one essential stipulation, before concluding the charter-party; and that was that Macrory should produce to him something to show that insurance risks would be taken by the insurance companies on the cargo shipped by the vessel. In order to satisfy this stipulation Macrory went to various insurance offices starting with the agents of the defendant Company, and obtained the document sued upon, and four other open covers, which he endorsed over to the plaintiff, who then executed the charter-party. What happened seems to have been done in pursuance of a practice which has been followed by other local shipowners like Mr. Macrory, who, according to the evidence of Mr. Borland, apply to insurance agents here for open covers in order to be able to show them to persons whom they may ask to charter their vessels as a guarantee that cargo shipped by them will be insured."

The facts attending the plaintiff's application to Messrs. Gladstone, Wyllie & Co., as the defendants' agents, to declare policies of insurance on the rice, and on disbursement, and their refusal,

with the material part of the correspondence thereupon,—are set forth in their Lordships' judgment.

The Additional Recorder was of opinion on that the contract to issue a policy had never been enforceable, by reason of Mr. Macrory's not having had any insurable interest in the rice shipped in the *Copeland Isle*. He had no doubt that the giving of the open cover might initiate a contract for insurance. But of that contract one of the most essential principles was that the assured should have at the time of the making of the contract an insurable interest in the subject-matter insured, and no such interest existed at the time. He was also of opinion that no custom in variation of this general principle, admitting the transferee who ultimately might become the shipper, to stand in the place of a person receving the open cover, had been proved to prevail in Rangoon. Nor in his opinion did the relation of agency between the plaintiff and Macrory exist, it being the fact that at the time when Macrory was effecting the arrangements which he made with the insurance agents, it was uncertain whether the plaintiff would ship any rice on board the vessel. For these reasons he dismissed the suit with costs.

Mr. *J. Gorell Barnes. Q.C.*, and Mr. *A. Agabeg*, for the appellant, argued that the judgment was incorrect in holding that the case turned on the absence of an insurable interest in Macrory at the time when he received the open cover. It had ben settled for a century past that it was sufficient for the party assured to have an interest at the date of the contract. This the plaitiff had when he accepted the offer of insurance previously made in the open cover. The contention on his behalf was that he accepted the terms offered to any shipper who should ship under charter v ith Macrory, which terms, in effect, were those of the open cover. It was further contended for the appellant that when he signed the charter-party, which he did upon the faith that he could have the policy referred to in the open cover, there was an adoption by the appellant of the terms, and thereupon a completed contract between him and the respondents who had offered those terms. The Court below had erred in holding that the evidence as to the mercantile usage regarding the issue of open covers was insufficient and in not holding that the plaintiff as principal was entitled to enforce the contract on which he sued.

They referred to Arnould on Insurance, 6th Edition, Part 10, Chapter III; *Sutherland* v. *Pratt* (1); *Irving* v. *Richardson* (2); *Routh* v. *Thompson* (3); *Fisher* v. *The Liverpool Maritime Insurance Company* (4); The Specific Relief Act, I of 1877, s 22; Fry on Specific Performance.

Mr. *A. Cohen, Q.C.*, and Mr. *R. G. Arbuthnot*, for the respondent Company, argued that the suit had been rightly dismissed. Macrory could not, by assigning the so-called open cover, confer greater rights on another than he had in himself; nor had the supposed custom, to issue open covers by the insurance agents to serve as an offer to any shipper subsequently coming forward to accept them, been proved to prevail in Rangoon. There were doubts how far such a custom would be enforceable. Again, it was argued that there was ground for the finding that there had been no relation of principal and agent between the appellant and Mr. Macrory in the obtaining the open cover; as to which it was open to doubt whether the document had been given as an open cover at all. Its effect might be considered to have been only that the Company regarded the shipment as a fair risk. Lastly, as to the acceptance, without which the case for the appellant must fail, to whom could it be said to have been addressed; and when was it complete. In regard to these points, the evidence did not enable the plaintiff to recover. They cited

(1) 11 M. & W., 296.
(2) 1 Mood. and Rob., 153; 2 B. and Ad., 193.
(3) 11 East, 433; 13 East, 279.
(4) L. R., 8 Q. B., 462; L. R., 9 Q. B., 425.

Dickenson v. *Dodds*(1), *Mackenzie* v. *Coulson*(2).

Mr. *J. Gorell Barnes, Q.C.*, replied, arguing that there had been a complete acceptance by the plaintiff of a previous offer, made through and by means of the open cover, in which there was no necessity for persons to be named. He cited *Weidner* v. *Hoggett*(3), *Ionides* v. *Pacific Insurance Company*(4), *Great Northern Railway Company* v. *Witham*(5), *Morrison* v. *Universal Marine Insurance Company*(6), *Lishman* v. *Northern Maritime Insurance Company*(7).

Their Lordships' judgment was afterwards (1st December) delivered by

THE RIGHT HON. SIR RICHARD COUCH :—

The appellant in this case brought a suit against the respondents, for specific performance of a contract of insurance. The Recorder of Rangoon, in whose Court it was brought, dismissed the suit with costs, and this appeal is from that judgment.

In March 1885, one John Macrory, a ship builder and owner of a vessel called the *Copeland Isle* then lying in Rangoon river, applied to the plaintiff, a merchant carrying on business at Rangoon, and also at Calcutta and Bombay, to charter that vessel. The evidence of the plaintiff, who was examined as a witness, was as follows :—

"I said to Macrory that if an open cover were given to me free of particular average, I would charter the vessel. When the charter-party was drawn and brought to me by Macrory and Sutherland (one of the brokers who arranged the charter) I said : 'Where is the open cover?' Then Mr. Macrory gave me this open cover, with these five others. When I got these the charter-party was signed by me. I shipped goods on the *Copeland Isle*. I shipped my own goods, 6,220 bags of rice. This is a copy of the charter-party. Subsequently I went to Messrs. Finlay Fleming, Messrs. Strang Steel, and Messrs. Gladstone Wyllie's, for policies on the covers. I got policies from all, except from Messrs. Gladstone Wyllie. I went to Gladstone Wyllie's and saw Mr. Bertram. I went three times to them before I wrote to them. Once I saw Mr. Bertram, and twice Mr. Gordon. I showed Bertram the open cover, and asked him for policies for Rs. 10,000 for 1,000 bags of rice, and Rs. 5,000 for disbursements. Mr. Bertram said : 'We have given a policy to a chetty.' That was, I believe, for Rs. 17,500. I said : 'I have no concern with the chetty's policy. I want the policy for my goods.' Bertram said he would not give one. I then went to Gordon, who was the then Manager of Gladstone Wyllie's Gordon said. 'I cannot give a policy, go to Mr. Macrory.' I went that day or the next day with Macrory to Gordon. Macrory asked Gordon to give the policy, as the ship was to be cleared. He spoke for a long time, and so did I. We both pressed Gordon to give one, but he said he would not. Then I said : 'If you do not give one I will send the customary notice.' Afterwards I addressed a letter to Gladstone Wyllie as the agents of the defendants' company."

The open cover was in these terms :—

"*Rangoon, 9th March 1885.*

"NETHERLANDS INDIA SEA AND FIRE INSURANCE COMPANY OF BATAVIA.

"Dear Sir,

"We hereby consider you insured under an open cover to the extent of rupees fifteen thousand only, on rice per *Copeland Isle*, Captain————, Rangoon to Bombay.

"Premium, 2 per cent.

"Free of war risks.

"Average f. p. a.

(1) L. R., 2 Ch. D., 463.
(2) L. R. Exch., 368.
(3) L. R., 1 C. P. D., 533.
(4) L. R., 6 Q. B., 674.
(5) L. R., 9 C. P. D., 16.
(6) L. R., 8 Exch., 40.
(7) L R,, 8 C. P., 216 ; L. R., 10 C. P. 179.

"Policy to be applied for before the ship sails, and vessel to be towed by steamer to sea.

"Yours faithfully,

"GLADSTONE WYLLIE & Co.,
"J. R. BERTRAM,

Agents in Rangoon.

"To R. MACRORY, ESQ."

(On the back:) "J. MACRORY."

The letter to Gladstone Wyllie as the defendants' agents above-mentioned was dated the 31st March 1885, and requested them to declare policies of insurance on 1,000 bags of rice, value Rs. 10,000, and on disbursements of the vessel from Rangoon to Bombay Rs. 5,000, and it enclosed Government promissory notes for Rs. 300 for the premium. Gladstone Wyllie & Co. replied by letter, dated the 1st April 1885, saying: "As we did not grant you an open cover by the *Copeland Isle*, we regret we cannot issue a policy, and we return Rs. 300 in Government currency notes which you sent us." On the 1st April the plaintiff again wrote, stating that Macrory had transferred the open cover to him, and enclosing it with the Government notes, to which Gladstone Wyllie & Co. replied on the 2nd April that they could not recognize the transfer by Macrory of the open cover, and that they never entered into any engagement to grant the plaintiff a policy for Rs.15,000.

Although the plaintiff at the interviews with Bertram and Gordon, and in his letter of the 31st March, asked for two policies, he appears not to have insisted upon having the insurance in that way, and the defendants' agents did not take the ground that the open cover did not bind them to give a separate policy for disbursements, but absolutely refused to issue any policy. Their Lordships think the defendants cannot say that the plaintiff was not willing to take a policy on rice for Rs. 15,000. Whether upon such a policy he could recover the disbursements or the Rs. 4,000 advanced on account of freight it is not now necessary to determine. In his plaint he has simply asked for a policy of insurance in terms of the open cover.

When the defendants' agents refused to issue a policy to the plaintiff, he endeavoured to obtain an insurance on the cargo uninsured from other offices in Rangoon and Bombay, but did not succeed. The *Copeland Isle* proceeded on her voyage to Bombay on or about the 1st April 1885, and was totally lost in a cyclone on the following 10th of June.

To return to the evidence. About the open cover, Macrory said (omitting passages which it is not necessary to read):—

"I remember this open cover. I got it for the charterer, Bhugwandas. I was to see if an insurance could be effected on the cargo before he would sign the charter-party. I made it over to Bhugwandas, and endorsed it. . . . I made all the covers over to him on his signing the charter-party. . . . I saw Mr. Gordon when I first got this open cover. . . . I asked Mr, Gordon if he would take a risk, as I could get a charter if he would take a risk. I did not say that I only wanted it to show to other Companies, and not as an undertaking to issue a policy. . . . Mr. Bertram was present in Gordon's room when I had the conversation with Mr. Gordon, and immediately after I got the open cover. . . I went out of Gordon's room with Bertram. I got the open cover from Bertram in his room. I talked to Bertram there about the ship and the money I had expended on her, and the condition she was in. I said that if I could get an insurance I could effect a charter. I mentioned Bhugwandas as the charterer. . . . I asked Gordon whether he would insure a part of the cargo, or as much as he could take. When he said he could take up to Rs. 15,000, I asked for an open cover to that effect. I think the open cover was taken out of a book. I do not remember who put to stamp on."

Mr. Gordon was not examined as a

witness, and there was a satisfactory explanation of this omission. Mr. Bertram was examined and said:—

"I am an assistant in the firm of Messrs. Gladstone Wyllie & Co., in Rangoon. The firm are the agents of the defendants' Company in Rangoon. I saw Macrory on the 9th March 1885, with reference to the vessel the *Copeland Isle*. He came to me personally at half-past two. . . . He asked me for a chit to show the other insurance offices that we were prepared to take insurance on the *Copeland Isle*; of course that had reference to what had previously taken place when the matter was arranged by Mr. Gordon. . . . I heard Gordon tell Macrory that he would be willing to take a risk up to Rs. 15,000 on the vessel for the defendant Company. . . . At this second interview Macrory asked if we would give him a letter to show to Steel's and to Finlay's so that they could see that we were willing to take insurance on the vessel. I gave him a paper. This (the open cover) is the paper I gave. I used this form because he wanted something definite to show to people, mere word of mouth not being sufficient. I chose an open cover form because it was the most convenient thing we had, and it was much easier for me to fill up this form than to write an open letter. . . . We said that we were prepared to accept a risk on the *Copeland Isle* to the extent of Rs. 15,000. Nothing was said about giving an open cover or a policy. Gordon said this. . . . We knew at the time Macrory had no rice to ship."

Mr. John Anderson, a witness for the plaintiff, whose firm are agents for several Marine Insurance Companies in Rangoon, said:—

"An open cover is issued generally before the shipment of the goods to be insured. After the goods are shipped the party producing the open cover gets a policy on payment of the premium. I do not know if we ever had a case of the kind, but our firm would issue a policy to the person producing the open cover to us, notwithstanding the open cover had been issued in another person's name." On cross-examination he spoke to the same effect.

Mr. John Borland, another witness for the plaintiff, whose firm at Rangoon also are agents for several Marine Insurance Companies, said: "If we issued an open cover to *A*, and afterwards *B* shipped the cargo, we should have no objection to issuing the policy to *B*." And on cross-examination: "I have many times issued an open cover to a man who has not an insurable interest. If Macrory came to us and told us he could not get a charter unless he got open covers on the cargo to be shipped, we would issue open covers to him, and look to him for the premium until we had intimation that the cargo had been shipped by some one else, and that the open cover was held by the shipper."

Upon the evidence in the suit their Lordships have come to the conclusion that the open cover was given to Macrory in order that he might give it to the charterer of the vessel, and that it was a proposal to insure. Although addressed to Macrory, it could not have been intended for his acceptance, as it was known that he was not going to ship the rice. When he handed it to Bhugwandas it was a subsisting proposal capable of being accepted by him, and when Bhugwandas went to Gladstone Wyllie's and showed Bertram the open cover, and asked him for policies, there was an acceptance of the proposal so as to make a binding contract with Bhugwandas to insure and issue a policy in terms of the open cover. The asking for two policies did not prevent the acceptance being sufficient, as Bertram absolutely refused to give any policy.

The letter of the 1st April 1885, refusing to issue a policy, and of the 2nd April, refusing to recognize the transfer to Bhugwandas of the open cover, have been noticed. It is to be observed that neither in the interviews with Bhugwandas, nor in the letters, was it said that the paper given to Macrory was not intended to be an open cover. Indeed,

in the letter of 2nd April it is so called. It was argued by the learned Counsel for the appellant that the contract became complete when the charter-party was signed, and the proposal to insure was acted upon. It is not necessary for their Lordships to give any opinion upon this contention, as they hold that the acceptance by Bhugwandas was made whilst the offer to insure was subsisting, and was sufficient to complete the contract. The plaintiff is entitled to specific performance, and their Lordships will humbly advise Her Majesty to reverse the decree of the Recorder's Court, and to make a decree that the defendants or their agents do make and issue a policy of insurance in terms of the open cover, and for the amount therein mentioned, and do pay the costs of the suit. The respondents will pay the cost of the appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Bramall & White.*

Solicitors for the respondents: Messrs. *Freshfield & Williams.*

13th, 14th and 15th November 1888.

PRESENT.

Members of the *Judicial Committee.*—The Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, the Right Hon. Sir Richard Couch, and the Right Hon. Mr. Stephen Woulfe Flangan.

SHANKAR BAKSH* ...*Defendant,*

and

HARDEO BAKSH AND OTHERS...*Plaintiffs.*

On appeal from the Court of the Judicial Commissioner of Oudh.

Hindu law—Partition—Inheritance of talukdari estate in Oudh—Sanad recognizing primogeniture, Effect of as to existing rights of inheritance—Shares held by members of family—Mesne profits on specific and definite shares.

The ordinary rule is that if persons are entitled beneficially to shares in an estate they may have partition. Although in a suit for the partition of joint family estate, where the head of the joint family does not account for the profits, under the ordinary Hindu law, mesne profits are not recoverable, it is not so where the family has been living under a clear agreement that the members are entitled, not as an ordinary Hindu family, but in specific and definite shares. If the enjoyment of those shares is in any way disturbed, the right to sue for profits will arise, as well as the right to partition.

A talukdari estate which, before and after annexation, was subject to the common Hindu law of Oudh, *viz.*, the Mitakshara, was restored, after the general confiscation of 1858, to the family, which received a sanad recognizing the shares of its members. At the same time, a grant was made to the head of the family as talukdar of two other villages, and to him afterwards, in 1861, was issued a primogeniture sanad of the above talukdari estate. This sanad could not prevail against the family rights of inheritance; and effect was given to family arrangements, with the same result as regards the two villages.

On the contention that the family, by the effect of the sanads, was to have one head and sole manger in the talukdar, who, being accountable to the junior members for their shares of the profits, was alone to hold the entire estate by primogeniture: *Held*, that this kind of managership was entirely unknown to the common Hindu law of Oudh; and that, apparently, the Oudh Estates Act, 1869, did not contemplate any such thing. At all events there must be clear arrangements, such as were not found here, to establish and prove its existence. Partition was, accordingly, decreed to the members of the family suing for it.

Pirthi Pal Singh v. *Jawahir Singh* (1), as to the right to partition of a talukdari estate, referred to and followed: also, the same case in regard to profits, where the members of a family are entitled to specific and definite shares not as members of an ordinary joint family.

APPEAL from a decree (12th March 1883) of the Judicial Commissioner, confirming, after a remand (27th April 1882), a decree (17th April 1881) of the District Judge of Sitapur.

The plaintiffs in the suit out of which this appeal arose, Hardeo Baksh, Jagan Nath Singh, and Ganga Baksh, sued for separate possession of their several shares, upon partition of family talukdari estate, together with their shares of profits therein for the Fasli year 1288; claiming

* 16 Cowell's Ind. Ap., 71; 16 Calc., 397.

(1) L. R., 14 I. A., 37; 4 P. C. J., 758.

also their shares in the other property of the family.

The defendant, Shankar Baksh, denied their right to partition, alleging that they were entitled only to maintenance out of the profits of the talukdari estate, which he claimed as inherited by himself, according to the rule of primogeniture; the latter having been, as he alleged, established by sanad in regard to the taluk.

The principal question, on the whole case, having been whether the talukdari estate descended to the eldest son alone, or was subject to division into shares, in the course of this appeal, the defence on which reliance was mainly placed, on behalf of the appellant Shankar Baksh, was that, notwithstanding that there was participation between the members of the family in the profits, or a beneficial interest in the talukdari estate to that extent, their rights went no further, and that by the effect of the primogeniture sanad, the eldest son was entitled to be sole talukdar, having the management of the estate in his hands, subject to the trusts for the benefit of the other members.

On the annexation in 1856, a talukdari estate, Rampur Kalan, in the Sitapur District, was settled with Anant Singh, Balwant Singh, Hardeo Baksh, the three sons, and with Jagan Nath Singh, the grandson of Dariao Singh, a Kanungo in Oudh. After the Mutiny settlement was made with, and a sanad dated 25th October 1859 was granted to, the same four persons. At the same time separate sanads were given to Dariao Singh as sole talukdar of the separate villages of Saraiyan and Piprawan, which, out of confiscated lands not restored to the previous owner, were granted to him as a reward for his services.

In 1861, Dariao, having received the circular regarding the descent of taluks to one talukdar, replied that the taluk Rampur Kalan was held by the family in shares, also recognized by the sanad of 1859, and that there was no occasion for a new one. The primogeniture sanad, to which the present question related, was however sent to and retained by him.

On the 2nd September 1867 he died; and, in the following December, mutation in the revenue register was made in the names of the four persons above-named.

At the regular settlement, the shares of the brothers were recorded thus: Anant Singh, 6 annas; Balwant Singh, 5 annas; Hardeo Baksh, 5 annas.

On 3rd November 1871, Balwant, the second son, died; and mutation of name was made in favor of his two sons, Jagan Nath and Ganga Baksh, on the application of Anant Singh, their uncle.

In the official list of talukdars down to 1878, the names of all the sons and grandsons of Dariao were mentioned. Anant Singh, the eldest son, died on 11th October 1879; the name of Shankar Baksh, his son, being entered in his place and the amount of his share being recorded as 6 annas.

In or about 1880, differences arose between Shankar Baksh on the one side and Hardeo Baksh and Jagan Nath on the other, in regard to the question of the rule of inheritance in the talukdari, with the result, after other litigation, that the present suit was instituted.

The District Judge found that the property was ancestral, save the two villages acquired by Dariao, and a small part consisting of purchases by the family: also that the whole was held by the members of the family in specified shares. He referred to the cases of *Hardeo Baksh* v. *Jawahir Singh*(1), adding that, apart from the admissions of Dariao Singh, and his son Anant Singh, "as to the rights of the plaintiffs, their names are entered in the khewats as recorded proprietors, and these papers have been attested both by Dariao and Anant Singh, and upon that point there is and cannot exist any dispute. The plaintiffs, moreover, are in possession up to the present date. They are in the enjoyment of the usufruct according to their respective shares in the

(1) L. R., 4 I. A., 178; 3 P. C. J., 704.

estate, and their status as such has never been once disputed, except by the present defendant."

His Judgment also stated the following:—

"A Commissioner was appointed under the provision of s. 392, Act X of 1877, to make a local investigation as to the exact value of the moveable property appertaining to the estate as well as the profits due to the plaintiffs as recorded proprietors according to the shares so recorded. As, however, the defendant admitted that the profits claimed by the plaintiffs were correct, there was no need for futher enquiry upon that point, and the Commissioner's enquiry was therefore limited to the moveable property of the estate. The Commissioner's report, upon that question is full and satisfactory, and as no objections have been raised to that report, the finding of the Commissioner will be accepted as correct and binding upon the parties to the suit."

The District Judge's decree was "for the plaintiffs to the extent of a 10 anna share in the entire estate, Rs. 88,182; moveable property of the estateRs. 20,797 as profits, and Rs. 12,065 debts due to the estate. The partition will be made by the Collector under s. 265 of Act X of 1877."

On the defendant's appeal, the suit was remanded, under s. 562, Civil Procedure Code, by the Judicial Commissioner, for the evidence of same witnesses tendered, but not examined. The result was the same decree. The Judicial Commissioner upheld it, in a Judgment of which the material part was as follows:—

"I agree with the District Judge that the fact that a primogeniture sanad was granted to Dariao Singh cannot deprive his younger sons of rights which were acknowledged before the grant of that sanad, and were admitted and recorded in the settlement papers after the grant of that sanad.

"All the evidence tends to show that, though the members of the family had agreed as to the manner in which the property should be divided if a separation should take place, they continued to live as a joint family. Had Hardeo Baksh, for instance, had no share in the estate, villages would not have been purchased in his name from the profits of the estate. But the main contention is that, after the declaration of definite and certain shares, the joint family could no longer exist: such a declaration being incompatible with the status of a united family.

"It appears to me that the intention of the parties must be looked to. In the settlement record the share of each brothers was recorded, but no separation ever took place. The members of the family continued to live together, there was no division of profits, there was nothing in fact to show that any separation of right or of property took place or was intended to take place. The family having recorded that the share of the the elder branch should be 6 annas and the shares of the younger branches 5 annas each continued live in union. The arrangement could not come into effect till the family separated. Acting on this arrangement the plaintiff's, respondents, have now sued for their share as representatives of the two younger branches, not for their legal shares as three members of an undivided Hindu family.

"I am of opinion that, though the share which each branch should eventually have was defined anything, like an actual separation of rights or of property was indefinitely postponed, and that the family still remained joint and undivided.

"The last objection is that, though there is not a title of evidence of appellant having any moveable property in his possession, the lower Court has decreed Rs. 88,182.5-6 on this account,—and that the law did not authorize the Judge to delegate his function by appointing a Commissioner to value the property.

"It appears that on the 5th July 1881, the District Judge appointed a Commissioner under s. 392 of the Civil Procedure Code, to ascertain the value of the moveable property referred to in the 12th issue, which was "what is the nature and value of the moveable property in the whole estate." The defendant's agent attended the Commissioner; it has not been brought to my notice that the defendant made any objection to the appointment; it was not made a ground of appeal in the first appeal, and I do not see that the appointment was contrary to s. 392 of the Code of Civil Procedure, which empowers the Court to issue a Commission "for the purpose of.....ascertaining the market value of any property." The Commissioner has given full details of the property, and no objection has been taken to the items. I disallow the general objection and uphold the District Judge's finding regarding the amount to which the plaintiffs respondents are entitled as their share of the moveable property."

On the 8th September 1883, a certificate under s. 600 of the Civil Procedure Code (Act XIV of 1882) was granted by Judicial Commissioner. On the 13th

June 1884, the appellant applied to withdraw his appeal, and to have back the security bond and costs deposited by him; and an order was made to that effect, striking the application for leave to appeal off the file.

On the 16th June 1884, the appellant applied to the Judicial Commissioner for leave to proceed, notwithstanding the above, and the respondents were called upon to show cause why this application should not be granted. They urged that the case having been struck off, the case was not then within the competency of the Court to deal with.

On the 28th July 1884, the Judicial Commissioner made an order in the applicant's favor, giving his reasons. They were that a ruling of the Full Bench of the High Court, Calcutta, in *Radha Binode Misser* v. *Kripa Moyee Debia*(1), laid down that "the High Court has the power, and ought to exercise its discretion in each particular case with regard to restoring appeals to the Privy Council, dismissed for default, or removed, for any reason, from the file of the Court." He concluded that under the circumstances, and considering that no harm had been caused to the respondents by the action of the applicant, he ought to accede to his request, on the condition of his paying the respondent's costs of the application, and he directed that the appeal be re-admitted upon the register, and proceed.

On this appeal,—

Mr. *R. V. Doyne* appeared for the appellant.

Mr. *Theodore Thomas* and Mr. *C. W. Arathoon* for the respondents.

Objection was taken for the respondents to the hearing of the appeal, on the ground that it had not been duly admitted. The Judicial Commissioner had no authority under the Code of Civil Procedure to make his order of the 28th July 1884. The only course for the appellant at that time was to apply for special leave to appeal.

(1) 7 W. R., 531; B. L. R., Sup. Vol., 730.

LORD HOBHOUSE said that Counsel for the respondents would be at liberty to make this objection part of their argument, if they should think proper so to do, after the case for the appellant had been heard.

Mr. *R. V. Doyne*, for the appellant, contended that the sanad of the 11th October 1860 was effective to show the introduction of the rule of primogeniture.

The rights of the respondents, regard being had to the terms of the sanad, and to the family declarations and admissions, were to obtain their proportionate shares of the profits or income of the talukdari estate. It was not shown that, by arrangement contrary to the terms of the sanad, the members of the family had a right to partition. They might, it was not disputed, take their shares of the profits; but they had no right to break up the taluk. The conduct of the parties pointed to this course, that while the senior member of the family managed the estate, the junior members received their proportion of the profits, as separate interests of their own; and it had been repeatedly decided that a talukdar might be held a trustee; trusts obliging him to hold in some cases on behalf of others interested in the estate. There was no surrender or waiver of the primogeniture sanad, yet it was admitted that the talukdar was bound to give, not only maintenance, but a specific share of the profits to his younger brothers and their sons. The succession to the talukdari estate was governed by the rule of primogeniture, the talukdar having the perpetual right of management, and he alone being invested with that title. He referred to *Hurdeo Baksh* v. *Jawahir Singh*(2), *Hardeo Baksh* v. *Jawahir Singh* (3), *Widow of Shanker Sahai* v. *Kashi Persad*(4), *Pirthi Pal Singh* v. *Jawahir Singh*(5).

(2) L. R., 4 I. A., 178; 3 P. C. J., 704.
(3) L. R., 6 I. A., 161; 4 P. C. J., 10.
(4) L. R., 4 I. A., 198; 3 P. C. J., 289.
(5) L. R., 14 I. A., 37; 4 P. C. J., 758.

Mr. *Theodore Thomas* and Mr. *C. W. Arathoon*, for the respondents, were called upon only as to the question whether mesne profits should be allowed. They were also heard as to the readmission of this appeal on 28th July 1884. They referred to s. 599, Civil Procedure Code, arguing that the Judicial Commissioner had no other power than such as was given in Chapter XLV, Civil Procedure Code, and could not review the order of 13th June 1884. *Radha Binode Misser* v. *Kripa Moyee Debia*(1) was referred to.

Lord Hobhouse said that the Judicial Commissioner could bring the appeal on to the file again.

On the question as to the right to mesne profits, it was maintained that the right of the respondents to receive profits had not been questioned. The appellant had made collections, and it was on their specific and admitted shares, as regards the profits, that the respondents had been entitled to them. There was an admission as to this spoken of in the judgment of the District Judge.

Mr. *R. V. Doyne*, in reply, said that as long as the family remained joint, the statement of an account could not have been called for. He referred to the finding of the District Judge that the plaintiffs had continued to enjoy the profits of the estate, according to their specific shares, down to the date of the judgment.

Their Lordships' judgment, at the end of the arguments of Counsel, was delivered by

The Right Hon. Lord Hobhouse :—

The principal question raised in this case is whether certain estates which belonged to Dariao Singh, talukdar of Rampur Kalan, go according to the law of primogeniture, or are subject to a family arrangement by which they were divided into shares? The principal estate is known by the collective name of Rampur Kalan. It was an estate which was subject to the common Hindu law of Oudh—the Mitakshara law. It was confiscated with other Oudh estates, and it was restored to the family by sanads. The only material difficulty that exists in the case is owing to the circumstance that two different sanads were granted for the purpose of the restoration: one recognising a division into shares, and the other establishing primogeniture.

Their Lordships have not to deal with the difficult question which has been agitated in so many cases here, whether, to use rather a popular than a legal term, equities shall prevail against the form of the sanads; because, although it was maintained in the Courts below that the primogeniture sanad was to prevail against all inferences to be drawn from the transactions among the family, yet that position has been abandoned now, and Mr. Doyne has very candidly stated that he cannot resist the conclusion that, as regards the beneficial interest in the profits, there must be participation between the members of the family. But what he maintains is that the arrangements led to this inference, that the family was still to have a sole head to it and that he would take the title of talukdar and have the management of the property, and though he would be accountable to his brothers, the younger branches, for certain shares of the profits, yet the property was still to be held in one hand as an entire estate; and that they could not displace the head of the family from that position.

It is extermely difficult to understand what sort of an estate that would represent. It would be a kind of trusteeship, managership, or headship, which could never be displeased or disturbed by the persons having the beneficial possession. Such an estate is entirely foreign to the commom Hindu law of Oudh. Nor is any such thing apparently contemplated by the Oudh Estates Act. Their Lordships do not pronounce an opinion here whether it could legally exist; but assuming that it could, there must be some

(1) 7 W. R., 531; B. L. R., Sup. Vol., 730.

very clear arrangements between the parties to prove its existence.

The ordinary rule is that if persons are entitled beneficially to shares in an estate they may have a partition. In the last case of *Hardeo Baksh* that of *Prithi Pal Singh v. Jawahir Singh* (1) in the 14th volume of Indian Appeals, very much the same sort of contention was set up. Let us take the statement of the defendant's contention—he was the head of the family—from page 60 of the report. Jawahir Singh prayed a declaration that he was entitled to hold the property "as an integral, impartible, and indivisible estate or taluka subject to the beneficial interest of the defendant in respect of the profits thereof to the extent of his share as declared by the Court." Sir Richard Couch delivered the judgement of the Committee, and observes that Jawahir Singh did hold the estates in "trust for the joint family, but as a joint family estate they were subject to partition, and as a trustee he is bound to allow the partition to be made."

Their Lordships then ask what is the evidence in this case to show that there was an agreement between the members of the family that the head of the family should continue to hold the estate as an entire estate, and hand over the profits? To answer that question it is necessary to touch upon the heads of the case; but owing to the position the argument has assumed, it will not be necessary to go with great particularity into the documents.

It appears that in 1856 a temporary settlement was made, which, by the desire of Dariao Singh, the then head of the family, was in the names of his three sons—Anant, Bulwant, and Hardeo, and a grandson, who was a son of Bulwant. Bulwant and the grandson took one share between them, and the grandson's name may be left out of our consideration. The estate was settled in definte shares, nearly equal, but giving a slight preference of three pies to Anant, the eldest son.

It next appears that a sanad, of which we have no copy, was issued on the 25th of October 1859, in the terms of that temporary settlement. In December 1860 came the circular that was issued to the Oudh talukdars, calling upon them to elect whether they would take their sanads according to the common law of the Mitakshara or according to the law of primogeniture. It is impossible to read that circular without seeing that the officials then were desireous that the talukdars should choose the primogeniture sanads. To that circular Dariao made a reply to this effect: "That at the time of the settlement of 1864 Fusli, in order to avoid future dispute, and according to the custom prevailing in his family, he caused a kabuliat to be executed;" and then he states that it was executed in the manner which has been mentioned. "The sanad, dated 25th October 1859, has been grantedly by the Chief Commissioner according to the above terms. The petitioner has now no occasion to apply for a fresh sanad, because the aforesaid sanad is enough for them." Therefore he distinctly elects to take a sanad which recognises the co-sharing of all his sons. That election of his is the more pointed because there were two other villages, not then part of Rampur Kalan, though they have since become part, Saraiyan and Piprawan. Those were granted by Government to Dariao Singh in consideration of loyalty; and as to those he prays that "Saraiyan and Piprawan be after the petitioner's death in the name of Anant Singh, the eldest son, in addition to the 5½ annas shares out of taluka Rampur Kalan." Dariao Singh knew perfectly what he was about, and he elects that as to Rampur Kalan it shall go in shares, and as to the two other villages they shall go accordingly to primogeniture.

It is a very strange thing that in answer to that request of Dariao Singh, the officials should have sent him a primogeniture sanad; but they did so. It was dated,

(1) L R., 14 I. A, 37; I L R., 14 Calc., 493; 4 P. C J, 758

strange to say, before the date of Dariao's answer. Dariao's answer was on the 29th of January 1861; and the sanad is dated on the 11th of October 1860. It was cut-and-dried ready to issue. When precisely it was received by him does not appear, but it was some time between the 13th of December 1860 and the 14th of April 1863. No remark was made upon it. Whether he did not observe that the wrong sanad had been sent to him, or whether he did what is so exceedingly common for Indian gentlemen to do, thought it was best not to be offensive, and to comply with the wish of the Sircar, we do not know. In point of fact no remark was made upon the sanad at that time.

Only one event took place, between Dariao's death and the receipt of the sanad, having any bearing on the question, and that is, that Dariao personally accepted and agreed to pay the Government jumma, and it would seem that his name was entered in the Collector's books as the talukdar.

Nothing further occurred until the 2nd September 1867, when Dariao died; and then came the necessity for a mutation of names; and what took place upon that occasion is, as their Lordships think, the most important feature in the whole case. It is very unfortunate that these documents have been tossed together in a way that makes it difficult to disentangle the proceedings. It will be best to take the case of Saraiyan first.

On the 13th of November 1867, the tahsildar of the district made a statement regarding the death of Dariao, "lambardar of village Saraiyan," and, after showing that his heirs were his three sons, he names as the heir able to become lambardar Anant Singh, that is the eldest son. Then he enters a remark "Dariao Singh, lambardar, has left three young sons, Anant Singh, the eldest son of the deceased is able to become a lambardar;" and he states that, subject to notice, Anant Singh's name deserves entry in the register. But Anant Singh was not willing to accept that position, and he presents a petition. In that petition he says that "there has been unanimity without 'any feeling of estrangement; between him and his brothers, and he prays that their names may be entered along with his in the column 'Name of Lambardar.'"

It is difficult to trace the exact proceedings further in respect of Saraiyan but it is clear that in the result Saraiyan, though clearly granted in primogeniture, was entered in the four names of the three sons and the one grandson.

Turning to Rampur Kalan, we again find that Anant Singh was not desirous of appearing as the sole talukdar. He was called upon to present a fatehnama for mutation of names on his father's death. He sends one as to Saraiyan, and excuses himself as to Rampur Kalan. The three brothers present a petition on the 7th of April 1868, saying, "that the kabuliat of ilaka Rampur Kalan has stood in the name of the petitioners, and a sanad has also been granted in their names, such being the case a fatehnama should not be called for in respect of Rampur Kalan," meaning that no alteration of name was necessary. A fatehnama, however, appears to have been insisted on, and one is sent on the 11th April, but with a protest in the shape of a deposition by Anant. He there states that his father's name was entered as proprietor for Saraiyan only, but since 1264 Fusli 'my name and the names of Bulwant Singh and Hardeo Baksh, my brothers, have been entered in the column 'Name of Proprietor,' in respect of the rest of taluka Rampur Kalan. The deceased's name was not there; moreover, the Government has granted a sanad in the name of us three brothers." Then he adds his desire that, "the names of the three brothers be also entered in the column 'Name of Lambardar.' Since 1264 Fusli the names of us three brothers have been entered in respect of all the villages of taluka Rampur Kalan which are situated in Tahsil Biswan; and our names were also entered in respect of certain other villages, but as Dariao Singh, my father, used to

remain with the Settlement Officer, and was my superior, therefore at the time of assessment of the present settlement jumma his name was entered in respect of these villages; I now desire that jointly with my name the names of Bulwant Singh and Hardeo Baksh my brothers be entered as before in equal shares in these villages also;" a most distinct return to the state of things which existed before this primogeniture sanad was sent wrongly to Dariao Singh, and his name was entered in the Collector's book.

The proceedings seem to have occupied a considerable time. No order was made until the 29th of April 1869, when an order was issued in this form by the Deputy Commissioner: "The case is before me for an order as to mutation of names. There is no one to dispute the title of these sons. The hitch, if any, is the fact that Jagan Nath (Bulwant Singh's son) is entered in the Malguzari Register: it must remain there." He was an infant at that time. "Mutation of names is to be in the name of all four: Anant Singh; Bulwant Singh; Hardeo Baksh, and Jagan Nath."

The same sort of proceedings took place in respect of Piprawan, but it is not necessary to follow them out with the same particularity. The result is summed up by the Deputy Commissioner in the year 1841 in a judgment which he delivered on an application for partition, which is quoted in the District Judge's judgment in this case. He says: "In the khewats prepared at regular settlement the shares in the whole ilaka, and also in the grant, were defined as follows: Anant Singh six annas, and the other two sons five annas each. These shares are slightly different from what was stated by Dariao Singh in his letter of 19th January 1861." That was in answer to the circular about the sanads "By this new arrangement the eldest son, Anant Singh, gave up his exclusive right to two mauzas, and he was recorded as proprietor of a 6 annas share in the whole estate instead of a 5½-annas share in part of it. The khewats were signed by Anant Singh with his own hand."

That was the result. These proceedings show exactly the footing on which the family stood. It is not a question whether Anant Singh made a conveyance to his brothers; though if that had been the question there might be reason to maintain the affirmative. As to Piprawan and Saraiyan, he did most distinctly make a conveyance because those were granted according to the law of primogeniture. He took a consideration for it by receiving a larger share in the whole estate. But the value of the proceedings is to show that from 1856 onwards the estate had been treated, notwithstanding the issue of the primogeniture sanad, as an estate which was held in the shares designated in Dariao's letter.

There are many other things in this record which show the same condition of the family, but their Lordships think it not necessary to refer to them, because what has been stated is quite sufficient. But some notice must be taken of those things which, according to the contention of the appellant, would lead to the contrary inference. Mr. Doyne, in his argument, referred to three circumstances. One was that Anant Singh has rested his title not entirely on the earlier sanad, but on both sanads. Another is that in the lists of talukdars that were made out, Dariao Singh's name was entered in respect of Rampur Kalan, in list No. 3, which is one of the primogeniture lists. Another is that in the wajib-ul-arz, which seems to have been framed either under the signatures, or with the assent of, the three brothers, they claim that the succession is to go according to s. 22 of the Oudh Estates Act, which relates to the primogeniture estates.

With respect to the reliance on the two sanads, that is contained in a statement which is called a petition; but it is a statement of Anant Singh's, made on the 9th of July 1868, in the course of the proceedings for mutation of names. All he says is this: he mentions the earlier sanad and then he says that, "a fresh sanad in English and Persian in

the name of the petitioner's father (deceased) has been granted as an additional favor, so the taking effect of both the sanads is the cause of further stability of the (ilaka) estate." He then goes on to reiterate the case for partition: "From 1263 Fusli up to 1266 Fusli and up to this day, the settlement of ilaka Rampur Kalan has been in the name of the petitioner, Bulwant Singh, Hardeo Bakhsh, and of Jagan Nath Singh, son of Bulwant Singh, and in the registers of the Collector's Court and of the tahsils, the above-mentioned names are entered all along; such being the case under the rule laid down in the directions of the revenue officers, mutation of names should be effected without any alteration in the names entered as proprietors." That is the occasion on which he mentions both sanads. But on the very same occasion he also state that the estate is held in co-parcenary according to the family arrangement, and there is not the least appearance upon the face of this document that Anant Singh was considering that there was any conflict between the primogeniture sanad and the co-sharing of the estate between the family, or that he intended for a moment to set up any claim under the primogeniture sanad which was in contravention of the family arrangement.

In March 1869 the sanads were called for, and were sent in for the purpose of preparing the lists. On that occasion, in a petition signed by the three brothers, they prayed that, under Rule No. 3 "our names may be entered in list No. 3;" and the order made by the Deputy Commissioner was: "Enter names in the list." That order was made on the 10th of March 1869. Again we find what one must characterise as a most extraordinary proceeding. Instead of entering the names in the list No. 3 as prayed, the name of Dariao, then dead, was entered in the list No. 3, so that, according to the effect of that list, the estate would go by the rule of primogeniture, and go to Anant alone instead of being divided among the three. It does not appear that any explanation was given to these gentlemen, that any questions were asked of them, that it was pointed out to them that there was an inconsistency between the entry in list No. 3 and the desire to keep the estate in the three names; but there seems to have been, without any further communication, a simple entry of Dariao's name in the list. It is impossible for their Lordships to attach importance to such a proceeding as that.

The third document replied on is the wajib-ul-arz, which was framed on the 1st January 1870; and there, no doubt, occurs a passage that "as the proprietors are talukdars, succession will be regulated by s. 22, Act I of 1869." Well, that is a matter of law, on which they were not very competent to speak; but on the matters of fact, on which they are the most competent of all men in the world to speak, they have no doubt whatever as to what the state of the family was. They state: "From the death of Dariao Singh, the sons, the present talukdars, have continued in possession of the taluk;" and then lower down they say: "This village"—that is Rampur Kalan, the whole estate,—"is in the possession of talukdars as a joint zemindary; the shares being as follows;" a table shows the shares: Anant Singh six annas; Bulwant and Jagan Nath five annas; Hardeo Baksh five annas. "All the co-sharers live in commensality; accounts of profits and losses are not rendered. Anant Singh, as head of the family, manages the work of collection and assessment." Now that document is an extremely important document as regards the statements of fact. As regard the statement of law, the succession descending according to s. 22, it is of little value. The document is a strong assistance to the case of the plaintiff, and bears directly against the case of the defendant. In fact every group of facts that Mr. Doyne has referred to as leading to the inference that the estate was to be held by the head family as an entire estate, excepting the one fact that there was an

improper entry in list No. 3 of the talukdars, strengthens the case for the coshareship.

Only one other remark has to be made, which is, that during the life of Anant Singh, no attempt was made to disturb this state of things. It was after his death, and when his son came to represent the eldest branch of the family, that he was ill-advised enough to set up a claim of primogeniture. Both Courts have decided against that claim. Their Lordships entirely agree with them; and they think that the plaintiffs are entitled to a decree for partition.

The only other question remaining is that which concerns the mesne profits. In a partition suit, relating to an ordinary joint family, mesne profits are not recoverable, as was pointed out in the judgment at page 59 in the 14th Indian Appeals. Speaking of the provisions of the Code as to mesne profits, Sir Richard Couch says: "These provisions are intended for, and are applicable to suits for land or other property in which the plaintiff has a specific interest, and not to the suit which was instituted in 1865, or to a suit for a partition where he has no specific interest until decree." The taluk here in question was in a very peculiar position; the family were living together as a joint family, and in commensality, Anant acting as head and not accounting for the profits, which is the case with an ordinary Hindu family; but still they were living under the most distinct agreement that they were entitled not as an ordinary joint family, but in specific and definite shares. Their Lordships consider that if the enjoyment of those shares is in any way disturbed, the right to sue for profits will arise, as well as a right to partition. Before the suit, there seems to have been some inconsistency in the defendant's position. Sometimes he said his brothers were only entitled to maintenance; at other times that they were entitled to specific shares of the profits. But by the plaint and the written statement the matter was distinctly put in issue. The plaintiffs claimed between them a 10 annas share of mesne profits. An issue was stated which is perfectly precise upon the point. "For what period are plaintiffs entitled to mesne profits, and what were the aggregate collections for the period claimed?" A commission of inquiry into that question was ordered, but before the commission, although an inquiry was made as to the value of the estate, there was no inquiry as to the profits, because it was considered that sufficient admissions had been made by the defendant to avoid the necessity of any such inquiry. The exact form in which these admissions were made does not appear, but in the judgment of the District Judge, on the issue that has just been read, the 13th, he finds "that the plaintiffs are entitled to Rs. 20,797 as profits upon the defendant's own admission." That is in the first judgment which he delivered before the remand. There was an appeal from his decision to the Judicial Commissioner, and, on that appeal, one of the grounds of objection was, "that the lower Court should have held that the plaintiffs were not entitled to any profits." The suit was then remanded to the District Judge, not on this ground, but on other grounds, to take oral evidence, and, on the remand, the District Judge came to exactly the same finding with respect to mesne profits. A second appeal was presented to the Judicial Commissioner, and in the grounds of objection upon that second appeal there is no mention whatever of any error as to mesne profits. Therefore, although there are difficulties in understanding the exact grounds upon which the Court came to its conclusion, their Lordships must take it that something passed, either before the Commissioner or before the Court itself, on which that finding was rested, and which must, at the time of the appeal from the decree on remand, have been satisfactory to the parties. The alternative would be a most disastrous one; it would be necessary to send back this case for an inquiry, which might result in something more being found for mesne profits, or something less,

but which would probably cost a great deal more than the amount in dispute.

Their Lordships think that they ought not to disturb the decree upon this point, and the result is that the appeal fails on every point, and it must be dismissed with costs. Their Lordships will humbly advise Her Majesty accordingly.

Appeal dismissed with costs.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents Messrs. *Barrow & Rogers.*

15th November, 1st December 1888.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, the Right Hon. Sir Richard Couch and the Right Hon. Mr. Stephen Woulfe Flanagan.

NANDI SINGH AND ANOTHER. * ... } *Plaintiffs,*

and

SITA RAM AND ANOTHER... *Defendants.*

On appeal from the Court of the Judicial Commissioner of Oudh.

Hindu law—Gift—Inheritance in a village community in Oudh—Wajib-ul-arz modifying the Mitakshara law—Hindu widow's power of alienation—Operation of gift by her two donees, one of whom could not take.

A clause in the wajib-ul-arz of a village in Oudh authorized any co-parcener not having male issue, or his widow, to make a gift of his share in the village to a daughter, or a daughter's son; the intention apparent from this, and from a further provision as to the descendants of a sharer's daughter, being to modify the law otherwise prevailing, *viz.*, the Mitakshara, and authorize the introduction of a daughter, or her son, and their descendants, male or female, in priority to brothers or nephews of the sharer.

Held, that such introduction was authorized, and that the inheritance, where the widow had made a gift of it in favour of a daughter, was transmitted to the daughter's daughter, the gift being of more than the donor would have taken as a widow.

The gift was to the daughter, and to her husband jointly. *Held*, that the gift being invalid as to the husband, the daughter took the whole estate given on the general principle of gifts to two persons jointly, where they failed as to one of them, operating entirely for the benefit of the other who could take, declared in *Humphrey* v. *Tayleur* (1), which, not depending on any peculiarity of English law, was applicable here.

APPEAL from a decree (7th July 1885) of the Judicial Commissioner, affirming a decree (10th June 1884) of the District Judge of Lucknow, which varied a decree (24th December 1883) of the Subordinate Judge of the Unao District.

The suit out of which this appeal arose related to a gift of a one anna and three pies share in a village, named Baboo Rajnan, in the Unao District, of the description generally termed "Zemindari", or jointly held by the proprietary body(2). The share had been owned by Sheo Baksh, who died in 1869 without isssue, but leaving a widow Mussammat Bichan Kunwar, and a daughter Mussammat Mithan Kunwar. His nephews now claimed his share, and the principal question raised was, whether under the authority of the wajib-ul-arz of the village, and in consequence of a gift made by the widow to her daughter, that daughter's daughter took in priority to the collateral heirs of the deceased Sheo Baksh.

The clause in the wajib-ul-arz, and the contents of the deed of gift of 7th March 1870, by Bichan Kunwar to Mithan Kunwar and her husband Sita Ram (the latter not taking under it) are stated in their Lordships' judgment. Mithan Kunwar died in 1878, leaving her husband surviving her, and he was the first defendant in this suit, the other

* 16 Cowell's Ind. Ap. 44; 16 Calc. 677.

* (1) Ambler, 188.

(2) In these the co-parceners hold the whole village jointly in shares ordinarily determined by hereditary right, as distinguished from the ownership of share in villages of another kind, shown by the area of the proprietor's possession.

being his daughter by Mithan Kunwar, named Maharaj.

The Subordinate Judge held that the gift was invalid as to Sita Ram, but valid as a gift in favour of Mithan to convey one-half to her; and that Mithan's estate descended to her daughter, Maharaj, under the terms of the wajib-ul-arz, which used the words, "*auiad pisri*" "*ya dukhtari.*"

On the plaintiff's appeal, the District Judge remanded the suit, directing that Maharaj, who had not till then been made a party, should be joined, and adding an issue as to the effect of the deed of gift of 7th March 1870 in favour of Mithan in transferring the entire inheritance. The Subordinate Judge repeated his former decree.

The District Judge's judgment was, that he found no specification of shares in the deed of gift, and though invalid as to Sita Ram, it passed the entire property to Mithan. In regard to possession which should have followed, he held that an application presented by Bichan Kunwar for mutation of names in favour of Mithan, alleging that she had given her possession, was sufficient evidence of possession given in Bichan Kunwar's lifetime. He therefore dismissed the suit with costs.

The Judicial Commissioner's judgment, after a short summary, was as follows :—

The main contention in appeal is, that the deed of gift of 1870, not having been followed by a transfer of possession during the donor's lifetime, is invalid according to Hindu Law.

The lower Courts however concur in finding that there was a transfer of possession during the lifetime of Mussammat Bichan Kunwar. The Court of First Instance has found that Mussammat Mithan Kunwar and her husband Sita Ram lived with Mussammat Bichan Kunwar, and that Sita Ram managed the estate on behalf of the family. Under these circumstances it is difficult, if not impossible, to ascertain the truth as to actual possession. It is however on the whole presumable that Mussammat Bichan did make over the estate to her daughter before her death. If the deed of gift were invalid by reason of Mussammat Mithan Kunwar's not having obtained possession during her mother's lifetime, and if she (Mussammat Mithan Kunwar) had no right of inheritance, the conduct of the plaintiffs appellants in acquiescing for nine years in her usurpation is inexplicable.

It is further contended that under the terms of the wajib-ul-arz the widow could not create any interest beyond her own lifetime. This no doubt is the ordinary Hindu Law, but it is clear that this is not the intent of the wajib-ul-arz, which I consider has been rightly interpreted by the Courts below, as giving the widow power to create an absolute estate in favour of the daughter, or daughter's son, of the original owner.

I further concur with the District Judge that the deed of gift, though invalid as regards Sita Ram, was a valid conveyance of the whole share in favour of his wife, Mussammat Mithan Kunwar, the daughter of Sheo Bakhsh. I therefore affirm the decree of the lower Appellate Court, and I dismiss the appeal with costs.

On this appeal, Mr. *J. D. Mayne* and Mr. *J. H. W. Arathoon*, for the appellants, regard being had to the finding of the Courts below in succession, as to the question of possession by Mithan, proceeded to other points in the case. It was argued that the judgments to the effect that under the wajib-ul-arz and the deed of gift, an absolute estate of inheritance descending to her own daughter was created in favour of Mithan, were wrong. How far the wajib-ul-arz had the effect of altering the law was open to question, it being merely part of the settlement record, and though entries were presumed to be true under ss 16 and 17 of the Oudh Land Revenue Act (XVII of 1876), it might be erroneous as in the case of *Uman Parshad* v. *Gandharp Sing* (1). At all events, the words must receive a reasonable construction, and one could be placed on it that did not conflict with the plaintiff's claims. It could hardly be that the widow could give an estate of inheritance which she did not herself possess. And that the words translated, "descendants," meant such descendants as were heirs, rather than that they should allow a daughter's daughter to come in as an heir, was the better construction. If moreover the wajib-ul-arz had authorized a certain exclusion of collaterals in favour of

(1) L. R., 14 I. A., 134; I. L. R., 15 Calc., 20.

female heirs in a direct line, the gift of 1870 had not proceeded correctly upon the power given. The deed was invalid, at all events, as regarded one of the two donees, and formed but an ineffectual attempt to do more than create an estate for the life of Mithan Kunwar. If it could be taken to be intended to give a joint estate for the life of the daughter, or of both, with survivorship between them, it failed in both cases on the death of Mithan, and the right to inherit the share of Sheo Baksh belonged to his collateral heirs. The gift could not be treated as conferring upon Mithan an estate different from that which had been intended by the donor. Reference was made to *Harvey* v. *Stracey* (1), *Re Farncombe's Trusts* (2), *Re Brown's Trusts* (3).

The respondents did not appear.

Their Lordships' judgment was afterwards delivered, on last December, by

THE RIGHT HON. SIR RICHARD COUCH :—

The appellants in this case are the grandsons of one Fatteh Singh, who had two sons, Sardar Singh, the father of the appellants, and Sheo Baksh. The latter married Bichan Kunwar, and died on the 20th April 1869, without leaving any male child. They had a daughter Mithan Kunwar, who was married to Sita Ram, the first respondent. Mithan Kunwar died on the 18th March 1878, leaving a daughter Mussammat Maharaj, the second respondent. Bichan Kunwar died on the 26th March 1874. The suit was brought on 28th September 1883 by the appellants, to recover possession of land in the village, Baboo Rajnan, Pergunnah Harha, District Unao, which was the share of Sheo Baksh in the property inherited by him and his brother, the plaintiffs claiming to be his heirs according to Hindu law, and entitled to succeed to his estate on the death of his widow. It was not disputed that the plaintiffs' would be entitled if the ordinary law was applicable. The defence was rested upon a custom of the village of Baboo Rajnan as to the right to inheritance, and a deed of gift, dated the 7th March 1870, executed by Bichan Kunwar.

The wajib-ul-arz, which governs the right of succession to the property in dispute, is as follows:—

"*Extract from wajib-ul arz, of village Baboo Rajnan, Pergunnah Harha, paragraph 4, of right to inheritance.*

"The rule of inheritance is that if a sharer has children by two lawfully married wives—that is, one child by one wife and several by the other—the children by both the wives shall get equal shares, that is, one child will get possession over one half, and several chidren over the other half. If one wife have children, and the other be childless, both of them will hold possession of equal shares for their lifetime; after the death of the childless wife, the children of the other wife will hold possession in equal shares. If there be no male child, and any sharer or his wife make a gift of his or her share during his or her lifetime to his or her daughter or daughter's son, and puts her or him in possession of the same, they will remain in possession. If there remain no descendants of any sharer's son or daughter, his brothers or nephews descended from the same ancestor shall take possession of the share. A non-married wife, or children by her, shall not get anything except maintenance."

The intention appears to be to modify the Mitakshara law which prevails in Oudh by enabling a sharer in family property or his wife to alter the course of succession by introducing a daughter or daughter's son, and their descendants, male or female, in preference to brothers or nephews of the sharer. There is no reason for limiting the meaning of "descendants" to children, as where they are intended, that word is used, and where a male is intended it is so said. It is also apparent from the provision that the brothers and nephews are to take if there remain no descendants of a son or daughter, that the gift by the wife must be of more than the interest she would take as a widow, and is not, as the appellants contended, limited to that interest. Both the lower Courts have understood "descendants" as meaning male and female in any degree.

On the 7th March 1870, Bichan Kunwar executed a deed of gift of the

(1) I Drew, 117.
(2) L. R., 9 Ch. Div., 652.
(3) L. R., I Exch., 74.

property in dispute to Mussammat Mithan and Sita Ram, the words of gifts being followed by "I promise and agree in writing that the donee may, from the date of execution of this instrument, take proprietary possession similar to mine over the gifted property. There has been left no claim right or dispute to me or any of my heirs." This was intended to be and should be construed as an absolute gift. The contention of the appellants in the lower Courts and before their Lordships was, that the gift being invalid as regards Sita Ram was also invalid as regards Mithan. The District Judge and the Judicial Commissioner have both held that it is a valid gift of the whole to Mussammat Mithan. Their Lordships are of this opinion: The gift is to the two donees jointly, and in *Humphrey* v. *Tayleur*(1), Lord Chancellor Hardwick said: "If an estate is limited to two jointly, the one capable of taking, the other not, he who is capable shall take the whole." This principle does not depend upon any peculiarity in English law, and is applicable to this deed of gift.

The question whether the gift was accompanied by possession was disposed of by their Lordships in the course of the argument, and it is not necessary to say more upon it.

Their Lordships will humbly advise Her Majesty to affirm the decree of the Judicial Commissioner, and to dismiss the appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Young, Jackson & Beard.*

(1) Ambler, 138.

16th November 1888.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, the Right Hon. Sir Richard Couch, and the Right Hon. Mr. Stephen Woulfe Flanagan.

MAJID HOSSAIN AND OTHERS*...*Plaintiffs,*

and

FAZL-UN-NISSA ...*Defendant.*

On appeal from the Court of the Judicial Commissioner of Oudh.

Registration—Registration in accordance with the rules of 1862, regulating the place and mode of it, in Oudh—Oudh Estates Act I of 1869, s. 13.

An Oudh talukdarni made a grant of a village, part of her talukdari, to her adopted daughter; the instrument requiring, in order to be valid under Act I of 1869, s. 13, to be registered within one month after execution. With a view to its registration, she, being a purdanashin, sent for the neighbouring Pargana Registrar, who attended at her house for her convenience, took her acknowledgment of the document, recorded the registration, and filed a copy of the document in his office.

Held, that this proceeding was a registration of the document, complete and effective; having been, substantially, a registration at the Pargana office.

APPEAL from a decree (26th August 1885) affirming a decree (1st June 1885) of the District Judge of Lucknow.

The question was, whether a deed of gift required to be registered under Act I of 1869, s. 13, had been effectively registered.

The suit in which this question was raised was brought by Amir Haidar, talukdar of Gauria in the Lucknow District, to have set aside a deed of gift, of village Nizampur, executed, on 21st March 1871, by the late Mussammut Kutb un-Nissa, his predecessor in estate, in favour of her sister Mussammut Fazl-un-Nissa, the defendant. Amir Haidar was brother and heir of the last male talukdar; and he had, in March 1884,

* 16 Cowell's Ind. Ap., 19; 16 Calc., 468.

obtained the order of Her Majesty in Council, affirming a decree for the taluk against his nephew, Abdool Razzak, to whom Kutb-un-Nissa had bequeathed it by a will, which, not having been duly registered in accordance with Act I of 1869, s. 13, was held invalid(1).

The village in suit being a portion of the talukdari estate of Gauria, could not be given to Fazl-un-Nissa, except by an instrument of gift, executed and attested, not less than three months before the death of the donor, and registered within one month from the date of its execution—(Section 13, Act I of 1869). By the term "registered, according to the interpretation clause of the same Act, is to be understood registered according to the provisions of the Rules relating to the Registration of Assurances for the time being in force in Oudh.

The Judicial Commissioner's Circular, 41 of 1862, dated 25th February 1862, gave the rules for registration in force in Oudh in 1871. The first provided that there should be one Registrar in each Pargana, who should register contracts regarding immoveable property. The second rule, after providing that all deeds, relating to "real property," must be registered at the office of the Registrar of the Pargana in which the property was situate, contained the following: "All deeds of a value exceeding Rs. 500 will be registered by tehsildars in outlying tehsils, or by the Sadr Registrar, if the property is within the jurisdiction of the Sadr Tehsil, but they are invariably to send a copy for record in the Pargana office."

In the present case the donor, an aged purdanashin, sent for the Pargana Registrar to her own house. What followed is set forth in their Lordships' judgment.

The Courts in Oudh concurred in the opinion that there had been substantial compliance with the rules in force; the Judicial Commissioner, Mr. T. B. Tracy, affirming the decree of the District Judge dismissing the suit. Pending an appeal to Her Majesty in Council, Amir Haidar died, and was succeeded by the present appellants, by order of reviver, dated August 1888.

Mr. *R. V. Doyne*, for the appellants, argued that the attempted registration was ineffectual. It occurred in the outlying tehsil of Mohanlalganj, and the proper registering officer was the tehsildar. And even if the Pargana Registrar had authority, he was authorized to effect registration only in his own registry office, in the absence of special cause assigned by him for registering at the house of the party executing.

Mr. *C. W. Arathoon*, for the respondent, was not called upon.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD FITZGERALD:—

Their Lordships are of opinion that this objection ought not to prevail.

Kutb-un-Nissa made a grant to her adopted daughter of the village of Nizampur, which required to be executed three months before her death, and to be registered within a month after the date of its execution. The objection taken to the instrument was that it was not presented at the office of the Registrar, but that the Registrar was sent for to Kutb-un-Nissa's residence where the deed was executed and registered. She appears to have been a purdanashin; and the mode in which registration was effected was in this manner: She sent for the Pargana Registrar, whose name is given as Kali Churn, and he attended at her house. Her house appears to be near the office of the Pargana Registrar, and actually within the very village which was the subject of the grant. Kali Churn having attended her, and having the deed acknowledged in his presence, word for word, by the granting party, and having examined it, it was handed to him for registration.

The record of registration by the Registrar is as follows:—

"*No. 131, Volume* 2.—On Tuesday

(1) *Haji Abdool Razzak* v. *Munshi Amir Haidar*, L. R., 11 I. A., 121; I. L. R., 10 Calc., 976; 4 P. C. J.; 555.

the 21st March 1871, at 10 A.M., Mussammat Kutb-un-Nissa, aged about 65 years, wife of Jahangir Bakhsh, talukdar of Gauria, sent for me at her house in the village Gauria. She got this document executed in the presence of Ganesh Bakhsh and of Beni Parshad, the witnesses named on the margin, and having presented it for registration, admitted its execution on her part and attested the contents word for word, and, having seated herself on the threshold of her doorway, marked the document with her own hand in my presence. Mussammat Amiran, wife of Mahbub Ali, resident of Amethi, identified the obligor: therefore having registered this deed, drawn up on a blue impressed stamp of the value of Rs. 16, it is returned in original through Ganesh Bakhsh, a copy thereof having been kept, and Rs. 5, on account of fees, having been received.

(Sd.) KALI CHARAN,

Pargana Registrar of Mohanlalganj.

No. 26."

Their Lordships presume part of his duty was either to make a copy himself or to examine the copy made. Having thus got the original deed into his hands, and marked it, and having had that deed duly acknowledged so as to give the best testimony of its execution by the grantor, and having examined the copy which was either prepared by himself or prepared for him, and examined it word for word with the deed, his next step is to take those instruments to his office; to enter the registration in the book; and to file the copy in the proper Pargana office of the District.

The sole objection to that registration upon which their Lordships are asked to invalidate that deed is that the grantor did not go to the office of the Pargana Registrar. He came to her as a matter of convenience and received the deed and copy at her house. That is the sole objection. And upon that their Lordships are asked to declare this registration to be null and void, and consequently that the deed is worthless.

The registration is to be in accordance with the rules for the time being in force, and the registration is to be judged by those rules, and those alone. The first rule is this: "There must in future be only one registrar in each pargana for the registration of deeds relating to real property, who shall be especially appointed for that purpose, and styled the Pargana Registrar. He may, of course, register any other contracts that can be registered by ordinary registrars, but no other registrar may register any contract regarding immoveable property." He certainly could not be more clearly ear-marked as the proper and only registrar to register this deed under the circumstances. But there was something more to be provided for; and accordingly their Lordships find this in rule 2: "All deeds regarding real property, or in any way creating liens and encumbrances upon it, must be registered at the office of the registrar"— that is to say, the Registrar previously named, namely the Pargana Registrar—"of the pargana in which the property is situated, and must be copied in full. If for any special reason, parties at a place distant from the property wish to register a deed affecting it, they must go to the Tehsildar or Sadr Registrar, who will register it and will immediately transmit a copy to be registered at the office of the pargana in which the property is situated, charging and transmitting an extra fee for the same." That addition to or alteration of the second rule provides for a case of public convenience. These districts are no doubt very large in India, and it may be a very great inconvenience and expense for parties by reason of distance to attend at the Pargana office, and then by this rule they get the facility in place of attending at the Pargana office of going before the Tehsildar, or the Sadr Officer, who receives the deed and makes the copy, and transmits it to the Pargana Registrar. It is obvious that this is not one of those exceptional

cases, for the lady did not live at a distance from the Pargana District. She was within it, and a very short distance from the office of the registrar. The registration in fact took place at the office of the Pargana Registrar, though the officer attended to receive the deed, to receive its acknowledgment, and to compare the deed with the copy. He brought it all to his own office, and the registration is in fact the recording of that copy in the office of the Pargana Registrar, all the other requisites provided by the rule having been otherwise complied with.

Their Lordships are of opinion, without going further, that the registration was effective, complete, and full; and that the Deed ought not to be disturbed on that account.

There is said to be a contradictory provision at the conclusion of clause 2. Their Lordships do not find it necessary to express any opinion upon that. Their Lordships understand that rule has been superseded; but at any rate, they do not find it necessary to express any opinion on the question whether there is any contradiction between the two clauses. They are of opinion here that the registration was before the proper officer, and substantially a registration at the office of the Pargana District.

Their Lordships will therefore, humbly recommend Her Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants; Messrs. *Barrow & Rogers.*

Solicitors for the respondent; Messrs. *T. L. Wilson & Co.*

16th and 17th November 1888, and 5th February 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, the Right Hon. Sir Richard Couch and the Right Hon. Mr. Stephen Woulfe Flanagan.

SRINATH DASS* ... *Plaintiff,*

and

KHETTER MOHUN SINGH AND OTHERS ... } *Defendants.*

On appeal from the High Court in Bengal.

Limitation Act 1877, Art. 135—Suit by mortgagee against mortgagor and purchasers from him—Regulation XVII of 1806—Transfer of Property Act (IV of 1882).

A mortgage by conditional sale, before the operation of the Transfer of Property Act 1882, on default made in payment, proceedings having been taken by the mortgagee under Regulation XVII of 1806, entitled the mortgagee to possession after the year of grace. On the mortgagor's right of possession being thus brought to an end without a suit for foreclosure, a right of entry accrued to the mortgagee whose suit for possession, unless brought within twelve years from the date "when the mortgagor's right to possession determined," was barred by Art. 135 of Sched. II of Act XV of 1877.

This Regulation foreclosure was applied to a mortgage, dated 17th November 1865, between Hindus, with power of entry and sale, in the English form, of land in the 24-Pergunnahs District (which mortgage, therefore, received the same effect as a mortgage by conditional sale), and the proceedings were perfect on or before 31st March 1873, as against the mortgagor, whose right of possession determined on the 17th February 1866. Parcels of the mortgaged land had been sold by the mortgagor, down to August 1866, and the purchasers, not having been served with notice of the above proceedings under the Regulation, were not parties thereto, so that the relation of mortgagee and mortgagor continued to subsist, as between them and the mortgagee, notwthstanding the determination of the mortgagor's right of possession.

In a suit brought in 1882 against these purchasers, as also against the mortgagor, for fore-

* 16 Cowell's Ind. Ap. 86, 16 Calc., 693.

closure and possession, by a transferee who had acquired the mortgagee's interest in 1879: *Held* that the mortgagor's right of possession determined on the above date, and that the mortgagee's right of suing for possession having been extinguished on the expiration of twelve years from that time, *viz.*, on the 17th February 1878, such right was not revived by the subsequent creation of suits for foreclosure, on the coming into operation of the Transfer of Property Act, 1882; and that the title of the plaintiff, made through the mortgagee, to sue the purchasers for possession of the mortgaged land, was barred by time under Art. 135, as against them.

The suit therefore was dismissed as against the purchasers; but as against the mortgagor, who made no defence, the right of possession in the mortgagee consequent on the proceedings under the Regulation in force till its repeal in 1882 supported the decree made against him by the Courts below, from which he had not appealed.

APPEAL from a decree [18th November 1885(1)] of the High Court, reversing a decree [17th June 1883] of the Second Subordinate Judge of the 24-Pergunnahs District.

This suit was brought by the appellant, the transferee of a mortgagee, against the mortgagor and twenty-eight other defendants, the latter holding distinct plots of the mortgaged property under purchases from the mortgagor. And the question was whether the suit as against these purchasers, now respondents, was barred, as being a suit brought for possession more than twelve years after the mortgagor's right to possession determined, under Art. 135 of Sched. ii of Act XV of 1877; or fell within Art. 147, allowing sixty years from the time when the mortgage money became due for the mortgagee's suit.

The plaint was filed on the 6th September 1882, after the Code of Civil Procedure of that year, and the Transfer of Property Act, 1882, had come into force; s. 2 of the latter Act repealing Regulations I of 1798 and XVII of 1806, relating to mortgages, their foreclosure and redemption, and the Act substituting its own provisions.

The mortgage deed, which was in the English form, was executed, on the 17th November 1865, by Huri Narain Dey to Shama Sundari Debi, of five holdings of land in the 24-Pergunnahs District, to secure Rs. 15,705, to be repaid with interest at 18 per cent. on 17th February 1866. Besides the usual powers to the mortgagee to enter upon default and to sell, there was a provision enabling Huri Narain Dey "to sell such portions of the mortgaged premises as he might be able to sell to such purchasers, and at such prices as he shall deem advantageous," with an agreement for "the release of the piece or pieces of land so sold from this mortgage." The deed was registered on the 23rd January 1866. Sales of portions of the mortgaged property then took place.

Shama Sundari, as mortgagee, on the 15th February 1872, petitioned the District Court, under Regulation XVII of 1806, ss. 7 and 8, to issue a notice of foreclosure to Huri Narain Dey, alleging that there was then due the sum of Rs. 28,777 on the mortgage. On the same day, the order was made "that the usual notice of one year, together with the copy of the petition, be served on the opposite party." No notice of these proceedings was served on any of the defendants in this suit, other than Huri Narain Dey, although they, with the exception of No. 29, purchased before the proceedings were taken. On the 31st March 1873, the Judge ordered as follows: "Whereas one year has elapsed from the date of the service of notice, ordered that this be struck off the file." And no further step was taken by the mortgagee to obtain possession of the mortgaged land, or to enforce any rights against the purchasers. But Shama Sundari, on 10th May 1879, by a conveyance in the English form, duly registered, sold and assigned to this appellant, for Rs. 11,000, all her interest in the mortgage debt and interest due from Huri Narain Dey, and in the mortgaged lands, confirming this by a subsequent deed of 1st April 1880. The prayer of the plaint was that the defendant be ordered to pay, within a time to

(1) *Shurnomoyee Dasi* v. *Sreenath Dass*, I. L. R., 12 Calc., 614.

be specified by the Court, Rs. 63,212, or the sum that might be found due on the taking of accounts and interest for the period of the suit; also a declaration was asked that in default of such payment, the defendants were not entitled to redeem, and that the plaintiff should have possession.

Huri Narain Dey and eight of the twenty-nine defendants made no defence. The others alleged title, each to their several portion of the mortgaged land, under kobalas from the mortgagor; some of them admitting notice of the mortgage, and alleging payment of the purchase-money on account of the mortgagee, Shama Sundari, others denying all knowledge of the mortgage. Some alleged title through mesne or intermediate transfers, others claimed directly through Huri Narain Dey. The latest purchase had taken place in August 1866. All those who defended relied on limitation, alleging that the mortgagor's right to possession having determined on the 17th February 1866, and twelve years from that date having expired in 1878, the suit was barred in the latter year.

On the issue of limitation, as also in other respects, the judgment of the Subordinate Judge was in favour of the plaintiff, to whom he decreed possession. He held Art. 147 to be applicable, and not Art. 135 of Act XV of 1877.

From this decree sixteen of the defendants appealed to the High Court, which reversed it as to all the defendants except the first, the mortgagor. The judgment of a Divisional Bench [PIGOT and O'KINEALY, JJ.](1) was that as against all the defendants except the first, the plaintiff's suit should have been dismissed, as he had failed to prove his title as against them, and had also failed to prove the identity of the parcels occupied by them with those that he claimed. The only ground however of dismissal that need be stated is limitation, as to which the judgment of the High Court will be found reported in I. L. R., 12 Calc., 616.

On this appeal, which included all the defendants as respondents,

Mr. *R. V. Doyne* and Mr. *J. D. Mayne*, for the appellant, argued that the period of limitation was given by Art. 147 of sched. ii of Act XV of 1877, and not by Art. 135, the latter having been wrongly applied by the High Court, which had failed to see the distinction between a claim to possession by the mortgagee, as against the mortgagor, made in the character of mortgagee, and a claim for an account for foreclosure and sale brought by the mortgagee, or as here by his transferee. A mortgagee, after taking proceedings under Regulation XVII of 1806, if entitled by the terms of his mortgage to possession, still had to sue for it, if out of possession, or for a declaration that he was entitled to it, if he was in possession, there being no decree upon proceedings under the Regulation—See the judgment in *Forbes* v. *Ameeroonissa Begum*(2). And it followed that such a suit brought by the mortgagee must be brought within twelve years from the date when the mortgagor's right of possession determined, that being the case to which Art. 135 was applicable. But when a suit, as in this instance, aimed at bringing the mortgage to an end, Art. 147 was applicable.

The frame and prayer of the present suit were justified by, and maintainable under, the Transfer of Property Act, 1882, which repealed Regulation XVII of 1806. They were also in accordance with s. 16, cl. c, of the Code of Civil Procedure (Act XIV of 1882). The Transfer of property Act came into force on the 1st July 1882, establishing for mortgagees the suit for foreclosure; so that the appellant obtained thereunder the right to maintain this suit for foreclosure. It was under this Act that his rights were enforceable against the purchasers, who were no parties to the previous proceedings against the mortgagor.

(1) *Shurnomoyee Dasi* v. *Sreenath Dass*, I. L. R., 12 Calc., 616.

(2) 10 Moore's I. A., 340; 2 P. C. J.; 153.

There was nothing in the state of things existing between 1878 and 1882 which excluded the appellant from obtaining the benefit of the law which in the latter year he found in his favour. Referring to the development of the law of mortgage in Bengal, originally land mortgaged by way of conditional sale became the lender's property on non-payment of the money lent; but Regulation XVII of 1806 controlled the mortgagee's right until he should have taken proceedings as the Regulation directed to terminate relations according to his contract. The mortgage in the English form of land, outside the local jurisdiction of the Supreme Court and of the High Court which had succeeded it, was dealt with by the Courts in the same way. And these proceedings being ministerial, and not judicial, and the so-called foreclosure not resulting in any decree, the mortgagee had, nevertheless, in any case, to sue for possession—See the judgment in *Forbes* v. *Ameeroonissa* (1) at page 350 of the report. The provisions of the three successive Limitation Acts were then referred to, the conclusion being drawn that Art. 135 applied where the relation of mortgagor and mortgagee subsisted and did not apply where the suit was to change the character of the relation of mortgage to that of absolute ownership. Reference was made to *Bhowani Charn Mitre* v. *Joykishen Mitre* (2), *Forbes* v, *Ameeroonissa Begum* (1) *Brojonath Coondoo Chowdhry* v. *Khelat Chunder Ghose* (3), *Huro Chunder Gooho* v. *Gudadhur Koondoo* (4), *Sarasibala Debi* v. *Nand Lal Sen* (5), *Denonath Gangooly* v. *Nursing Prosad Dass* (6), *Ghina Ram Dobey* v. *Monaruth Ram Dobey* (7), *Burmamoye Dasi* v. *Dinobundhoo Ghose* (8), *Gokuldass* v. *Krupa Ram* (9), *Mankee Kooer* v. *Munnoo* (10).

None of the respondents appeared.

On a subsequent day, 5th February 1889, their Lordships' judgment was delivered by

THE RIGHT HON. LORD HOBHOUSE :—

The appellant who was the plaintiff below, is the transferee of a mortgage effected by the first defendant Huri Narain Dey in favour of Shama Sundari Debi. The mortgage bears date the 17th November 1865. It is in the English form providing for the payment of the debt on the 17th of February 1866, and giving to the mortgagor the right of possession until default in payment, and to the mortgagee the right of entry after default.

The property mortgaged is in the district of the 24 Pergunnahs.

On the 15th February 1872, Shama Sundari applied to the District Judge of the 24-Pergunnahs to issue as usual a notice of foreclosure to the opposite party under Regulation XVII of 1806. The opposite party was Huri Narain. The notice was served on him, and, on the 31st March 1873, a year having elapsed from the date of the service, the case was struck off the file. It is clear, therefore, that Huri Narain's right to redeem was foreclosed, and that as against him Shama Sundari became absolute owner, on or shortly before the 31st March 1873.

In the year 1879 the plaintiff acquired Shama Sundari's interest in the mortgaged property, and on the 6th September 1882, he brought a suit against Huri Narain and twenty-eight other defendants whom he alleged to have been holding possession of several plots of the property claiming by purchase and otherwise from Huri Narain. He stated that they ought to have been made parties to the foreclosure case, but Shama Sundari had not done that; that the defendants knew of the mortgage; that nothing had been paid on account of the mortgage debt; and that the defendants refused to pay.

(1) 10 Moore's I. A., 340; 2 P. C. J; 153.
(2) S D. A., 1848, p. 354.
(3) 6 W. R., 269; and, on appeal, 14 Moore's I. A., 144, and 8 B. L. R., 104.
(4) 6 W. R., 184.
(5) 5 B. L. R., 389.
(6) 14 B. L R., 87.
(7) 7 C. L. R., 580; I. L. R., 6 Calc., 566 (note).
(8) I L R, 6 Calc., 564, 7 C. L. R., 583.
(9) 13 B. L. R., 205.
(10) 14 B. L. R., 315

He prayed an order for payment, and, in default, a declaration that the defendants would be unable to redeem the mortgaged properties and an order for possession.

Huri Narain has not made any defence at any stage of the suit. Of the other defendants, some either did not appear or did not put in any statement; one pleaded a mistake of personal identity, and eighteen, besides other pleas, contended that the suit was barred by time. Seventeen of them stated that they held plots purchased of Huri Narain at various dates, ranging from November 1865 to August 1866. Some of them stated as to their own plots, that Shama Sundari was privy to the purchases, and that the price was paid to her agent in reduction of the mortgage debt. But as the latest of these alleged transactions was in August 1866, the difference between the cases of these defendants need not be considered. One defendant, No. 29, stated that he had purchased two plots of Huri Narain's land, one in February 1873 at a revenue sale, the other in December 1876 at an execution sale. This defendant stands in a different position from the others as regards both time and the effect of the foreclosure proceedings. But if his title is impeachable at all, which their Lordships are far from suggesting, it must be in a suit properly framed and conducted for that purpose.

With this exception of No. 29 for whose case no issue was framed, their Lordships do not intend to discuss any other plea than that of limitation. Whether the plaintiff really acquired Shama Sundari's interest; whether the defendants' plots are or are not included in the mortgage; whether Shama Sundari was privy to the sale by Huri Narain; whether the purchase money was paid on account of the mortgage; whether the purchasers knew of the mortgage; whether their possession was adverse or non-adverse; all these questions have been discussed, but are immaterial, some in any case, and the others if the suit is barred by time.

The ruling Act is No. XV of 1877, and the question is whether the case falls within Art. 135 or 147. Article 135 provides that a suit by a mortgagee for possession of immoveable property mortgaged shall be dismissed if instituted after twelve years from the time when the mortgagor's right to possession determines. Article 147 provides that a suit by a mortgagee for foreclosure or sale shall be dismissed, if instituted after 60 years from the time when the money secured by the mortgage becomes due.

The Subordinate Judge made a decree against all the defendants without distinction, for payment, and on default for foreclosure. As regards the question of limitation, his grounds were as follows; that if the foreclosure proceedings were regular, a new starting-point of time was gained in February or March 1873; but if they were irregular, the mortgagee possessed only an inchoate right of possession, and so the mortgagor's right had not determined; that suits for foreclosure were, under the Codes of 1859 and 1877, allowed in the Bengal Mofussil; and that the plaintiff had a right to bring this suit quite independently of the Transfer of Property Act of 1882. These reasons lead up to the conclusion that the case falls within Art. 147, which allows 60 years to sue.

From this decree, sixteen of the defendants appealed to the High Court. The Court was of opinion that the mortgagor's right to possession determined on the 17th of February 1866; that the mortgagee's right to bring a suit for possession was barred on the 17th February 1878; that, with the right to possession was lost the right to take foreclosure proceedings under the Regulation of 1806; and that suits for foreclosure were then unknown in the Bengal Mofussil. They therefore concluded that the suit was barred by force of Art. 135, and they dismissed it against all the defendants except Huri Narain. They do not assign their reason for not dismissing it against Huri Narain, but their Lordships presume the reason to be that as against

him they took the suit to be one for possession, founded on the title acquired in February or March 1873 under the Regulation. From that decree the plaintiff appeals.

All the defendants, except Huri Narain and another, are made parties respondent to the appeal. No one has appeared and their Lordships have not had the advantage of hearing argument in support of the decree; but after taking time to consider, their Lordships find themselves in agreement with the High Court.

The inferences of fact which the Court is bound to draw from the evidence or the omission of evidence in the case appeared to their Lordships to be as follows: the foreclosure was, as against Huri Narain, perfect on or before the 31st March 1873; the purchasers from him were not served with notice as required by the Regulation; they therefore remained unaffected by the proceedings, and the relationship of mortgagee and person entitled to redeem continued to subsist between Shama Sundari and them; the purchasers have continued in undisturbed possession since the time of their respective purchases; no interest has ever been paid on account of the mortgage debt; if any part of the principal has been paid in respect of any of the plots, the latest payment was made in August 1866; therefore, if Art. 135 is the one applicable to the case, the twelve years there allowed ran out in the month of August 1878 at the latest.

In order to succeed then the plaintiff must show that Art. 135 is wholly inapplicable to his case. To do that, it is contended that Art. 135 applies only to those cases in which a mortgagee desires to take possession in that character; that if he wishes to foreclose he may do so within the time limited by Art. 147; that on the 1st July 1882, the right to maintain foreclosure suits was conferred on Bengal mortgagees; and that the Limitation Act immediately fastened on those suits, and provided 60 years as the limit for them.

To this argument it is sufficient for the present case to answer that in the year 1878, when no suit for foreclosure could be brought, the right of Shama Sundari to possession was wholly extinguished, and the title of the purchasers under Huri Narain freed from the mortgage. The subsequent creation of suits for foreclosure could not, except by clear enactment, revive the extinct right, and in effect the clear enactment is the other way, for s. 2, cl. (*c*) of the Transfer Act says that nothing therein shall affect "any right or liability arising out of "legal relation constituted before this "Act comes into force, or any relief in "respect of such right or liability." Their Lordships consider that, within the meaning of this section, the rights of the purchasers to unencumbered ownership of their plots have arisen out of the legal relations between them and Huri Narain and Shama Sundari.

It is therefore unnecessary to discuss what has been so much urged at the bar, *viz.*, the effect to be attributed to Art. 147, a provision which appeared for the first time in the Act of 1877.

The result is that the High Court decree is right and should be affirmed, and the appeal dismissed. Their Lordships will humbly advise Her Majesty to this effect.

Appeal dismissed.

Solicitors for the appellant: Messrs *T. L. Wilson & Co.*

19th and 20th November 1888.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, the Right Hon. Sir Richard Couch, and the Right Hon. Mr. Stephen Woulfe Flanagan.

MOHIMA CHUNDER MOZOOMDAR AND OTHERS* ... } *Plaintiffs,*

and

MOHESH CHUNDER NEOGI AND OTHERS ... } *Defendants.*

On appeal from the High Court in Bengal.

Limitation Act (XV of 1877), sched. ii, Art. 142—Burden of proof—Date of dispossession or discontinuance of possession.

The claimants had shown that they formerly were proprietors of the land to which they alleged title, and from which they claimed to oust the defendants; but they had been dispossessed, or their possession had been discontinued, some years before this suit was brought by them, and the land was occupied by the defendants who denied their title. That being so, the burden of proof was on the claimants to prove their possession at some time within the twelve years (prescribed by Art. 142 of sched. ii of Act XV of 1877) next preceding the suit.

That the claimants certainly showed an anterior title was not enough, without proof of their possession within twelve years, to shift the burden of proof on to the defence to show that the defendants were entitled to retain possession.

APPEAL from a decree (15th March 1886) of the High Court reversing a decree (10th June 1884) of the Subordinate Judge of Pubna.

On July 30th, 1883, the plaintiffs, now appellants, filed their plaint in the Court of the Subordinate Judge of Pubna, against 81 defendants, for the possession of land, of which the plaintiffs alleged that they were wrongly dispossessed in Assin 1282, corresponding to September 1874. Of the defendants, numbers 1 to 27 were sued as claiming to be proprietors of the land as part of their own village of Machuakandi. Numbers 78 to 81 were *pro formâ* defendants, having an interest in the land if belonging to Rajapur. The remaining defendants were tenants under the first 27.

The question, which was practically decisive, on this appeal was whether the admitted dispossession of the plaintiffs took place at a period within, or beyond, twelve years before the 30th July 1883.

From the revenue records of 1822 it appeared that of the contiguous mauzahs Rajapur and Machuakandi, the latter was in 1844 diluviated by the river Tchamati, which had till then been the boundary between it and Rajapur. The river then went further in the same direction, eastward from its former channel, leaving land re-formed on the old site.

This was resumed by the Government, and was afterwards measured and assessed as part of Machuakandi. The proprietors of Rajapur, however, claimed the re-formation as part of their mauzah, and, on the 3rd August 1846, the whole of the lands, measured and assessed as appertaining to chur Machuakandi, were re-leased to the proprietors of Rajapur as accretions to it. Some time before 1861, ryots were settled on this disputed land. According to the defendants' evidence, the cultivators and tenants all came from Machuakandi.

It was admitted by the plaintiffs that from the month of Assin 1282 (September 1874), the defendants had refused to acknowledge their rights as proprietors. No attempt was made to assert their title until May 1882, when some of the plaintiffs' tenants preferred a complaint to the Magistrate of Serajgunge, against some of the present defendants, alleging acts of violence to prevent their paying rent to the plaintiff proprietors. On the 12th July 1882 the Magistrate, proceeding under s. 530 of the Code of Criminal Procedure, found that the land in dispute was, and had been, in the possession of the Machuakandi ryots, and not of the ryots from the original Rajapur. This led to the present suit, in which the plaint was founded upon an alleged

* 16 Cowell's Ind. Ap. 28; 16 Calc., 473.

continuous title to the land in dispute as part of mauzah Rajapur. It alleged dispossession in Assin 1282 (September 1874), complained of the Magistrate's order of 12th July 1882, claiming that the plaintiffs' title should be established, they be put into possession, and receive mesne profits.

The answer of the defendant proprietors asserted that the land belonged to Machuakandi and not to Rajapur, and set up limitation under Art. 142 of sched. ii, Act XV of 1877. The issues raised the question of the plaintiffs' possession within the period of twelve years. The Subordinate Judge, upon the evidence, came to the conclusion that the plaintiffs had acquired title to the land in dispute, as accretions to their ancestral mauzah Rajapur, and were in possession of it from 1848; and their possession was upheld at the time of the survey measurement of the mehal Rajapur in 1852 and 1853. Then, it was to be seen whether the plaintiffs' claim was barred by limitation in consequence of their having been out of possession between the years 1870 and 1882. As to this, the Subordinate Judge found that it had been proved that although the plaintiffs and their old tenants were dispossessed from the greater part of the lands in dispute in 1875, yet they retained part of them, till ousted under the proceedings in 1882; and that, therefore, the plaintiffs' claim was not barred by limitation as to the whole of it. He accordingly decreed the claim in part.

Against this decree defendants 1 to 18 appealed to the High Court; the plaintiffs cross-appealing for what had not been decreed.

The judgment of a division Bench, (Mc Donell and Beverley, JJ.,) was that the decree of the lower Court was wrong, and that the suit should have been dismissed. The evidence, in the opinion of the Court, was unsatisfactory, the witnesses were tenants and interested, the absence of zemindary papers unexplained; and the judgment concluded as follows:—

"Now it is quite true that, as regards the small piece of land, measuring ten or fifteen pakhis, which was the subject of the proceedings under s. 530, Code of Criminal Procedure, the plaintiffs' claim would not be barred, and if those proceedings had been put in, or if there was any evidence to show where these ten or fifteen pakhis were situated, the plaintiffs would be entitled to a decree for that quantity of land. There is, however, no such evidence, and the mere fact that the plaintiffs retained possession of an insignificant portion of the land, will not save their claim as regards the rest from being barred."

Mr. *C. W. Arathoon*, for the appellants, contended that, on the evidence, the Subordinate Judge's finding that these appellants had possession of part of the property in suit, within twelve years before the institution of the suit, was clearly right. The presumption then was that what had been shown to be the antecedent state of things continued; and this if not establishing the plaintiffs' possession within twelve years of the suit being brought, was sufficient, at all events, to throw the burden of proving when they were dispossessed on to the defence.

He referred to *Rao Karan Singh* v. *Bakar Ali Khan*(1) and the Bengal Administration Report for 1872-1873.

Mr. *R. V. Doyne* and Mr. *J. D. Mayne*, for the respondents, argued that the decision of the High Court was right, the suit, having been barred by the law of limitation of Art. 142 of sched. ii of Act XV of 1877.

Mr. *C. W. Arathoon* replied.

Their Lordships' judgment was delivered by

THE RIGHT HON. MR. STEPHEN WOULFE FLANAGAN:—

This is an appeal from a decree of the High Court of Bengal dated the 6th March 1886, reversing a decree of the lower Court of the 10th June 1884. The action in this case was brought to recover possession of certain lands which

(1) L. R., 9 I. A., 99; I. L. R., 5 All., 1.

need not be particularly described. It is sufficient to say that they are lands in the possession of the respondents. A great deal of evidence has been given on the one side and the other as to the original title to these lands which were claimed by the plaintiffs as part of "Rajapur," and by the defendants as part of "Machuakandi." It appears to be unnecessary to go into that title. The question is whether, assuming the plaintiffs to have been at some time lawfully in possession, the plaint which was filed on the 30th July 1883, was filed within 12 years, as required by the 142nd article of the Limitation Act of 1877, from the date of their dispossession or discontinuance of possession.

It is conceded by the plaintiffs that in fact they were dispossessed, or their possession was discontinued from the year 1875, a period of eight or nine years prior to the bringing of this suit, and that the defendants have ever since been in undisturbed possession; but they allege that they were in possession within four years or more immediately prior to that date.

Now the only question in this case being one of fact with reference to the Limitation Act, it will be well to turn to the judgment of the Judge of the Lower Court and see upon what grounds he based his decision in favour of the plaintiffs and to contrast these with the reasons of the High Court reversing his decision. After referring to certain chittas, (which, in their Lordships' opinion are not evidence of possession within the time in question) he goes to the substantial question upon which his decision is based. He says: "It is also to be observed that the title of the defendants Nos. 1, 3, 4, and 5, to the mauzah Machuakandi was created just after the agrarian disturbance in this district. This circumstance alone is sufficient to lead me to believe that the defendants took advantage of the opportunity to revive their lost right to the mauzah Machuakandi by inducing the ryots of the chur Rajapur to admit them as their landlords." Then he says: "it was argued by the defendants' pleader, that the plaintiffs failed to prove collection of rent from their alleged tenants, as they did not file any collection papers, and their loss is not properly accounted for. It is proved by the plaintiff No. 1, and the plaintiffs' witnesses that in 1279 the plaintiffs' cutchery house was blown down by rain and storm, and greater part of the papers were lost, and the defendants' witness No. 1 deposed that occasionally he and his brother Kali Komul used to take papers from their ijmali serista, and he made over certain papers to his co-sharers at the time of instituting this suit."

Now, merely making a short comment on the first passage which has been just read, it appears to their Lordships that the question for decision is not whether or not the title of the defendants was created just after the disturbance or otherwise, but when were the plaintiffs dispossessed or when did they discontinue possession? The plaintiffs by their own witnesses have admitted in fact that their possession was discontinued, at all events, in July 1875. By one of their witnesses, —their principal witness,—Gomashta Panaulla, it appears that in fact they were dispossessed in the year 1873. Many witnesses were examined on behalf of the plaintiffs in this case, to prove their possession within the four years prior to 1875, but it is not necessary to go through their evidence in detail. These witnesses may be grouped in fact into two classes: witnesses who either are or have been in the employment of the plaintiffs, or witnesses who have been tenants upon the lands—witnesses who in fact had been dispossessed by the respondents, whose evidence, therefore, when it has to be balanced against other evidence of a contrary tendency, is subject to the remark that it is in accordance with their interests. It is a very singular fact in this case that there appears to be no documentary evidence whatsoever in support of the case which has been made by the plaintiffs here, to show their possession or their receipt of rent for a period

within 12 years before the time when the action was brought. Many documents were proved in support of their title to the lands some years previous to that date, but none to prove their possession. The statement by the witnesses in reference to the cyclone in the year 1872 and the destruction of their house and the place where they alleged all the papers were kept, and the scattering of those papers, is certainly one which cannot be relied on in a case of this kind as proving that documentary evidence of value in support of their possession had ever existed, nor as affording a sufficient reason for its non-production. It is also a singular circumstance in reference to the destruction of their cutchery house by the cyclone in the year 1872, that all the earlier papers, namely, the papers which were referred to at great length in the case as proving the title of the plaintiffs as distinguished from their possession are all forthcoming. How it is that they were not destroyed with all the other papers in that cyclone is not explained, but it is a remarkable thing and throws the greatest possible doubt and suspicion on the allegation in reference to the destruction of the papers, that papers of that class should be all forthcoming, and that the material papers, those relating to possession, are not produced at all. Bearing in mind that the lands are all cultivated and in the possession of tenants, there is also another class of papers which certainly ought to have been produced and have been either in the possession of the plaintiffs, if they really existed, or in the possession of their tenants, but which have not been produced. These papers are, amongst others, the receipts for the rents alleged by the plaintiffs and their tenants to have been paid for the years between the cyclone of 1872 and the year 1875, when they alleged their possession was first determined; these, although alleged to exist, were not produced. The learned Judge then says: "When I showed above that the plaintiffs are the rightful owners of the disputed land, it is for the ryot defendants to show that they are entitled to retain possession of these lands." That, as a proposition of law, is one which hardly meets with the approval of their Lordships.

This is in reality what in England would be called an action for ejectment, and in all actions for ejectment where the defendants are admittedly in possession, and *ä fortiori* where, as in this particular case, they had been in possession for a great number of years, and under a claim of title, it lies upon the plaintiff to prove his own title. The plaintiff must recover by the strength of his own title, and it is the opinion of their Lordships that, in this case, the onus is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within 12 years before the commencement of the suit, namely, for the two or three years prior to the year 1875, or 1874, and that it does not lie upon the defendants to show that in fact the plaintiffs were so dispossessed.

Now, turning from the judgment of the Judge of the Court below, to the reasons which were given by the Judges of the High Court for the decree they made reversing the decision of the Court below and dismissing the plaintiffs' suit with costs, the Court says in reference to the Law of Limitation: "This suit was instituted in the month of Srabun 1290, and it was, therefore, for the plaintiffs to show that they had been in possession of the land in suit since Srabun 1278. Now, admittedly, according to the plaintiffs, they were ousted in the year 1282, that is, eight years before the institution of the suit. And we find from the evidence, and particularly from the evidence of their gomashta Panaulla, that virtually they admit having been dispossessed so far back as 1280." That would be the year 1873. "In that year, according to the evidence for the plaintiff, their tenants first grew refractory; and it does not appear that the plaintiffs ever collected rent, or were in possession after that year. That being so, it appears to us

that a very heavy onus lay upon them to prove that they were in possession during the two years previous, that is, from 1278." With that observation their Lordships entirely concur: "and we are further of opinion that they have not succeeded in proving this." In that observation their Lordships also concur. "The only documentary evidence adduced on this point is a chitta of the year 1280. This chitta purports to have been prepared by one Tamiz Sircar, who, though alive, has not been called." What its contents may have been it is impossible from the record here to collect, but, at all events, this chitta having been prepared by Tamiz Sircar, who appears to be alive, Tamiz Sircar was not produced. "His signature on the paper has been proved by the gomashta Panaulla. But whether the chitta was really prepared by Tamiz Sircar and under what circumstances and how far it would be evidence of possession, are matters upon which there is really no evidence. This being so, it may be said that, practically, there is no documentary evidence whatever of the plaintiffs' possession." Then the Court goes on to say: "No dakhilas, kabuliyats, or pottahs have been put in." Their Lordships have already made a comment as to the nonproduction of some of these documents. "The only evidence on the question of possession consists of certain oral statements made by the servants and tenants of the plaintiffs. These tenants admit that they are now holding the lands of *usli* Rajapur and that they would benefit if the plaintiffs succeed in this suit. We think that very little reliance can be placed upon the evidence of such witnesses, unsupported, as they are, by single scrap of documentary evidence." Then the learned Judges commenting on the manner in which the absence of documentary evidence is attempted to be accounted for, namely, by a reference to the cyclone and the suggestion that one of the defendants having become a lunatic, he had got possession of some material papers; but why the papers, whether in his possession or that of his family, if the papers ever got in his possession, should not have been produced and proved has not been accounted for or explained in any way, say: "We think that neither of these reasons is satisfactory; and, in the absence of better evidence, we think the plaintiffs have not discharged the onus that lay upon them." Then the Judges of the High Court go on to say: "Now it is quite true that, as regards the small piece of land, measuring ten or fifteen pakhis, which was the subject of the proceedings under s. 530, Code of Criminal Procedure, the plaintiffs' claim would not be barred, and if those proceedings had been put in, or if there was any evidence to show where these ten or fifteen pakhis were situated, the plaintiffs would be entitled to a decree for that quantity of land. There is, however, no such evidence, and the mere fact that the plaintiffs retained possession of an insignificant portion of the land, will not save their claim as regards the rest from being barred." It appears to their Lordships that the High Court, in making that observation in reference to the criminal proceedings, must have mistaken the decision of the Magistrate, because so far as appears from the judgment in that case, it would seem that in point of fact the Magistrate finds that for a period of at least four years prior to the institution of those proceedings there had been peaceable possession on the part of the owners or ryots or tenants of the land of mauzah Machuakandi, and this finding, so far from being in support of any contention that these particular lands, whatever they may have been, were in the possession of the tenants or ryots of Rajapur, is distinctly to the contrary. Upon the whole, in this case, their Lordships, without going further into the matter, or considering the defendants' evidence, which is, however, cogent to show that they have in fact been in possession for more than 12 years prior to the filing of the plaint, are of opinion that the appeal from the decision of the High Court of Bengal should be dismissed, and the decree appealed from affirmed,

and they will humbly advise Her Majesty accordingly.

The appellants will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents: Messrs. *Oehme, Summerhays & Co.*

21st November and 19th December 1888.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, the Right Hon. Sir Richard Couch, and the Right Hon. Mr. Stephen Woulfe Flanagan.

KALI DUTT JHA AND OTHERS* *Defendants,*

and

ABDUL ALI AND ANOTHER ... *Plaintiffs.*

On appeal from the High Court in Bengal.

Mahomedan Law—Guardian—Power of Guardians—Sale by guardian of property to which ward's title was in dispute, and for the benefit of the latter.

By the Mahomedan Law, guardians are not at liberty to sell the immoveable property of their wards, the title to which property is not disputed, except under certain circumstances specified in Macnaghten's Principles of Mahomedan Law, Chapter VIII, cl. 14. But, where disputes existing as to the title to revenue-paying land, of which part formed the wards' shares, sold by their guardian, were thereby ended, and it was rendered practicable for the Collector to effect a settlement of a large part of the land, a fair price moreover having been obtained, the validity of the sale was maintained in favour of the purchaser as against the wards for whose benefit the transaction was.

Although the sale deed incorrectly stated the purpose of the sale to have been to liquidate debts, a statement repeated in a petition to the Collector, asking that settlement of the shares sold should be made with the purchaser, yet, on the transaction being afterwards impeached by the wards, *held*, that it was open to the guardian to prove the real nature of the sale, and to show that it is one beneficial to them.

* 16 Cowell's Ind. Ap. 96; 16 Calc., 627.

APPEAL from a decree (8th February 1884) of the High Court, reversing a decree (17th January 1882) of the Subordinate Judge of Mozufferpore.

The two plaintiffs, now respondents, were the son and daughter of Bibi Udulunnissa, who died on the 26th October 1861, leaving them, with her husband, their father Sheikh Riazuddin Hossein, her heirs. The share of the latter in her estate was one-fourth, and the residue formed the children's shares. Riazuddin, who in his wife's lifetime had been managing her estate, continued to manage it as to the children's interests after her death, the son being little more than two years old, and the daughter about one year, and he being their natural guardian according to Mahomedan law.

The plaintiffs, of whom the first attained full age on 3rd May 1880, and the second was still a minor suing by her maternal grandmother, claimed to obtain possession of a one-anna share in a taluk named Wari in Zillah Durbhunga, and to have set aside, as to the one-anna share, a sale made by their father Riazuddin (the kobala or sale deed having been dated 7th May 1862), of two annas out of nine annas of the whole sixteen of taluk Wari, for Rs. 6,235 (the price of one-anna share being half that amount). The sale was to Bhupat Jha, Sardari Jha, Madhuri Jha, and Ramdut Jha, described as shareholding proprietors and inhabitants of taluk Wari. They were defendants in this suit, their representatives and survivors being now appellants.

Taluk Wari, resumed as invalid lakhiraj in 1840, had from that time down to its final settlement by the Collector in 1862, been the subject of disputes, as to what persons were entitled to settlement; whether entitled as *maliks*, among whom were the predecessors of the Hindu respondents, the owners of neighbouring mauzahs, or entitled as *menhaidars* (persons holding at a reduced assessment), among whom were certain Mahomedans.

The taluk, including a share in it bought by Udulunnissa amounting to

four-and-a-half annas (she having purchased jointly with her brother nine annas, and Riazuddin her husband holding benami for her), became the subject of various dealings. These are set forth in their Lordships' judgment, which also contains all the relevant facts relating to the deed of sale of 7th May 1862 executed by Riazuddin.

The plaint stated that the consideration of the sale deed, so far as regarded the one-anna share, was Rs. 3,117, which sum was alleged to have been appropriated by Riazuddin to his own use. The ground on which the sale was impeached was that Riazuddin had not obtained a certificate from the Civil Court to act as guardian, and that the sale was not made to pay off any debt, as alleged in the deed of sale, or for the plaintiffs' benefit.

Besides other grounds of defence, the following was relied upon, *viz.*, that the defendants or their predecessors in estate had acquired by purchase in 1856, from one Sufdar Hossein, the right to a certain share in taluk Wari; and by virtue of that right, and also of a right of pre-emption by reason of vicinage, as regarded other interests sold by Sufdar Hossein to the plaintiffs' great-grandfather Jaffer Ali in 1856 and 1857, had instituted five several suits, in which they, the defendants, claimed nine annas of the taluk, and were also claiming in a resumption suit, then, and since 1840, pending before the Collector of the District, the right to settlement with them of the interest which they had so purchased; that the sale to them by the plaintiffs father was made for the purpose of putting an end to litigation, and that the consideration was applied to paying off a debt due from the plaintiffs, or their mother's estate, to a banking firm styled "Babu Gopal Das and Babu Bunsi Lal Das." And they further alleged that the suit was brought by the plaintiffs in collusion with their father, and contended that, even assuming that the plaintiffs' father had no right to sell their interest, his own interest in taluk Wari equalled or exceeded that which he had professed to sell, and that the plaintiffs had no title to what they claimed.

The issues raised the following questions, *viz.*: (1) whether the plaintiffs' father could sell the disputed property without having obtained a guardianship certificate from the District Judge; (2) whether the sale deed of 7th May 1862 was valid, either on account of benefit to the plaintiffs or because the father's share in his wife's property covered the interest sold; (3) whether the plaintiffs were benefited by the purchase money.

The Subordinate Judge dismissed the suit on the grounds that the plaintiffs' father, as their natural guardian, could without a certificate sell the plaintiffs' properties "under legal necessities;" that prior to the execution of the deed of sale in question, the five pre-empiton suits alleged by the defendants were pending, and affected the interest of the plaintiffs' mother in taluk Wari, and the sale was effected *bonâ fide* to compromise those suits, and the consideration was paid to the bankers, to an account which stood in their books in the name of Wasimunnissa the plaintiffs' grandmother, but which was in fact the joint account of her and her daughter Udulunnissa the plaintiffs' mother, and the plaintiffs had the benefit of that payment; that the plaintiffs' father Riazuddin, who was by Mahomedan law entitled to one-fourth of his wife's interest in taluk Wari (*i.e.*, to one anna and two-and-a-half gundas), had not, as alleged by the plaintiffs, relinquished that share; that the present suit had been brought in collusion with him, and that he had evaded the process of the Court to obtain his appearance and evidence.

A Division Bench (MITTER and MACLEAN, JJ.,) reversed the judgment of the first Court, being of opinion that it was not proved that any money was, prior to the sale in suit, due from the plaintiffs' estate to the bankers, and that there was no account between the latter and the plaintiffs' estate; that no benefit had resulted to the plaintiffs

from the compromise of the pre-emption suits, which appeared to have been brought against their mother and another, after her death, and which could hardly have been successful; and that therefore the plaintiffs had not benefited by the sale of their property by their father and guardian. And the Division Bench, differing therein also from the first Court, were of opinion that the evidence of the plaintiffs, and especially the language of the deed of sale in question, proved that Riazuddin had relinquished his interest in his deceased wife's estate, in consideration of her dower unpaid by him.

A decree in favour of the plaintiffs was accordingly made, and the defendants thereupon appealed to Her Majesty in Council.

Mr. *R. V. Doyne* appeared for the appellants.

The respondents did not appear.

For the appellants, it was contended by Mr. *Doyne* that the first Court had rightly held that the sale had been made by Riazuddin as guardian of the minors for their benefit. That benefit arose either from the liquidation of debts for which their mother's estate was liable, or from the pending litigation being brought to an end by the sale, and its being thereby rendered practicable for the Collector to effect a settlement of three-and-a-half annas of taluk Wari. The High Court's judgment was accordingly wrong, and that of the first Court should be restored. Again, the evidence including that afforded by the language of the kobala of 1862, had been wrongly treated by the High Court as proof of Riazuddin's alleged renunciation of his share of his wife's estate, in satisfaction of her claim for unpaid dower. That renunciation had been by no means established. Moreover, in regard to the whole case, if the sale should appear on other grounds to have been made without title (though it was submitted that it was not so), it should nevertheless be considered that Riazuddin was at the time of the sale entitled to a share equal to, if not larger than, one anna of Wari, which share therefore passed to the defendants; so that this suit could not be decreed.

Their Lordships' judgment was, on a subsequent day, 19th December, delivered by

THE RIGHT HON. SIR RICHARD COUCH:—

The suit, which is the subject of this appeal, was brought by the respondents to have it declared that a deed of sale, dated the 7th May 1862, executed by the defendant Sheik Riazuddin Hossein, the father of the plaintiffs, was invalid, and for possession of a one anna share in taluk Wari, which was the subject of that deed.

Mahomed Ali, who died in November 1854, had two wives, Wasimunnissa and Fakirunnissa. By the former he had a daughter, Udulunnissa, and by the latter a son, Mahamed Hossein. Udulunnissa married the defendant Riazuddin, and died on the 26th October 1861, leaving a son and daughter, the plaintiffs. Taluk Wari had been resumed as invalid lakhiraj in 1840, and from that time to its final settlement by the Collector had been temporarily let to various persons. Disputes arose and doubts existed as to the persons who were entitled to settlement, and the final settlement was not made until the 19th May 1862. Between 1840 and 1862, there had been various dealings with the taluk. It will be sufficient to mention those which affected the parties to this suit. On the 19th December 1856, Syed Sufdar Hossein executed a deed of sale of one anna three pie eleven cowries plus a fraction (which may conveniently be called a two-annas share) in the taluk and its dependency Sosi Narhat, in favour of Bhupat Jha and Madhuri Jha in consideration of Rs. 2,250. On the 6th January 1857, Sufdar Hossein executed another deed by which (after stating the sale of the 19th December, and that owing to the inattention of the purchasers, the mutual exchange of equivalents did not take place, and the deed of sale remained

with him; and that Udulunnissa and Fakirunnissa had, by their karpurdazes, claimed the right of pre-emption by reason of having, previously to the sale to Bhupat Jha and Madhuri Jha, purchased other shares in the taluk), Sufdar Hossein sold the two-annas share to Udulunnissa and Fakirunnissa for Rs. 2,250. On the 11th August 1856, the 4th December 1856, the 6th January 1857, the 29th January 1857, and the 23rd February 1857, purchases of other shares in the taluk and its dependency were made by Udulunnissa and Fakirunnissa. These shares, together with the share sold to them on the 6th January 1857, made up nine annas of the taluk, half of which was declared to belong to each of them. On the 31st December 1861, five suits were instituted against Fakirunnissa and Udulunnissa by Sardari Jha, the ancestor of some of the defendants, to establish a right of pre-emption to the shares composing the nine annas, and the Collector had before him these conflicting claims to the settlement.

It was in this state of things that the deed of the 7th May 1862 was executed by the duly empowered mokhtear on behalf of Riazuddin Hossein, described as the father and guardian of the plaintiffs, minor heirs of Udulunnissa, and on behalf of Fakirunnissa, mother and guardian of Mahomed Hossein, her minor son. By this a two-annas share of the nine annas of the taluk was sold for Rs. 6,235 to Bhupat Jha, Sardari Jha, Madhuri Jha, and Ramdut Jha, described as the shareholding proprietors and inhabitants of the taluk Wari. And it was stated that the Rs. 6,235 was for liquidating the debts due to Babu Gopal Das and Bunsi Lal, mahajuns. One anna was said to be purchased by Bhupat Jha, and one by the other three. The books of the firm of Gopal Das and Bunsi Lal were produced. They contained accounts in the name of Mussummat Wasimunnissa, the grandmother of the plaintiffs, who appeared to be possessed of considerable property, but had no interest in the taluk Wari. From various entries in these accounts they appeared to relate to this taluk as well as to the property and transactions of Wasimunnissa. In the account for the year 1269 (1861—62), under the native date corresponding with 16th May 1862, is the following entry:—

	Rs.	As.	P.
The 3rd Jeyt Budi.—Received on account of the consideration money of two annas of taluk Wari debited to Bhupat Jha, Sardari Jha, Madhuri Jha, and Ramdut Jha ...	6,235	0	0
Deduct on account of the share of Fakirunnissa, which is debited to her	3,117	8	0
Remainder ... Rs.	3,117	8	0

On the other side of the account, under a date corresponding with the 13th January, among the entries of "paid on account of revenue into Collectorate," there is an entry "Wari, Rs. 181-9," and under a date corresponding with the 29th March an entry "Wari of Raja, Rs. 447-15," and on the date corresponding with the 26th May 1862 there is an entry, "Paid through Sheik Velait Hossein, in order to defray the expenses of the settlement of taluk Wari Rs. 2,500." It appears from the proceedings of the Collector of Tirhoot, dated the 19th May 1862, in a suit for obtaining permanent settlement of taluk Wari, that a petition was filed on behalf of Bhupat Jha and Madhuri Jha, stating that they were the purchasers of one anna three pies and eleven cowries and a fraction share, and subsequently on the 10th May 1862 a petition of withdrawal was filed on their behalf, stating that they withdrew from that claim filed previously, and praying that the deed of sale to them on the 19th December 1856 might be considered ineffective, and that the settlement might be effected with Fakirunnissa and others. And that subsequently on the 12th May 1862 another petition was filed on their behalf with the deed of the 7th May 1862, praying that a settlement of the two annas share mentioned in that deed should be made with them. On the same 7th May 1862, consent decrees were made

in the five pre-emption suits by which they were dismissed. Thus all opposition on the part of the Jhas as regards seven annas was withdrawn, and they claimed the settlement of only two annas under their new title. In the end, the settlement was made with Fakirunnissa, described as mother and guardian of Mahomed Hossein, and Riazuddin, described as father and guardian of the plaintiffs, for seven annas of the nine, and with the Jhas for the remaining two annas. The allegation in the plaint that Riazuddin appropriated the consideration for the sale of the 7th May 1862, was not only not proved, but was disproved, and nearly the whole, if not the whole, of the consideration appeared to have been applied on account of the taluk.

The Subordinate Judge held that the deed of the 7th May 1862 was valid, saying in his judgment that the pre-emption suits and the defendants' claim case before the Collector were "impending dangers over Wari at that time, and what might have been the consequence of those objections cannot be now determined at this distance of time, and I should therefore think that Riazuddin acted wisely in making a compromise with the defendants by executing the disputed kobala so soon as only eleven months after the death of Udulunnissa, and thereby to avert that danger." He dismissed the suit. The High Court set his decree aside, and made a decree for the plaintiffs, being, they said, "on the whole of opinion that the respondents (the defendants) failed to establish that any benefit was conferred upon the appellants by the sale by their father of the disputed property." The statement in the deed, and in the petition to the Collector on the 12th May, 1862 of Riazuddin and Fakirunnissa, asking that a settlement of the two-annas share should be made with the Jhas, that the sale was for the purpose of liquidating debts due to the mahajuns, is not correct, though looking at Gopal Das's account, and the large payment made by his bank on account of Wari three weeks afterwards, the parties may have thought that it was correct; but at all events their Lordships think it does not preclude the defendants from proving the real nature of the transaction and that it was a beneficial one to the minors.

It is not a case of a sale by a guardian of immoveable property of his ward, the title to which was not disputed, in which case a guardian is not at liberty to sell except under certain cirumstances.—Macnaghten's Principles of Mahomedan Law, chap. VIII, cl. 14. The right of Udulunnissa and Fakirunnissa to be purchasers of the nine annas was disputed. By the sale of the two annas, the dispute was put an end to, and thus a settlement obtained of the seven annas. Moreover the Rs. 6, 235 appeared to be a fair price for the two annas which had in December 1856 been sold by Sufdar Hossein for Rs. 2,250.

Their Lordships differ from the opinion of the High Court that the present appellants, who were then respondents, had failed to establish that any benefit was conferred upon the minors by the sale. They are of a contrary opinion, and looking at the whole transaction they think it was within the power of the guardian to make the sale.

There is another ground upon which the appellants are entitled to have the decree of the High Court reversed, and the decree of the Subordinate Judge dismissing the suit affirmed.

The case stated in the plaint is that Riazuddin had sold to the defendants one anna out of four-and-a half annas, the property left by Udulunnissa in taluk Wari, and the plaintiffs only got three-and-a-half annas partitioned to them by the Collector. Now Riazuddin, as the husband of Udulunnissa, was entitled to one-fourth share of her property, and consequently the plaintiffs were in possession of more than they were entitled to by inheritance, their shares amounting to $3\frac{3}{8}$ annas. This objection was taken in the written statement of the Jha defendants. It was attempted

to be met by some loose evidence of Riazuddin being liable for dower and relinquishing his share to the plaintiffs on that account. No document was produced, and the Subordinate Judge found, as a fact, that Riazuddin did not relinquish his one-fourth share. Their Lordships are of opinion, upon the evidence, that this finding was proper, and that the reason given by the High Court for not agreeing in it is insufficient. An admission of Riazuddin that he had relinquished his share, even if it was clearly made in the deed of sale, ought not to affect the other defendants. He had been ordered to attend as a witness, and did not do so, and the Subordinate Judge thought he was in collusion with the plaintiffs. This was highly probable, and the suit appears to their Lordships to be a dishonest attempt to get back property, for which the plaintiffs had received full consideration, and had had the benefit of it.

Their Lordships will, therefore, humbly advise Her Majesty to reverse the decree of the High Court, to dismiss the appeal to the High Court, with costs, and to affirm the decree of the Subordinate Judge.

The respondents will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Barrow & Rogers.*

24th November and 12th December 1888.

PRESENT:

Members of the *Judicial Committee.*—The RightHon. Lord Hobhouse, the Right Hon. Sir Richard Couch, and the Right Hon. Mr. Stephen Woulfe Flanagan.

SIVARAMAN CHETTI, AND OTHERS* ... } *Plaintiffs,*

and

MUTHAYA CHETTI AND OTHERS ... } *Defendants.*

On appeal from the High Court at Madras.

Village property—As to what was the common property of a village, viz., a tank—Inability of any of the co-proprietors to exclude the rest from contributing to repair it.

A village tank, on the site of an ancient one, was the common property of and used by, all the inhabitants, of whom one family on the ground of improvements and additions made by their ancestor with the general acquiescence of the village claimed, against the rest, the exclusive right of repairing the tank at their own cost. But no corresponding obligation on the plaintiffs to repair was shown; and from the evidence, including that afforded by a compromise made in 1842, it appeared that the repairs were to be effected by a common collection made through the person in management, who was to account for his receipts and expenses:

Held, that it was equally at the option of the rest of the villagers either to permit the repairs to be done by the plaintiffs, or to insist on the work being done at the common cost; the tank remaining the common possession of the village, and no class of the villagers having any right to exclude the rest from contributing to the repairs.

APPEAL from a decree (4th December 1882) of the High Court (1), reversing a decree (7th April 1880) of the Subordinate Judge of Madura, East.

The parties, both described in the recored as traders, Nattukottai Chetti caste, residing in the village of Karakuddi in the Shivaganga zamindari, dispu-

* 16 Cowelle's Ind. Ap 48; 12 Mad., 241.

(1) Muttaya v. Sivaraman (I. L. R., 6 Mad., 229).

ted the right to repair a village tank, constructed on the site of an ancient one. The plaintiffs, four in number, were of one family, and the defendants, originally twenty-one in number, were of different families, all inhabiting the village.

In their plaint the plaintiffs stated :—

"That their common ancestor, one Meyyappa Chetti, about 70 or 80 years ago, with the consent of the Miras Ambalagars of the Karakuddi village, dug and constructed, at his own expense, the tank known as Kalkattu urani in the village, and thereupon he and his descendants became hereditary Hakdars of the urani.

"That the ancestors of the plaintiffs, and after them, plaintiffs, as hereditary Hakdars, had, up to date, been in possession of the urani, and at their own exclusive cost maintained the urani charity, by constructing stone-works round the urani, by digging supply and surplus channels, building flight of steps, building a large matam on the western bank of the urani, and by laying out a flower garden open to the public.

"That in the year 1842, on a complaint being made by Chidambaram Chetti, one of the plaintiffs' ancestors against the ancestors of the defendants 1 to 7, for wrongful interference with the urani, the then Collector of Madura, after inquiry, passed an order, dated 9th May 1842, to the effect that the urani was constructed at the exclusive cost of the ancestors of these plaintiffs, that they should therefore be allowed to make the repairs to the urani at their own cost according to mamul, and that the interference with the urani by the ancestors of the defendants Nos. 1 to 7 was wrongful.

"That subsequently, on the 2nd September 1842, Chidambaram Chetti and certain other Chettis of Karakuddi, executed a Kararnama before the Collector, to the effect that all the tanks and uranis of the Karakuddi Ilaka Nagarattars should henceforward be common to the whole community of the Nagarattars, but that the repairs, even though they should have to be made by the general contributions of the Nagarattars, should be made by the Hakdars who have right to the urani respectively by virtue of their ancestors having originally constructed the same.

"That the terms of the Kararnama were, however, never acted upon, but it was in fact virtually abandoned so far as this urani was concerned, and that since its date, plaintiffs and their ancestors, as Hakdars, had retained exclusive control of the urani and carried on repairs at their own cost."

Then followed the complaint that, in the year 1878, when they were about to repair the tank, they were stopped by the defendants, who claimed to take part in the work. They asked for a declaration of their sole right to repair, at their own cost, and for an injunction on the defendants ; also claiming Rs. 350 as damages for previous interference.

The defendants, who severed in their defences, denied that the plaintiffs' ancestors had excavated the tank, which they alleged to have been made for charitable purposes by a former inhabitant, on whose death, without heirs, it had become the common property of the "Nattars" and "Nagarattars" of the village ; and was appurtenant to a temple on its bank, in which temple all the inhabitants were interested, all the latter contributing to its cleaning and repairs. Some of the defendants also alleged that certain flights of steps had been built, some by the plaintiffs, but others by the defendants, at a time prior to the disputes, which arose in 1842.

The following issues were recorded : 1st, whether the plaintiffs had the exclusive right claimed by them, or the urani was the common property of the villagers ; 2nd, whether the flight of steps which defendants, Nos. 1 to 4 and 6 and 7, alleged to have been constructed by their ancestors, had been so made, or by the plaintiffs' ancestors ; 3rd, whether the flight of steps, which the 15th defendant claimed as having been constructed by

his ancestors, had been made by the latter, or by the plaintiff's family; 4th, whether the right of maintaining and repairing the steps existed in the parties constructing them, or that right resided in the village community; 5th, whether the plaintiffs were entitled to any relief; and, if so, to what relief?

The Subordinate Judge held that the tank was common property in the sense that the public could use the water; but that the right claimed belonged to the plaintiffs, because their family, though not the actual founders of it, had spent upon it large sums of money and improved it, "with the sanction of a few and the sufferance of many persons who could claim an interest in it." The Subordinate Judge, having referred to the Kararnama of 1842, and the other evidence, found that the plaintiffs for more than 30 years before disputes arose in 1878, had the exclusive superintendence of the tank, and cleaned it at their own expense. He held that thus "an easement" had arisen, and that the plaintiffs had thereby "acquired an exclusive right to conserve and improve the tank."

On issues 2 and 3 he held that the ancestors of defendants Nos. 1, 2, 3, 4, 6, 7, and 15 had originally constructed the steps, as alleged by these defendants.

On the fourth issue he apparently held that the defendants had lost by non-user their original right of repairing the steps constructed by their ancestors, and that the plaintiffs had acquired that right.

He refused to give the plaintiffs the damages asked for by them, but declared their sole right to repair the tank at their own cost, and enjoined the defendants from entering on the tank for the purpose of repairing it.

On appeal, the Judges of the High Court (Innes and Muttusami Aiyar, JJ.) gave the judgment, which is reported at length in *Mattaya* v. *Sivaraman* (1).

They considered that there was not any exclusive right of property in the tank itself, even alleged by either party; and it did not appear to them that there was any authority for saying that the construction of substantial adjuncts to the property of another could give the constructor a right of porperty therein. They held, accordingly, that the construction of certain masonry works, without opposition, did not give the plaintiffs any right to exclude others from interfering with the conservancy of the tank generally. If it did so, then some of the defendants, viz., Nos. 2 to 4 and 7, who constructed one set of steps, and the defendant No. 15, who constructed another, would equally have a right to exclude the plaintiffs from taking any part in the general conservancy of the tank. It was not necessary to consider whether the plaintiffs who had always repaired the steps built at their exclusive cost might not have had a right to exclude others from interfering with the repairs of that particular set of steps. The relief now sought was something far beyond this, and no ground for it had been made out. Accordingly, the High Court dismissed the suit with costs.

On this appeal,—

Mr. *J. Graham*, Q. C., and Mr. *J. D. Mayne* appeared for the appellant.

Mr. *T. H. Cowie*, Q. C., and Mr. *R. V. Doyne* for the respondent.

For the appellant it was argued that the tank was used for the benefit of the village community, being, when the improvements had been made, a charitable institution, and therefore subject to the laws regulating such establishments as temples, dharmsalas, and other things. *Prima facie*, the management and supervision of such an institution, and the exclusive duty of providing for, and of executing, all necessary repairs, would devolve upon the founder and his heirs. The evidence established that here such was, in fact, the prevalent usage.

[Sir Richard Couch inquired if there was shown to be any legal obligation on the appellants to undertake the repairs at their sole expense]. So far only as

(1) I. L. R., 6 Mad., 229.

that the appellants' family were hereditary and exclusive managers of the tank, as representing the villagers. That family were entitled to do all acts in the management, discharging the duties of managers. Thus it was that they became "Hakdars" in respect of the tank. The villagers might have sued the family, either to retire from the management, or maintain; and thus the latter had a right, corresponding to the duty to maintain, to repair exclusively. The succession to the management of a temple ordinarily depended on similar rights—See the judgment in the *Rajah Muttulinga Setupati* v. *Perianayagum Pillai* (1).

Moreover the plaintiffs relied on a uniform usage of threefourths of a century that, in this respect, the plaintiffs' family should represent the community. The permission accorded to the ancestors of the defendants to construct two flights of steps into the tank would not give them a general right of interference in its management, nor any right, except, perhaps, that of keeping those particular steps in repair. Reference was made to *Churton* v. *Frewen* (2), and the *Duke of Norfolk* v. *Arbuthnot* (3) cited in the argument, and in the judgment, on the appeal to the High Court.

Counsel for the respondents were not called upon.

Their Lordships' judgment afterwards, on 12th December, was delivered by

THE RIGHT HON. LORD HOBHOUSE :—

The plaintiffs and defendants are all inhabitants of the village of Karakuddi, and the subject of dispute is a tank belonging to that village. The plaintiffs claimed in their plaint to be hereditary Hakdars, which the High Court interpret to mean rightful owners of the tank, and they prayed for a declaration that they have the sole right to repair it at their own exclusive cost, and for other relief flowing from that right and from the defendants' interference with it. The Subordinate Judge gave the plaintiffs a decree establishing their sole right to repair the tank at their own exclusive cost. Upon appeal the High Court dismissed the suit. Their Lordships are now asked to say the High Court was wrong.

The plaintiffs do not now assert that they are owners of the tank in any full or proper sense of the word; they admit that the villagers at large have full right to the enjoyment of it; but they contend that the function of cleaning, repairing, and generally managing and protecting the tank is an hereditary possession of their family, which they have a right to retain so long as they bear the cost of it. It may be that for generosity and public spirit their attitude deserves all that has been said of it by their counsel. But the defendants object to it; and the only question for a Court of Justice is on which side the lawful right is be found.

Though the various classes and divisions of villagers are called by local and unexplained names, this much is clear, that the tank in dispute is on the site of an old village tank; that about the beginning of the century it was improved at the cost of the plaintiffs' family upon the request of at least some leading villagers, and with the general acquiescence of the village; that since the year 1842, when there was a quarrel and a settlement, the plaintiffs' family have executed the general repairs and cleansing, and have on one occasion interfered to protect the tank from encroachment; and that some of the defendants have constructed and kept in repair flights of steps leading down into it. These matters, to which the greater part of the oral evidence relates, are not conclusive either way. But the proceedings of 1842 are of great importance and require to be carefully looked at, not because they resulted in any decree or contract binding the present parties, but because they furnish the best evidence of the

(1) L. R., 1 I.A., 209, at p. 228.
(2) L. R., 2 Eq., 634.
(3) L. R., 4 C. P. D., 290; L. R., 5 C. P. D., 390.

true relations and legal position of the disputants.

On the 1st of April 1842 Chidambaram, who was the head of, or in some way represented, the plaintiffs' family, presented a petition to the Collector of Madura, in which he alleged that when his predecessor improved the tank, it was agreed that his family should have charge of all the affairs appertaining thereto, and maintain it for ever. Then, after stating that their opponents in the village had prevented them from cleansing the tank, he prayed, "that an order may be passed allowing us to remove the mire and maintain the said urani charity for ever as we have been usually doing, prohibiting interference on the part of the persons who are endeavouring wrongfully to trouble us, and enabling the continuance of the charity in perpetuity."

The Collector referred the matter to the local Ameen, who took evidence and made a report; and on the 9th May 1842 the Collector declared that the opponents were not justified in interfering, and gave directions to the Ameen to issue orders for the complainants to carry on the work according to custom. It is noticeable that neither in the evidence adduced to the Ameen, nor in his report, nor in the judgment of the Collector, does there appear anything to support Chidambaram's allegation of an agreement that his family should have charge of all the affairs of the tank and maintain it for ever.

The order of May 1842 was no sooner issued than the opposite party, represented by one Lakshamanan Chetty, began to petition against it. They insisted that the tank was a common charity, and denied both the right of the plaintiffs' family to maintain it solely and the fact that they had done so. And they prayed a direction "that the charity has, according to custom, been maintained by our Nagarattar community in common, shall continue to be maintained in common henceforth." The immediate result of this petition was that the Collector directed that action on his previous order should be suspended till he himself came to the spot. The ulterior result was a compromise of the dispute, which for the time put an end to it.

The Kararnama which embodies the compromise is the most important document in the case. It was entered into before the Collector himself very formally. It was prepared by the Head Sheristadar of the district. It was signed by Chidambaram and Lakshamanan, the principal disputants, and by two others, apparently a partisan of each; and it was attested by the signatures of the Collector and the Assistant Collector. It runs as follows:—

"On Chidambaram Chettiar commencing repairs to the Kalkattu Amman urani, Lakshamanan Chettiar and others said that they also would give money for digging that urani. Chidambaram Chetti objected that it ought not to be so received, and both parties resorted to the authorities. Chidambaram Chettiar contended that, as (his) father originally built the Kalkattu urani, he was the owner. The authorities (said) that uranis dug for Charitable purposes are common property, and Chidambaram Chettiar urged that other uranis in the village shoud be likewise common, which statement the authorities accepted as just, and Lakshmanan Chettiar and others also admitted it as right. Therefore, both the parties having agreed that all the tanks and uranis of the Nagarattars of Karakuddi are common property, we have, with our mutual consent, agreed in the presence of the authoritises, that in future, on occasions of removing mud from the urani and doing other repairs, all the Nagarattars should collect the money in common, hand over the said money to the person who may be in management as the original proprietor of the urani, have the work done, and adjust the accounts in common, and that there shall be no dispute whatever about this in future. Therefore we have executed this to be held as a deed of Kararnama for the same. We will henceforward abide by this alone."

The inferences to be drawn from this document are clear enough The tank is the property, not of Chidambaram, but of the villagers, and the repairs are to be effected by common collections through the person in management, who is to account for his receipts and expenses. The only obscurity is in speaking of the person in management as the original proprietor of "the urani." Whatever may be the meaning of that expression, it cannot detract from the clear statement that all the tanks and uranis are common property. The terms of the Kararnama are fatal to the claim of the plaintiffs that they are entitled to repair at their sole expense. Their Lordships do not find anything in the previous evidence to show that these terms are erroneous; nor anything in the subsequent evidence to show that the position of the parties has been altered. The circumstances that the plaintiffs' family have in fact executed subsequent repairs without dispute, and that they have stood forward to protect the tank when threatened with injury, are quite insufficient for that purpose.

Moreover, it is very difficult to understand how such a right as this can be claimed without a corresponding obligation, and the plaintiffs' counsel are unable to show in what way any obligation is imposed on their family. There is no endowment to support the tank, and no right of taking tolls or fees. It is confessedly at the option of the plaintiffs' family whether they will execute the repairs or not. In their Lordships' opinion, it is equally at the option of the other villagers to permit the repair to be executed by the plaintiffs, or to insist on the work being done at the common cost.

It seems a great pity that there should be litigation on such a ground. Disputes for the purpose of avoiding a charge are much more common than disputes for the purpose of bearing one. But as we have a dispute of the latter kind, it must be settled, like any other, by law. And that compels their Lordships to hold that the tank remains the common possession of the village, and that no class of the villagers has any right to exclude the rest from contributing to the repair. The appeal fails, and must be dismissed, with costs. Their Lordships will humbly advise Her Majesty to this effect.

Appeal dismissed.

Solicitors for the appellants—Messrs. *Lawford, Waterhouse and Lawford.*

Solicitors for the respondents—Messrs. *Frank Richardson and Sadler.*

6th and 19th December 1888.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, and the Right Hon. Sir Richard Couch.

* IN THE MATTER OF THE PETITION OF R. E. TWIDALE.

Privy Council, practice of—Admission to practise in the Privy Council—Rules of 31st March 1871—Vakil of High Court.

The words of ss. 2 and 3 of the Rules of 31st March 1871 are such that the classes of persons to be admitted to practise in the Privy Council must be either Solicitors or others practising in London, or Solicitors admitted by the High Courts in India or in the Colonies respectively, and have not left an undefined class admissible at the discretion of the Judicial Committee.

THIS was a petition by Mr. Richard Erasmus Twidale, a pleader in the High Court, Calcutta, to be admitted as Agent to practise in the Privy Council, upon his subscribing the declaration prescribed by the rules established by the order of Her Majesty in Council of 31st March 1871, "to be observed by Proctors, Solicitors, Agents and other persons admitted to practise before Her Majesty's Honourable Privy Council"(1).

* 16 Cowell's Ind. Ap. 163; 16 Cal. 636.

(1) The rules are printed in the Appendix to "The Practice of the Judicial Committee," by William Macpherson, Esq., at p. 65.

After requiring in the first section that every Proctor, Solicitor, or Agent admitted to practise before the Privy Council or any of the Committees thereof, shall subscribe a declaration in the form given, the rules contain the following:—

2. Every Proctor, Solicitor or Attorney practising in London, and duly admitted in any of the Courts of Westminster, shall be allowed to subscribe the foregoing declaration, and to practise in the Privy Council, upon the production of his certificate for the current year.

3. Persons not being certificated London Solicitors, but having been duly admitted to practise as Solicitors to the High Courts of Judicature in India or in the Colonies respectively, may apply by petition to the Lords of the Judicial Committee of the Privy Council; and such persons, if admitted to practise by an order of their Lordships, shall pay annually, on the 15th November, a fee of five guineas to the Fee Fund of the Council Office.

Mr. *R. V. Doyne*, in support of the petition, argued that the scope of the Rules of 1871 having been to state certain duties to be discharged by practitioners upon admission, their object had not been to define the classes of persons to be admitted to practise. This was left to be, as it must have been before the rules, a matter discretionary with their Lordships; and the second and third sections specified those classes in imposing a duty upon them, which hitherto alone had been admitted. But the rules were for an enabling purpose, imposed no limit upon the powers of the Committee, and used no negative words to confine the term "Agents" to any classes of persons. He referred to the case of *In the matter of the petition of W. Tayler.*

The judgment of their Lordships was delivered by

THE RIGHT HON. LORD HOBHOUSE:—

Since this case was argued their Lordships have considered the matter very carefully and they have been furnished with a copy of the shorthand notes of the proceedings on Mr. Tayler's petition; and they find, with some regret, that they are unable to accede to Mr. Twidale's request.

Mr. Twidale is a vakil of high standing and reputation in the Calcutta High Court; but he has not been admitted as a Solicitor anywhere, in England or in India. He now applies to be admitted to practise here as an Agent, and the question is whether the Orders in Council admit of such an application being granted. No doubt, there is some ambiguity about them because in general terms they refer to "Proctors, Solicitors, or Agents." There are four sections of the Order relating to the subject, and in the first and fourth of those sections all those terms are mentioned; but the two sections which show what is the mode of admission, and the classes to be admitted, are the second and third; and those only apply to Solicitors or others practising in London, and to Solicitors admitted by the High Courts in India or the Colonies respectively. The question is whether those rules 2 and 3 are exhaustive of the classes to be admitted, or, as was argued by Mr. Doyne, they only specified what should be done in the case of those two classes, and left an undefined class called "Agents," who were to be admitted at the discretion of the Committee. Mr. Tayler's case, which has been cited, is exactly in point. Mr. Tayler also was a vakil of the Calcutta High Court, and he had not been admitted as a Solicitor anywhere. He applied for leave to practise at this bar. His Counsel, Sir Roundell Palmer (Lord Selborne) put the case very much as Mr. Doyne has done. Lord Cairns, on behalf of the Committee, said in that case "the qualifications are in the Schedule." That means in the Orders I suppose; it is a mistake of the shorthand writer. "The third appears to be the only one upon which any claim can be made. The third applies to Solicitors practising in India." Then Sir Roundell Palmer said "yes, I see there are affirmative words which do not embrace this case: I do not perceive that there are any negative words which would exclude it." Well that is precisely the argument which Mr. Doyne put at the bar here. The answer to this is, "Lord Cairns:—There was an obvious reason for specifying

the classes which are here specified. I do not say what may or may not be done hereafter, with regard to the very wide class of vakils who are under very different jurisdictions, but certainly they are not included at present in the Order." That (as will be seen) is exactly in point.

Their Lordships collect that the Committe on that occasion, as on this, were by no means disinclined to grant the petition, if it were within their power. But it has been expressly decided that it is not within their power, and their Lordships now must follow that decision, and refuse the application.

Petition rejected.

Solicitors for the petitioner: Messrs. *T. L. Wilson and Co.*

31st January, 1st February, and 1st August, 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Lord Fitzgerald, the Right Hon. Lord Hobhouse, and the Right Hon. Lord Macnaghten.

STANG, STEEL & Co., . *Defendants,*

and

A SCOTT & Co. ... *Plaintiffs.*

On appeal from the Court of the Recorder of Rangoon.

Maritime Law—Jettison—Right to general average contribution—Right of shippers of jettisoned cargo—Default of master—Right of ship-owner—Remedies of shippers—Lien on cargo, saved in consequence of jettison.

In jettison of part of a general cargo the right of those entitled to contribution, and the corresponding obligations of the contributors, originating in the actual presence of a common danger, not in the causes of it, are mutually perfected whenever the goods of some of the shippers (not being wrong-doers, or those responsible for the latter) have been advisedly sacrificed, and the property of others has been thereby preserved. Such exceptions as that recognized where the average loss has been occasioned by the ship's being unseaworthy [*Schloss* v. *Heriot*(1)], and as that made in the refusal of contribution to shippers of deck-cargo when jettisoned are in truth but limitations on the above rule, which have been introduced from equitable considerations. Where a ship was stranded owing to the negligence of her master, and thereby ship and cargo were placed in a position of such danger as to make it necessary to jettison part of the cargo in order to save the remainder and the ship: *Held*, that innocent owners of the jettisoned cargo were entitled to general average contribution; but that the owners of the ship were not entitled (their legal relations to the shippers not having been varied by contract). The rules of Maritime law as to the rights and remedies in a case of jettison are: (1st) each owner of jettisoned goods becomes a creditor of the ship and cargo saved; and (2nd) he has a direct claim against each of the owners of the ship and cargo, for a *pro rata* contribution towards his indemnity. Contribution can be recovered by the owner of jettisoned goods either by direct suit, or by enforcing, through the shipmaster, who is his agent for this purpose, a lien on each parcel of goods saved, belonging to each separate consignee, for a due proportion of his claim.

APPEAL by special leave (29th December 1887) from a decree (15th August 1887) of the Recorder of Rangoon in favour of the respondents.

The respondents sued the appellants for Rs. 1,592, money paid by the former to the latter, under protest, to obtain the delivery of goods *ex Abington* detained as subject to a lien, and for Rs. 200 damages for the detention. The plaintiffs were the consignees of the goods, which had been shipped on board the steamship *Abington* from London to Rangoon with a general cargo. The defendants were the agents at Rangoon of the shipowners, and it was on their demand that this money had been paid to them under protest, they detaining the consignment, as being subject to a lien in respect of a probable average claim, on account of the jettison of other

*16 Cowell's Ind. Ap., 240; 17 Calc., 362.

(1) 14 C. B. (N. S.), 59.

cargo from on board the *Abington* when near the end of her voyage. The master was also joined as a defendant. The circumstances of the jettison are stated in their Lordship's judgment.

The finding of fact by the Recorder was that the jettison took place in imminent danger to the ship and cargo occasioned by the negligence of the master. The Recorder held that, as the danger was occasioned by this negligence, no claim for general average contribution could be enforced, and that consequently no right of lien had arisen. He was also of opinion that the defendants were not entitled to insist on having the assessment in their hands, so as for them to have control over it exclusively of the shippers. The claim was accordingly decreed.

On the present appeal,

Mr. *R. B. Finlay, Q. C.*, and Mr. *J. Gorell Barnes, Q. C.*, for the appellants, contended that the respondents were liable to contribute in respect of the cargo jettisoned, and the expenditure incurred. Therefore the appellants had rightly demanded the money, having, as agents of the owners of the ship, a lien on the respondents' goods for the amount of general average contribution payable by them. Although the jettison of part of the cargo was a consequence of the ship's having grounded through the master's negligence in navigation, the respondents were not relieved from their liability to contribute. The appellants were entitled, and also were bound, to assert a lien in respect of the general average contribution, the respondents' liability not being dependent upon any of the causes of the ship's being in peril, but only on the fact that she was in peril, and that she, and the cargo, were saved as the result of the jettison. The negligence of the master or crew in the navigation did not deprive the owners of their right of lien on the cargo for general average contribution. The owners were also exempted from liability in respect of the negligence of the master by the bills of lading, under which the respondents' goods were carried ; and for this reason, as well as on the general principle, the negligence of the master did not deprive the owners of the ship of their right of lien on the cargo for sacrifices made for the common benefit. Moreover the agents of the shipowners were entitled to demand a deposit of five per cent on the value of the goods and to refuse to release them unless the deposit should be made. It was the duty of the master to collect the general average contributions before parting with the goods, and in such case he acted not merely as agent for the shipowners, but also as agent for the shippers. Whether the contribution was for the benefit of the ship or for the benefit of the shippers was immaterial, as in either case it was the master's duty to collect it. Reference was made to *Simonds* v. *White*(1), *Crooks* v. *Allan*(2), *Schloss* v. *Heriot*(3), *Hallet* v. *Bousfield*(4), *Dobson* v. *Wilson*(5), *Burton* v. *English*(6), *The cargo ex Laertes*(7), *The Glenfruim*(8). Reference was also made to Lowndes on General Average, 4th Edn., 332 ; Abbott on Shipping, 12th Edn., 532 ; Parsons on the Law of Shipping, Vol, II, 4th Edn., 285. The claim rested on the general Maritime law and the equitable right to contribution ; a right which followed upon the obligation to submit to the jettison.

Mr. *Bigham, Q. C.*, and Mr. *J. D. Fitzgerald*, for the respondents, argued that the judgment of the Court below was maintainable, on the ground that the stranding of the *Abington* had been occasioned by the negligence of the master. The right to general average contribution could not arise upon a jettison in that way rendered necessary ; the master and owners being liable for the losses resulting from the master's wrongful acts or

(1) 2 B. & C., 805, 811 ; 4 D. & R., 375.
(2) L. R., 5 Q. B D., 38, 41.
(3) 32 L. J., C P., 211 ; 14 C. B. (N. S.), 59 ; 8 L. J. (N S.), 246 ; 11 W. R., 596.
(4) 18 Ves. Jun., 187.
(5) 3 Camp., 480, 486.
(6) L. R., 12 Q. B. D., 218.
(7) L. R, 12 P D, 187.
(8) L. R., 10 P. D., 103.

omissions. When the master jettisoned cargo, under circumstances such as caused this jettison, he was the agent of the shipowners, and not of the shippers; the loss must fall upon the owners, and the shippers were exempted from the consequences; the jettison not being such a one as gave rise to a general average contribution. If the shippers were called upon, the sacrifice would not be for the general benefit of all concerned, but for the benefit of the shipowners, to avert from them the consequences of the wrongful act of their servant the master. This would be contrary to the principle, which was an equitable one, in which contribution took its origin. Reference was made to Parsons on the Law of Shipping, Vol. I, Chap. IX; Abbott on Shipping, Part 6, p. 499, Edn. of 1881. To show that if the jettison was a consequence of danger into which a ship had been brought by the master's negligence, the goods saved were under no liability in respect of the goods jettisoned. Reference was made to Parsons on Marine Insurance, Vol. II, p. 285; Parsons on the Law of Shipping, Vol. I, p. 211, and a case cited in the latter; in a note on deck cargo jettisoned from Ware's State of Maine Admiralty Decisions, p. 326, *The Paragon*. The contract evidenced by the bill of lading, and the exceptions in it, did not relate to the questions of general average. On the general questions raised in the appeal, they referred to *Crooks* v. *Allan*(1), *Wright* v. *Marwood*(2), *The Norway*(3), *Huth* v. *Lamport*(4), *Ashmole* v. *Wainwright*(5), *The Ettrick*(6).

Mr. *J. Gorell Barnes, Q. C.*, replied.

On a subsequent day (August 1st) their Lordships' judgment was delivered by

THE RIGHT HON. LORD WATSON:—

The steamship *Abington*, on her way from London to Rangoon, with a general cargo, ran aground on the Baragua Flats in the Gulf of Martaban. Part of the cargo was thrown overboard in order to lighten the vessel, which was got off by that means, and was enabled to reach her destination in safety on the 19th October 1886. On the day of her arrival in the port of Rangoon, the appellants, Strang, Steel & Co., local agents for the ship, intimated to the respondents, A. Scott & Co. and other consignees of the cargo then on board, that a deposit of one per cent. upon the value of their goods would be required before delivery "against probable average claim;" and on the following day they made a further intimation that the amount of deposit required would be five per cent. A correspondence ensued, in the course of which the respondents made various tenders, all of which were declined; and on the 25th October, six days after the arrival of the *Abington*, they paid the required deposit, amounting to Rs. 1,592-11, under protest, and obtained delivery of their goods.

The respondents, on the 27th October 1886, instituted the present suit in the Court of the Recorder of Rangoon for recovery of their deposit, and for damages on account of the detention of their goods, upon the allegation that they had before payment made a tender entitling them to delivery. Upon the same day on which their plaint was filed, the respondents applied to the Court, under s. 492 of the Civil Code, for an injunction to restrain the appellants, Strang, Steel & Co., from remitting to England, or removing from the jurisdiction of the Court, the deposit paid to them on the 25th October. These appellants judicially undertook to retain the amount claimed in their own possession, subject to the orders of the Court, without the issue of a formal injunction, and no further proceedings have been taken in that application.

On the 5th February 1887, the respondents were allowed to add to their original ground of action an allegation,

(1) L. R., 5 Q. B. D., 38, 41.
(2) L. R., 7 Q. B. D., 62.
(3) Br. & Lush., 377.
(4) L. R., 16 Q. B. D., 442.
(5) L. R., 2 Q. B. D., 837.
(6) L. R., 6 P. D., 127, 135.

to the effect that they were not liable to contribute for general average on account of either ship or cargo, because the grounding of the *Abington* and the consequent jettison of part of the cargo, were due to the default, negligence, and misconduct of her master. Upon the pleadings thus amended, the case was twice tried before the Recorder, who ultimately, on the 15th August 1887, gave the respondents a decree for Rs. 1,592-11, and for Rs. 200, in name of damages, with costs of suit. The learned Judge found, as a matter of fact, that the stranding of the ship upon the Baragua Flats was occasioned by the negligent navigation of the master; and he held, as a matter of law, that no claim for general average arises to the owners of cargo jettisoned when the peril which necessitated jettison is induced by the fault of the ship. Whilst resting his decision upon that ground, the learned Judge indicated that, in his opinion, the respondents had made a tender entitling them to demand immediate delivery of their goods, before they paid the deposit to the appellants.

In the course of the argument upon this appeal, three separate points were raised and fully discussed. The appellants argued: (1) that innocent owners of cargo, sacrificed for the common good, are not disabled from recovering a general contribution by the circumstance that the necessity for the sacrifice was brought about by the ship-master's fault; (2) that inasmuch as the bills of lading for the cargo of the *Abington* specially excepted "any act, neglect, or default whatsoever of pilots, master, or crew in the management or navigation of the ship," the owners of cargo saved are not, so far as concerns any question of contribution, in a position to plead the fault of the master; and (3) that the respondents did not, before the 25th October 1886, make a sufficient legal tender. The parties were not agreed as to the facts upon which the second of these contentions is based; but there was no controversy as to the facts upon which the first and third of them depend. It was conceded by the appellants that the *Abington* was stranded through the negligence of her master; and, on the other hand, the respondents admitted that the effect of her stranding was to place both ship and cargo in a position of such imminent danger as to make it prudent and necessary to sacrifice part of the cargo in order to preserve the remainder of it and the ship. The question whether the respondents made a legal tender depends upon the construction of the correspondence which passed between the parties in October 1886.

The first question raised is one of general importance, and, so far as their Lordships are aware, has never been made matter of direct decision in this country. It may be convenient in dealing with it to consider, first of all, the rights and remedies which the owners of cargo thrown overboard have in a proper case of jettison. Some of the qualities of their right, and of the remedies by which it may be enforced, have been authoritatively defined. Each owner of jettisoned goods becomes a creditor of ship and cargo saved, and has a direct claim against each of the owners of ship and cargo, for a *pro ratâ* contribution towards his indemnity, which he can enforce by a direct action. In *Dobson* v. *Wilson*(1) Lord Tenterden said: "If a shipper of goods, which are sacrificed for the salvation of the rest of the cargo, is entitled to receive a contribution from another shipper whose goods are saved, I know not how I can say that this may not be recovered by an action at law. This is a legal right, and must be accompanied with a legal remedy."

Again, it is settled law that, in the case of a general ship, the owner of goods sacrificed for the common benefit has a lien upon each parcel of goods salved belonging to a separate consignee for a due proportion of his individual claim. The cargo not being in his possession or subject to his control, his right of lien can only be enforced through the ship-master,

(1) 3 Camp., 484.

whom the law of England, following the principles of the Lex Rhodia, regards as his agent for that purpose. The duty being imposed by law upon the master, he is answerable for its neglect. In the course of the argument, his liability in that respect was questioned upon the authority of certain *dicta* of Lord Eldon's in *Hallett* v. *Bousfield*(1). The circumstances of that case were very special. One of a number of persons alleging a right to contribution applied for an injunction to restrain the master from delivering the cargo without taking security, the bulk of them having consented to his so doing. Lord Eldon expressed a doubt whether it was the right of every owner of part of the jettisoned cargo to compel the captain to call on every owner of cargo saved to give security; but he dismissed the application on the ground that there was no instance of such an equitable remedy having been granted. Courts of Equity are chary of granting injunctions which may lead to inconvenient results; and it does not follow from *Hallett* v. *Bousfield* (1), that a master might not be restrained from making delivery of the cargo, at the instance of all or most of those entitled to contribution, without taking security for their claims. But their Lordships see no reason to doubt that, assuming the applicants' claim for contribution in that case to have been well founded, he would have had his remedy at law. In *Crooks* v. *Allan*(2) Lord Justice (then Mr. Justice) Lush held that a master or shipowner is bound to exercise the power he is invested with when a general loss has arisen, and to use the means in his power for adjusting the average claims and liabilities and securing their payment, and he accordingly ordained the defendants, who had neglected to perform that duty, to pay to the plaintiffs the whole amount of contribution to which they were entitled. The learned Lord Justice observed at page 42 of the report that "the right to detain for contribution is derived from the Civil law, which also imposes on the master of the ship the duty of having the contribution settled and of collecting the amount, and the usage has always been substantially in accordance with that law, and has become part of the common law of England."

The rule of contribution in cases of jettison has its origin in the Maritime law of Rhodes, of which the text, as preserved by Paulus (Dig. L., 14, Tit. 2), is: "*Si levandae navis gratiâ jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.*" The principle of the rule has been the frequent subject of judicial comment. Lord Bramwell, in *Wright* v. *Marwood*(3), said that, to judge from the way in which contribution is claimed in England, "it would seem to arise from an implied contract *inter se* to contribute by those interested." The present Master of the Rolls in *Burton* v. *English* (4), disputed that view, and stated his opinion to be that the right to contribution "does not arise from any contract at all, but from the old Rhodian laws, and has been incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, when natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one, in order that the whole adventure may be saved." Whether the rule ought to be regarded as matter of implied contract, or as a cannon of positive law resting upon the dictates of natural justice, is a question which their Lordships do not consider it necessary to determine. The principle upon which contribution becomes due does not appear to them to differ from that upon which claims of recompense for salvage services are founded. But, in any aspect of it, the rule of contribution has its foundation in the plainest equity. In jettison, the rights of those entitled to contribution, and the corresponding obligations of

(1) 18 Ves. Jun., 190.
(2) L. R., 5 Q. B. D., 38.
(3) L. R., 7 Q. B. D., 67.
(4) L R., 12 Q. B. D., 220.

the contributors, have their origin in the fact of a common danger which threatens to destroy the property of them all; and these rights and obligations are mutually perfected whenever the goods of some of the shippers have been advisedly sacrificed, and the property of the others has been thereby preserved.

There are two well-established exceptions to the rule of contribution for general average, which it is necessary to notice:—

When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which immediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property. In any question with them he is a wrong-doer, and, as such, under an obligation to use every means within his power to ward off or repair the natural consequences of his wrongful act. He cannot be permitted to claim either recompense for services rendered, or indemnity for losses sustained by him, in the endeavour to rescue property which was imperilled by his own tortious act, and which it was his duty to save. *Schloss* v. *Heriot* (1) is the leading English authority upon the point. In that case, which was an action by the shipowner against the owners of cargo for contribution in an average loss, a plea stated in defence, to the effect that the ship was unseaworthy at the commencement of the voyage, and that the average loss was occasioned by such unseaworthiness, was held to be a good answer to the claim by Erle, C.J., and Willes and Keating, JJ.

The second exception is in the case of deck cargo. The reason why relief by general contribution is denied to the owners of goods stowed on deck, when these are thrown overboard in order to save the cargo under hatches, is obvious. According to the rules of Maritime law, the placing of goods upon the deck of a see-going ship is improper stowage, because they are hinderances to the safe navigation of the vessel; and their jettison is therefore regarded, in a question with the other shippers of cargo, as a justifiable riddance of encumbrances which ought never to have been there, and not as a sacrifice for the common safety. But the owner of deck goods jettisoned, though not entitled to general contribution, may nevertheless have a good claim for indemnity against the master and owners who received his goods for carriage upon deck; and the exception does not apply, either (1) in those cases where, according to the established custom of navigation, such cargoes are permitted, or (2) in any case where the other owners of cargo have consented that the goods jettisoned should be carried on the deck of the ship.

It appears from the proceedings in this suit that the average claims at the instance of cargo owners exceed $30,000, and that there is a small claim on account of the ship. The fault of the master being matter of admission, it seems clear, upon authority, that no contribution can be recovered by the owners of the *Abington*, unless the conditions ordinarily existing between parties standing in that relation have been varied by special contract between them and their shippers. But the negligent navigation of the master cannot, in the opinion of their Lordships, afford any pretext for depriving those shippers whose goods were jettisoned of their claim to a general contribution. They were not privy to the master's fault, and were under no duty, legal or moral, to make a gratuitous sacrifice of their goods for the sake of others in order to avert the consequences of his fault. The Rhodian law, which in that respect is the law of England, bases the right of contribution not upon the causes of the danger to the ship and cargo, but upon its actual presence; and such exceptions as that recognized in *Schloss* v. *Heriot*(1) are in truth limitation on the rule, which have been introduced, from equitable considerations in the case of actual wrong-doers

(1) 14 C. B. (N. S.), 59.

or of those who are legally responsible for them. The owners of goods thrown overboard having been innocent of exposing the *Abington* and her cargo to the sea peril which necessitated jettison, their equitable claim to be indemnified for the loss of their goods is just as strong as if the peril had been wholly due to the action of the winds and waves.

In support of the legal proposition which they induced the learned Recorder to accept, the respondents relied upon a passage which is to be found in the original text of Lord Tenterden's work on Shipping (Ed. 1881, p. 499). It is in these terms: "The goods must be thrown overboard for the sake of all, not because the ship is too heavily laden to prosecute an ordinary course through a tranquil sea, which would be the fault of those who had shipped or received the goods, but because at a moment of distress and danger their weight, or their presence, prevents the extraordinary exertions required for the general safety." It appears to their Lordship that, if Lord Tenterden had really meant to lay down the rule, that there can be no contribution for jettison in the case of a ship overladen through the fault of those who received and put her cargo on board, he would have done so in plain terms. What he does say is, that there can be no proper jettison from an overladen ship, so long as ship and cargo are exposed to no peril whatever from the action of the sea, but are merely exposed to the inconvenience of being unable to reach their destination in the ordinary course of time.

The authority upon which respondents placed their chief reliance was that of Mr. Parsons, who, in his Treaties on the Law of Insurance, Vol. II., p. 285, and also in his Law of Shipping, Vol. I, p. 211, states that "when a jettison is justified by the circumstances in which it takes place, and these circumstances are occasioned by the fault of the master, or his want of care or skill, the jettison would give no claim for contribution; but the owners of the ship would be liable to the owners of the goods jettisoned for the damages caused by the wrong-doing of the master." In both works the proposition is laid down in precisely the same terms, and the same cases are referred to. These treatises are justly regarded as of great authority in questions of Maritime law; but their Lordships are constrained to say that, in their opinion, the text above cited is inaccurate, in so far as it bears that no claim of contribution will arise to the owners of jettisoned cargo in the case supposed, and is unsupported by the decisions upon which it is founded, which, all of them, relate to one or other of the exceptions already noticed.

Upon the question of legal tender, their Lordships are unable to concur in the opinion expressed by the learned Recorder. The correspondence which passed before the deposit was paid appears to them to show that both of the parties were exceedingly unaccommodating, and somewhat unreasonable, and that neither of them was altogether in the right.

Their Lordships, even if it had been desirable to decide the second point urged for the appellants, are not in a positon to do so, because there is no proof and no admission to the effect that, as alleged by them in argument, all the bills of lading for goods shipped in the *Abington* contained the same exception with those produced, of the masters's act, neglect, or default in navigating the ship. But this is not a suit for recovery of contribution; and the appellants, if it be necessary, will not be precluded from substantiating their averments in the adjustment of average claims.

The result is that their Lordships will humbly advise Her Majesty to reverse the judgment appealed from, and to dismiss the respondents' action, with costs in the Court below. The respondents must also pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants: Messrs. *Crump & Son.*

Solicitors for the respondents: Messrs. *Badham & Gore.*

12th, 13th and 16th February 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Lord Hobhouse and the Right Hon. Sir Richard Couch.

MAHABIR PERSHAD SINGH AND ANOTHER* ... } *Plaintiffs,*

and

MACNAGHTEN AND ANOTHER ... } *Defendants.*

On appeal from the High Court in Bengal.

Res judicata—Code of Civil Procedure, s. 13—Omission to bring forward in a prior suit what then would have been a defence—Accounts between mortgagor and mortgagee—Purchase of mortgaged property by the latter at judicial sale, on leave obtained to bid.

A mortgage between parties who had accounts together, comprised lands which also were leased by the mortgagors to the mortgagees, who in 1878 obtained a decree upon the mortgage, although at the time they owed to the mortgagors a considerable sum for rents. The mortgagors did not then set up the defence that they were entitled to have a general account taken, and to have the mortgagees' decree limited to such balance as might be found to exist in favour of the latter. But the mortgagors alleged a specific agreement, which they failed to prove, that the rents were to be set off against the mortgage debt; and they also stated their intention to sue separately for the rents due. No deduction was made in the decree upon the mortgage on account of these rents, for which moreover afterwards the mortgagors did obtain a decree. But the mortgagees executed their decree upon the mortgage, notwithstanding objections (which were disallowed in 1882), and having obtained leave to bid at the judicial sale purchased the property. In the present suit, brought by the mortgagors to have the judicial sale set aside, and to have the mortgage debt extinguished, by having set off against it the rents which had already accrued, or might afterwards accrue, and for possession of the lands on the expiry of the lease:

Held, that, although an equity had been raised in favour of the mortgagors, that an account should have been taken and that the rents payable should have been credited against the sums due by them, yet this equity could not be enforced in this suit. The proper occasion for enforcing it would have been in defence of the suit upon the mortgage; the present claim was within the meaning of s. 13 of the Code of Civil Procedure; and the plaintiffs were now barred from insisting on it, *exceptione rei judicatæ.*

Nor could the mortgagees be held to have purchased as trustees for the mortgagees, as suggested for the appellant, the leave granted to bid having put an end to the disability of the mortgagees to purchase for themselves, putting them in the same position as any independent purchaser.

APPEAL from a decree (12th February 1886), affirming a decree (8th May 1884) of the District Judge of Tirhoot.

The suit, out of which this appeal arose, was brought by the proprietors of mouzas forming part of two taluks, Malik Alipur and Jonapur, in the Tirhoot District, which they had mortgaged to the defendants, who had caused the mortgaged villages to be judicially sold, themselves, by leave to bid granted by the Court executing their decree, becoming the purchasers. The question now raised was whether the mortgagors, notwithstanding the decree obtained against them, and the sales in execution, could now have an account taken of the mortgage debt, and have set-off in their favour, and against such debt, rents due to the mortgagors from the mortgagees; or whether, with reference to the law, as explained (Explanation II) under s. 13 of the Code of Civil Procedure, that any matter which might and ought to have been made ground of defence in a former suit should be deemed to have been a matter directly and substantially in issue in such suit, precluded the mortgagors from now insisting on their right to set off the rents.

The decree which the mortgagees had obtained, upon the mortgage in the Court of the Subordinate Judge, was dated 18th January 1878, and was affirmed by the High Court on appeal on 22nd May 1879.

The appellant, Mahabir Pershad Singh, and his brother Kumla Pershad Singh (the latter now deceased, and represented

* 16 Cowell's Ind. Ap., 107; 16 Calc., 682.

by the other appellant, a minor), leased to the proprietors of the Khanpur Indigo Factory, Messrs. E. Macnaghten and R. Olpherts, six bigas, part of their shares in the taluks above-mentioned. Their shares, however, in 1867, were sold at a sale for arrears of revenue. This sale was subsequently set aside by a decree of the High Court, affirmed by Her Majesty in Council, in *Bunwaree Lal Sahoo* v. *Mahabir Pershad Singh*(1).

The relations between the parties are set forth in their Lordships' judgment.

The mortgage on which the decree of 1878 was obtained was executed on the 9th December 1871.

On the 15th September 1873, while Bunwari Lal's appeal was still pending, Mahabir Pershad and his brother executed an ikrarnama, agreeing with Macnaghten and Olpherts to grant them further leases, and to give them other land in a mokarari, should the sale for arrears be set aside. Afterwards, on or about the 21st June 1874, pottahs and kabuliyats were executed between them.

On the 29th June 1877, Macnaghten and Olpherts sued Mahabir Pershad and his brother on the mortgage of 9th October 1871, to recover Rs. 34,516. In that suit the defence was, that an express arrangement had been made, whereby the mortgagees were precluded from recovering, without the taking of accounts between the parties; and an issue was raised whether there had been an agreement between the parties that the factory, taking the usufruct of the mortgaged villages, should liquidate in that way what might be due to it. The Subordinate Judge, in his judgment of 18th January 1878, found that the arrangement alleged by the mortgagors had not been proved. He found that an adjustment of accounts between the parties had taken place on 31st December 1873, when the mortgagors were still indebted to the amount for which the mortgage was executed. The High Court affirmed this judgment on 22nd May 1879, observing that it had been proved that, on 31st December 1873 Rs. 25,000 were due on the mortgage, and that the alleged arrangement for rents to be set off had not been proved. The Judges also pointed out that the defendants, in their written statement, declared that the accounts and the sums due to them for rent were to be the subject of another suit, already filed. While that suit on the mortgage was pending, the mortgagors did in fact claim in another suit Rs. 4,475, rent due on a lease executed by Macnaghten and Olpherts on 21st June 1874. This claim was dismissed in the first Court, but on appeal, the High Court decreed the amount on 21st April 1881. Mahabir Pershad also obtained another decree on 30th June 1879 for Rs. 2,829, in a suit against the present respondents on other kabuliyats.

Meanwhile, the mortgagees enforced the decree on the mortgage; and at judicial sales on 15th September and 20th November 1879, the mortgaged property was sold; and decree-holders, having previously obtained leave to bid, became the auction purchasers for about Rs. 20,000.

Afterwards the mortgagor, Mahabir Pershad Singh, applied, under s. 311 of the Code of Civil Procedure, to have these two sales cancelled, alleging irregularity and inadequacy of price realized at the sales. This application having been rejected on 25th September 1880, the order rejecting it having been upheld by the High Court was maintained by an order of Her Majesty in Council on 24th November 1882 in *Olpherts* v. *Mahabir Pershad Singh* (2).

In the present suit, instituted on the 24th November 1883, the plaint asked, that the sales of 15th September and 20th November 1879 might be declared fraudulent and inoperative as against the plaintiffs, whose position as lessors was not, it was contended, changed; and that it should be declared that the plaintiffs were entitled to have rent from the defen-

(1) L. R., 1 I. A, 89; 3 P. C. J, 338.

(2) L. R., 10.I. A., 25; I. L. R., 9 Calc., 556, *nom Macnaghten* v. *Mahabir*; 4 P. C. J., 417.

dants in respect of the leases and mocurari, from the time of satisfaction of their decree by setting off the sums due to the plaintiffs from the defendants; and that it should be declared that, after the expiry of the term of the leases, the plaintiffs were entitled to have khas possession; also for such other relief as might seem just.

The suit was dismissed by the District Judge, and on appeal, the following principal question was thus expressed, and disposed of, in the judgment of a Division Bench, composed of Mitter and Norris, JJ. :—

The only ground upon which this appeal has been argued is this, that as on the dates of sale mentioned above, a large amount of money was due from the defendants to the plaintiffs, and as the defendants were the mortgagees, the sale should be declared as null and void, and that an account should be taken between the plaintiffs and the defendants of the moneys due to each other; and if on taking such account anything be found due to the plaintiffs, they should be allowed to sell the mortgaged property for the realization of the same.

The plaintiffs allege, that the amount of money which was receivable by them from the defendants falls into two classes: *First*, the rents of the disputed property which the defendants had in their hands, having been collected by them for the plaintiffs, after possession was taken of the property in dispute in accordance with the decree of the High Court, dated 31st January 1871; *second*, the rents due under the ticca pottahs executed in June 1874.

Now, we find that in the suit which was brought by the defendants upon the bond dated 9th October 1871, the plaintiffs, who were the defendants in it, set up in their written statement that the plaintiffs in that suit were not entitled to recover the amounts sued for unless an account were taken of the two classes of money due to them referred to above. In that written statement they based their defence upon this point upon an express contract between the parties.

In the opinion of the Court of First Instance as well as of this Court, which heard the case in regular appeal, this express contract was not established.

As regards the first class, this Court found that on an adjustment of accounts between the parties, which took place on the 31st December 1873, the plaintiffs in this case were found still indebted, to the extent of the money for which the bond of the 9th October 1871 was executed. Therefore, as regards this amount, it is no longer open to the plaintiffs to contend that anything was due to them from the defendants. The learned Advocate-General contended, that although the express contract upon which the plaintiffs relied in the former litigation was not established in the opinion of the Courts which dealt with it, yet the plaintiffs are not precluded from relying upon the equity which arises upon the establishment of the fact that on the dates of the respective sales, the defendants were indebted to the plaintiffs on account of the rents due upon the lease executed in June 1874. He further argued, that this equity was not pleaded and dealt with by the Court in the former litigation.

We desire to guard ourselves from being understood to say that, in our opinion, any such equity as is put forward by the learned Advocate-General on behalf of the plaintiffs, does really exist, having regard to the facts stated in the plaint. But conceding this point in favour of the plaintiffs, it seems to us that the result of the former litigation precludes them from relying upon it. The suit upon the bond dated 9th October 1871, was brought to recover the money due under it by the sale of the mortgaged premises. In that suit the equity in question, if it really existed, would have been a valid defence. Therefore the decree which was passed in favour of the plaintiffs directing the sale of the mortgaged premises, precludes the plaintiffs from setting it up again in a subsequent litigation.

We are, therefore, of opinion that the ground urged before us in support of the appeal is not valid. We may notice here a decision cited before us in support of this ground of appeal, *Kamini Dasi* v. *Ramlochan Sirkar* (1). In that case, what was sold by the mortgagee was not the mortgaged property but simply the mortgagor's equity of redemption. There is, therefore, this essential difference between the facts of that case and the present, that in the former the mortgagee bought in the equity of redemption, while in the latter, the mortgagee brought a suit to enforce his mortgage lien, obtained a decree declaring his right to sell the mortgaged property in satisfaction of that lien, and after obtaining sanction of the Court, himself became the purchaser of the property brought to sale in execution of that decree.

The result is that this appeal will be dismissed with costs.

On the plaintiffs' appeal, Mr. *R. V. Doyne*, for the appellants, argued that, as the facts showed that, at the time of the sales in 1879 in execution of the decree upon the mortgage, the respondents were indebted to the appellants in respect of rents, and money had and received; it followed that it was inequitable that the respondents should be allowed to bring the

(1) 5 B. L. R., 450.

mortgaged lands to sale without coming to an account, and also inequitable that they should become the purchasers. It was also argued, that inasmuch as the decision already given on the mortgage had dealt only with an alleged right of set-off under an express agreement, the appellants were not precluded from establishing facts that might disclose a right of set-off. It was not now alleged that there had been any express agreement to that effect, but it was contended that an equity resulted from the relations between the parties to have an account. Moreover, the respondents having themselves become the purchasers at the judicial sales, should be held under the circumstances to have purchased as trustees for the appellants, notwithstanding that they had purchased after obtaining an order giving them leave to bid.

Reference was made to the Transfer Property Act (IV of 1882), s. 99, and to ss. 13 and 111 of the Code of Civil Procedure. *Kamini Debi* v. *Ramlochan Sircar* (1) and *Neerunjun Mookerjee* v. *Oopendro Narain Deb*(2) were cited.

Mr. *T. H. Cowie, Q.C.*, and Mr. *C. W. Arathoon*, for the respondents, were not called upon.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD WATSON:—

In order to trace the circumstances which have given rise to the present litigation, it is necessary to go back to the year 1867; and it will be convenient, for the sake of brevity, to use the terms "Appellants" and "Respondents," as including not only the parties to this appeal but their predecessors in interest. The appellants, members of a joint Hindu family, were owners of certain shares of 20 mouzas, in taluks Malik Alipur and Jonapur, which were sold, in that year, for arrears of Government revenue, to one Bunwari Lal. An action was brought by them to set aside the sale as irregular, which was dismissed in the District Court; but in January 1871 the High Court gave their decision in favour of the appellants, which was affirmed by this Board in December 1871.

The respondents held six of these mouzas in lease before the sale to Bunwari Lal. They were proprietors of an indigo factory in the neighbourhood, and they gave the appellants pecuniary and other assistance in their suit, in consideration of which the appellants, in April 1871, during the dependence of Bunwari Lal's appeal to the Privy Council, executed a mortgage bond, by which they hypothecated their interest in the 20 mouzas to the respondents for Rs. 25,000, with interest at 1 per cent. per mensem, payable in one lump sum by the month of April 1875. The appellants were restored to possession in April 1871, after the judgment of the High Court in their favour. In September 1873, the parties entered into an agreement by which, in consideration of further assistance already given, and to be given them by the respondents, the appellants undertook, in the event of Bunwari Lal's appeal proving unsuccessful, to renew the lease of the six mouzas, to let to the respondents the remaining 14 mouzas under a ticca pottah for 15 years, and to grant them a mokarari lease of 13½ bigas, required by them for the extension of their factory. In February 1874, shortly after the dismissal of Bunwari Lal's appeal, the appellants executed a sunnud, authorizing the respondents to collect the rents of their mouzas for the year ending in September 1874, the respondents accounting to them for their receipts, under deduction of costs and charges. In July 1874, the appellants, in terms of their previous agreement, renewed the lease of six mouzas, at a rent of Rs. 645, for 15 years, from September 1874, and granted the respondents a ticca pottah, for the same period, of the remaining 14 mouzas, at a yearly rent of Rs. 3,527, subject to future adjustment. They also gave, as stipulated, a mokarari lease of the 13½ bigas.

(1) 5 B. L. R., 450.
(2) 10 B. L. R., 60.

These transactions between the appellants and respondents, which were by no means complicated, have unfortunately been the occasion of numerous and protracted litigations. The respondents began the strife, in June 1877, by bringing a suit upon their mortgage bond. At that date, they undoubtedly owed to the appellants a considerable sum, for past rents of the 20 mouzas, no part of which had been paid. The appellants did not plead in defence to the suit that, in the circumstances already explained, they were entitled to have a general account taken, and the respondents' decree limited to the balance in their favour. They alleged that there had been a specific agreement (which they failed to prove) to the effect that the rents should be set-off against the mortgage debt; and they also stated that it was their intention to institute a separate action for recovery of these rents. The result was that, on their failure to establish the alleged agreement, the Subordinate Judge, in January 1878 gave the respondents a decree, without any deduction on account of rents, which was affirmed by the High Court on the 22nd May 1879. The respondents, in April 1878, sued for execution on the decree of the Subordinate Judge; but in consequence of its being appealed from to the High Court proceedings were stayed. The next step was taken by the appellants, who, in June 1878, raised two actions, one for the rents due in respect of the six and the other for the rents due in respect of the 14 mouzas. In the former of these actions they obtained a decree, and the latter was dismissed by the Subordinate Judge in April 1879, on the ground that the rent payable for the 14 mouzas had never been adjusted in terms of the lease; but the High Court, holding that it lay with the respondents to show what, if any, abatement ought to be made from the rent specified, on the 2nd April 1881 reversed his decision, and gave the appellants a decree for the amount of their claim, which was upwards of Rs. 15,000.

The judgment of the High Court in their mortgage suit having then become final, the respondents, in June 1879, revived the execution proceedings which they had instituted in April 1878. The mortgaged property was exposed for sale on the 15th September and 20th November 1879, when it was purchased in two lots by the respondents, who had obtained leave to bid from the Court, for Rs. 17,000. The regularity of the sale was impeached by the appellants, but their objections were over-ruled by the Subordinate Judge, and after being sustained in part by the High Court, were ultimately, disallowed by this Board on the 24th December 1882.

Having thus failed to make good their statutory objections, the appellants, on the 24th November 1883, filed their plaint in the present suit, which prays to have the two judicial sales, of 15th September and 20th November 1879, set aside or treated as nullities; to have the mortgage debt extinguished by setting against it the rents which had already accrued or might afterwards accrue; and for khas possession of the mortgaged property after the expiry of the respondents' leases in 1889. The prayer was based upon two grounds: the *first*, which attributed the sales to undue influence and oppressive conduct on the part of the respondents, was abandoned in the High Court, and was not insisted on here. The *second* consists in an alleged equity, arising out of the relations of the parties to each other in the years 1871 to 1874, and the transactions between them during that period, to have an account taken, and to have the rents payable by the respondents credited against the sums due by the appellants under the mortgage bond. Their Lordships are disposed to think that the circumstances upon which the appellants rely did raise such an equity in their favour. The mortgage bond, the agreement, followed by the granting of the leases therein stipulated, and the sunnud, were all parts of one complex transaction, the objects of which were to enable the appellants to recover their property from Bunwari Lal, and to secure

to the respondents re-payment of moneys which they had advanced, as well as remuneration for services rendered. But, assuming the existence of the equity, the real question in the present appeal is, whether it could be enforced by the appellants, in November 1883, to the effect of annulling the judicial sales of 1879.

Their Lordships entertain no doubt that the proper occasion for enforcing the equity, now pleaded, would have been in defence to the mortgage suit of 1877. That was certainly the suit in which any account to, which the appellants were entitled, as in a question with their mortgagees, ought to have been taken. But the appellants not only abstained from putting forward any claim to a general accounting; they declared in their pleadings their intention of bringing a separate action for recovery of the rents, a proceeding which would have been wholly unnecessary if the plea which they urge in this appeal had been put forward and given effect to. The plea is within the meaning of s. 13 of the Civil Procedure Code of 1882, a matter which ought to have been made ground of defence in a former suit between the same parties, and the appellants are therefore barred from insisting on it, *exceptione rei judicatæ*.

It was argued by Mr. Doyne, upon the authority of a decision by Macpherson, J., *Kamini Debi* v. *Ramlochan Sirkar*(1) that the respondents must be held to have purchased as trustees for the appellants. The same argument, which is not raised in the pleadings, seems to have been addressed to the High Court, who, in their judgment, distinguish between that case and the present, on the ground that in the former, the mortgagee did not purchase the mortgaged property, but the mortgagor's equity of redemption. Their Lordships cannot regard that explanation as satisfactory. It appears to them to be probable that, in the case referred to, the mortgagee had not obtained leave from the Court to purchase. The report does not state that he had; and the reasoning of the learned Judge, and the mass of authorities by which he supports it, have a direct bearing upon the case of a mortgagee purchasing without leave, and in that view of the facts his reasoning is intelligible and logical. Leave to bid puts an end to the disability of the mortgagee, and puts him in the same position as any independent purchaser. If the decision of Macpherson, J., proceeded on the footing that the mortgagee had obtained leave, their Lordships are not prepared to assent to it. On that footing it appears to them that purchase of the equity of redemption by the mortgagee at a judicial sale would have the same effect against the mortgagor as the purchaser of the mortgaged property.

Their Lordships will therefore humbly advise Her Majesty that the judgment appealed from ought to be affirmed, and the appeal dismissed. The appellants must bear the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson &c.*

Solicitor for the respondents: Mr. *S. G. Stevens.*

(1) 5 B. L. R., 450.

13, 14, 15, 16, 19, February and 3rd April 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, and the Right Hon. Sir Richard Couch.

GOSSAMI SRI GRIDHARIJI*... *Plaintiff,*

and

ROMANLALJI GOSSAMI SON AND REPRESENTATIVE OF PURUSHOTTAM GOSSAMI AND OTHERS ... *Defendants.*

AND A CROSS-APPEAL OF ROMANLALJI GOSSAMI.

On Appeal from High Court in Bengal.

* 16 Cowell's Ind. Ap., 137; 17 Calc., 3.

Hindu Law—Endowment—Hereditary right to be shebait and to have possession of property dedicated to religious purposes.

According to Hindu law, when the worship of a Thakur has been founded, the office of a shebait is held to be vested in the heir or heirs of the founder, in default of evidence that he has disposed of it otherwise, provided that there has not been some usage, course of dealing, or circumstance, shewing a different mode of devolution. *Peet Koonwur* v. *Chutter Dharee Singh* (1) referred to. It having been established that a particular worship had been founded by the plaintiff's grand father, it followed that the plaintiff was by inheritance the shebait of that worship, there being no proof of any usage at variance with this presumption, but the custom appearing to be in accordance with it.

Held, that the plaintiff, as such representative of the founder, was entitled, in preference to a collaterally-descended member of the founder's family, to claim the shebaitship. Also, that the plaintiff was entitled, in that character, to the possession of a portrait which had been by the same founder dedicated to this worship. But that he had no right to a temple in which the portrait was kept, this temple having been given by one of the worshippers ("for the location of the Sri Sri Ishwar Jios") with the condition annexed that the defendant should be shebait. The plaintiff, accordingly, could not claim possession of this temple, as it could only have been accepted as a gift upon the donor's terms; and this condition prevailed notwithstanding that the temple had been in part paid for by subscription among the worshippers; there being no evidence that the latter did not know of it, or had paid their money with any reference to the question who was to be shebait.

APPEAL and cross-appeal from a decree (9th January 1885) of the High Court varying a decree (28th June 1882) of the High Court in its original civil jurisdiction, the latter decree having been confirmed by a decree (9th March 1883) of a Division Bench of the same Court.

The suit, out of which this appeal arose, was brought by the appellant against Purushottam Gossami (now represented by the first respondent) and others, for the possession of a portrait, property connected with worship, and the temple in which the portrait was kept, in Hanspokar Lane in Calcutta; an injunction, a receiver, and an account, were also asked for. The portrait was that of a deceased Gossami named Daoji, the plaintiff's grand-father, who, as head of a sect named the Bullav Acharji, presented it to his followers in Calcutta in the year 1825, founding a worship in connection with it.

The questions now raised were, whether the plaintiff's title to the office of shebait, he being admitted to be the grandson of the founder of the worship, the donor of the portrait, was better than that of the principal defendant, a collateral relation of the founder; and whether the plaintiffs rights as such shebait, besides including the possession of the portrait, also of valuables and contributions, extended to the possession of the temple in which the portrait was worshipped, or kept as a symbol of the object of worship.

The plaint alleged that he was entitled, by reason of his being the hereditary head of the Bullav sect of Vishnuvites, to the possession of all property dedicated by members of the sect for the worship. But at the trial the claim was limited to property dedicated by the sub-division of the sect to which he belonged. The custom having been negatived in the original Court and in the Division Court, still the latter Court held that the plaintiff had a claim to possession and management of the particular property in dispute, as being the heir of the founder of the institution, such a claim being according to Hindu law.

In that Court (Garth, C. J., and Wilson, J.), by both Judges it was agreed that the claim based on custom was not made out; but they held that the founder's title to possession was good. The latter Judge, however, was of opinion

(1) 13 W. R., 296—In that case a mutwali or trustee of dedicated property, was constituted by a donor whose deed gave property for maintaining the worship of a Thakur and keeping up the Thakurbari. On the death of this mutwali, the property was claimed by a relation of the deceased: It was held by H. V. Bayley and Dwarkanath Mitter, JJ., that "the property is always the property of the Thakur, under the management of the mutwali; and, on that view, the managership must revert to the heirs of the persons who endowed the property."

that the suit was barred by limitation, a point on which the Chief Justice did not concur with him.

The plaint stated several appointments by the plaintiff of persons to act as *mukhia*, and conduct the worship, including that of the defendant Sewlol; and it was alleged that when the plaintiff, who had till then been at the earlier and principal seat of the worship in Rajputna, came in person to Calcutta in February 1881, and visited the temple in Hanspokar lane, his servants in charge of it were forcibly expelled by the defendants, at the instigation of Purushottam. The plaintiff then, as he alleged for the first time, learned that the latter and Sewlol, claimed title to the temple, on the ground that one Munni Bibi had executed, on the 13th August 1866, a deed of gift, making *debutter* or religiously dedicating the land on which the temple was erected, not only for the purposes of the worship previously established by Daoji, but for that of another deity, Behariji, a household deity of her own family worship.

The exclusion of the plaintiff and his servants led to a charge being made before a Bench of Magistrates, who on 12th July 1881 imposed fines on the defendants in this suit other than the first; and the defendant Sewlol filed, on 21st July 1881, a suit against the plaintiff in the present one for a declaration of his right under Munni Bibi's deed of gift.

The first defendant, Purushottam, admitted the plaintiffs descent from Daoji, and his high place as a member of the sect; but denied that the sacred character claimed by the plaintiff gave him any exclusive right of possession, that quality extending to all the members of the Bullav family to which they in common belonged.

He alleged that each member of that family was qualified and entitled to be the custodian and trustee of any property dedicated to the worship of their deity. He also, without claiming for himself any exclusive title, alleged that Munni Bibi in 1866, by her deed of that year, dedicated the land on which the temple was afterwards erected, and that this had been under his control, containing the portrait which was placed there.

Sewlol's defence supported that of the first defendant, by whom he said that he had been appointed *mukhia*, not by the plaintiff to whom he denied ever having rendered any accounts. Other defendants, Newal Kishen Choobe and Monilal Khandelwal, jointly, in their answer, alleged themselves to be agents and managers on behalf of the first defendant.

The first Court (Cunningham, J.,) found that Daoji in his lifetime founded the worship, and presented his portrait to his disciples. He held, however, that the first defendant was entitled to have charge of the temple, which had been built on land given by the deed of 30th August 1866. His judgment dismissing the suit concluded thus:—

"On the whole, I consider the balance of evidence to be on the side of the first defendant, and that the more probable story is that which he sets up, *viz.*, that he being a moharaj with temples and disciples at various places obtained the grant from Munni Bibi appointing him shebait; that the terms of that grant must be held to regulate the right of those who hold under it; that the portrait of Daoji was removed thither by Purushottam in 1866; that Govindram and Sewlol and the committee of management acted under his orders; and that the attempt on the plaintiff's part to assert his ownership of the temple was unlawful."

On the plaintiffs appeal, the two Judges of a Division Bench were unable to agree. Wilson, J., was of opinion that the plaintiff, as the grandson and heir of Daoji, the founder of the worship, had, according to Hindu law, shown a good title to the custody of the portrait with its jewels and valuables, and to the control of the worship. He was also of opinion that about the temple a further question might arise from the terms of its dedication. But he was further of opinion that the plaintiff was barred by limitation from asserting his title to the temple against the first defendant, who

had been in adverse possession since August 1866. The Chief Justice agreed in the above, as to the question of title, but differed as to limitation.

The Chief Justice stated in his judgment that, with the exception of the point of limitation in this case, he and Mr. Justice Wilson were substantially agreed. He continued thus :—

The plaintiff has certainly failed to prove a case strictly in accordance with the custom or customs which he has alleged in his plaint ; but if he has proved facts which are in accordance with his claim and which would entitle him in law to the relief which he seeks, I think we are bound to grant him that relief.

Now, it seems to me either admitted or proved by the evidence of both sides, that by the law of this country, as well as by the usage of this particular sect, where the worship of a divinity has been founded by a moharaj or shebait, the founder and his heirs, in the absence of evidence to the contrary, is considered to be the proprietor and high priest of the establishment ; and so long as the worship is properly conducted by him or those in authority under him, no other person is legally justified in depriving him or his heir of their status or proprietorship.

In this case it seems to be admitted that Daoji, in the year 1825, when he came to Calcutta, presented his own portrait to his disciples for purposes of worship, and that he then by that means founded, in the first instance, the shrine which is the subject of this suit. It is not suggested that the worship of Daoji was established by, or belonged to, any one else than Daoji himself ; and it is clear that the picture has been the object of adoration ever since, and that from time to time, a *mukhia*, or officiating priest, has always been appointed to perform the services.

We must assume, therefore, I think, in the absence of evidence to the contrary, that as Daoji was the founder of the worship, it was he who, in the first instance at any rate, appointed *mukhias ;* and we find that for some time before and up to the year 1860 one Tickumji was the officiating *mukhia*, and that he was succeeded in that year by his brother Govindram ; and that Govindram continued to officiate till the year 1877.

Meanwhile, Daoji himself had died, and it is admitted that Govindraiji was Daoji's heir, and that the plaintiff is the heir of Govindraiji.

In the year 1865 certain facts occurred, which give rise to the only substantial difference between my brother Wilson and myself. In that year Purushottam, the principal defendant in the suit, appeared upon the scene for the first time. He is a moharaj of the same sect as the plaintiff, but not, as it would appear, so high in rank or position.

It seems to me more than probable, although it is not actually proved, that Purushottam, whose principal place of worship was at Patna, was induced or invited to come here by Govindram, who was formerly his *chela* or pupil. As Daoji and his heirs had not come to Calcutta for a good many years, and apparently evinced no particular interest in the shrine, it was, perhaps, only natural that Govindram should have asked, Purushottam to come to Calcutta, with a view to his becoming eventually the malik of the establishment. Whether that was so or not, we find that Purushottam, in the year 1866, had the picture removed from Shama Bhye's Lane, where it had been previously worshipped, to a house in Hanspokar Lane, which is the site of the present temple. This latter house was the property of an old lady, called Munni Bibi, who was a devotee of Purushottam ; and it appears that a proposition had been made to her to sell Purushottam this house for the purpose of the worship. She however refused to sell the house ; but she made a dedication of it by deed, not to Purushottam himself, but to her own family idol Behariji and to Daoji in the way in which property in this country is usually dedicated to idols. By this deed Purushottam and his heirs were constituted the shebaits of the worship, and Purushottam was directed by the deed to employ Govindram as the *mukhia* or officiating priest for his life.

I agree with my brother Wilson that there is no reason to suppose that any particular secrecy was observed about this transaction. On the contrary, the deed was publicly registered, and Purushottam afterwards appointed a committee of four persons, to see that the worship was properly conducted during his absence. From this time Purushottam did not remain in Calcutta, but merely visited the shrine when he came here from time to time, in the same way as he visited other establishments of the same kind which he had founded in other parts of India.

The plaintiff's case is, that Govindram all this while continued to act, and to communicate with him from time to time, as his *mukhia*; and although he was informed by Govindram that the worship had been removed from the one place to the other, he was not made aware of the terms of the deed of dedication, and never knew that Purushottam had, under that deed or otherwise, been appointed the shebait, or had appropriated to himself the worship of Daoji ; or that Govindram had been appointed *mukhia* under Purushottam. There is no evidence whatever that the plaintiff was aware of these facts ; and I fully believe, for reasons which I shall more fully explain presently, that he was not made acquainted with them.

It is contended, on the part of the defendant, that although the plaintiff himself might not have been aware of these facts, yet his agent Sukloll, who collected the rents of the plaintiff's house

property in Calcutta, and looked generally after his interests there, must have known all that was going on. But Sukloll says he did not know it; and whether he did or not, I believe, for reasons which I shall also explain, that he did not communicate to the plaintiff the true state of the case.

On the other hand, there is evidence, though it certainly is not of a very satisfactory character, that Govindram continued, after this dedication as before, to communicate with the plaintiff, and to send him sums of money from time to time out of offerings to the shrine. In 1875 the new temple was built. The subscriptions for it were raised in the name of Daoji, and were principally contributed by the worshipper's of Daoji. Govindram died in the year 1877, and after an interval was succeeded as *mukhia* by his brother Sewlol. Sukloll says that, during that interval, he kept the keys of the temple, and otherwise exercised acts of ownership over it."

The judgment then related to the particulars of the evidence; and afterwards to the question of limitation. As to this, the Chief Justice said:—

"It will be observed that, according to my view, the plaintiff and his ancestors have, from first to last, believed, and had reason to believe, that they were the maliks of this shrine, and that the *mukhias* who were officiating from time to time were their servants. Purushottam, as I conceive, had no right whatever, by virtue of the so-called deed of dedication, to take the right of worship out of the hands of the plaintiff, and to appropriate it to himself. He had no more right to do this than the plaintiff would have had to go to Dacca in Purushottam's absence, and remove Purushottam's establishment into a temple dedicated to himself, and so appropriate a worship which belonged to Purushottam. I consider further that as Govindram and Sewlol were both from the year 1866 playing this double game, still acting or professing, as between themselves and the plaintiff, to act as *mukhias* for the plaintiff, whilst they ostensibly performed the services under the supervision of Purushottam's committee, and as the plaintiff from time to time not only believed in the allegiance of these two persons, but communicated with and received money from them from time to time, however small the remittances may have been, I consider that the plaintiff was never in fact ousted from his properietorship of the shrine in such sort as to deprive him by limitation of his right to bring this suit. I consider that the cause of action in this suit arose when the plaintiff was forcibly ejected from the temple in 1881; and that what he really sues for in this suit is to have his rights declared, and to be restored to the proprietorship as malik of this shrine, and the property appertaining to it, to which he has all along been entitled.

I would illustrate what appears to me to be the legal position of the parties in this simple way: If I leave my servant in charge of my house or other property, and he, in my absence and without my knowledge, colludes with some other person, and allows that person to live in my house and to use my property, whilst he all along continues to act towards me ostensibly as my servant, and to communicate with me as such, and to send me what he represents to be the usufruct of my property, I take it to be clear that, in point of law, and for purposes of limitation, he never ceases to be my servant, and his possession of my house and property continues to be my possession. It is upon this point, as I understand, that the only substantial difference exists between my brother Wilson and myself.

There undoubtedly is some difficulty with regard to the land on which the temple stands, and which I presume belongs, in point of law, to the heirs of Munni Bibi, subject to any rights over it, which may have been conferred on Purushottam by reason of the deed of dedication.

It seems to me that as regards the picture of Daoji, or the worship of that picture, or the worship of Daoji as connected with it, Purushottam never had, and has not now, any rights at all; and yet it is very difficult, having regard to what occurred in 1875, to disconnect for the purposes of the suit the picture and worship of Daoji from the temple in which it has been so long carried on. It seems to me that as to this point we ought to consider whether, in point of fact, the temple was substantially built by offerings from the worshippers of Daoji, and for the purpose of the worship of Daoji, or whether it was built partly for that purpose, and partly for the worship of the other minor deities, which appear to have been also more or less objects of worship.

Having regard to the evidence upon this point, it seems to me that the temple was built mainly and substantially for the worship of Daoji; and that looking at the matter in that light, neither the heirs of Munni Bibi nor Purushottam had any right to require the plaintiff or his worshippers to pull down the temple and remove the picture to any other place. Purushottam must take the consequences of that, which I think he must have known in 1865 to have been a wrongful and improper act on his part. If he could show, that any of the minor deities in the temple belonged to himself, and that any jewels or other valuables belonged to those deities, he should be at liberty to remove them. But with regard to the temple itself, the picture of Daoji, and the bulk of the valuables, which are proved to have been offered to Daoji, I consider that the plaintiff's proprietorship should be declared, and that he should be restored to the possession of the temple and valuables as malik. As the difference, however, between my learned brother and myself depends (in my view of the case) upon a question of fact, I think that according to the rule which now governs this Court (see s. 575 of the Code), his judgment, being in accordance with that of the Court below, will prevail."

The result of this difference of opinion was, under s. 575, Civil Procedure Code, that the appeal was dismissed and the decree of the first Court affirmed. The plaintiff then appealed under the 15th section of the Letters Patent of the High Court, from the judgment of Wilson, J. A question as to the admissibility of such an appeal having been heard and decided in the affirmative by a Full Bench(1) which decided that, when the judgment of the lower Court has been confirmed under s. 575 of the Code Civil Procedure, by reason of one of the Judges of the Appellate Court agreeing upon the facts with the Court below, an appeal will lie, the appeal came on to be heard before a Bench, consisting of Mitter, Pigot, and Norris, JJ.

One the Judges of this latter Bench, Pigot, J., expressed himself unable to see any satisfactory ground for holding that Daoji was founder of this worship, in such a sense as the word bears when it is said that the heirs of a founder are shebaits. He pointed out that nothing was proved to have been done by Daoji, when he presented his portrait to his disciples in Calcutta. It was admitted that he did present it: but to whom, at what place, under what circumstances, there was nothing to show. And even if a consecration by Daoji's heirs could be presumed, it could not be understood that he was rendered a founder. Custom having failed, not having been proved, upon the point of title, the evidence in favour of the plaintiff was reduced to little, if anything, more than that he was the grandson of Daoji. This was not in the learned Judge's opinion enough. Again, on the point of limitation, he agreed with Wilson, J., that the plaintiff's claim (if he ever had any) was barred.

The judgment of the majority of the Appellate Court, *viz.*, that of Mitter, J., and Norris, J., was delivered by the former, who expressed the opinion that the defendants were bound by the judgment of the Divisional Court on the facts, in which the Judges of that Bench had concurred; but stated that he came to the same conclusion on the facts, and gave the reasons.

As to the title to the portrait, and the valuables attached to it, and the control of the worship, it was clear to him "that Daoji presented the portrait to his disciples after consecrating it. A present of his portrait, without such consecration, would be wholly useless. It was, however, not shown that at the time of the consecration, Daoji laid down any rule regarding any rights of control and succession to the shebaitship of the portrait."

Then, "there was ample evidence in the case itself that the consecrator became the shebait, and that his heirs succeeded to the office of shebait on his death." He was also of opinion that upon the facts, the plaintiff's claim to the custody of the portrait, and the valuables belonging to it, was not barred by limitation. As to this, he was of opinion that "the plaintiff was in undoubted possession in 1866, through his *mukhia* Govindram, and the mere fact of the latter having removed the portrait, and its accessories, to the house dedicated by Munni Bibi, and then acknowledging the defendant Purushottam as the shebait, under the deed of dedication, would not constitute the plaintiff's dispossession, unless these facts were brought to his knowledge, of which last there was no evidence. On the other hand, there was a strong probability that he was not informed about the appointment of a new shebait. In the year 1866, the plaintiff was in possession through his agent, Govindram, who continued to have the actual custody of the portrait, and its belongings, till his death, which occurred in November 1877. Supposing that Sewlol was not the plaintiff's servant, still the suit relating to the custody of the portrait was not barred, as it was brought in September 1881, within four years and a few months from the date of dispossession.

(1) *Gridharijl Moharaj Tickait* v. *Purushottam Gossami*, I. L. R., 10 Calc., 815.

"But the question of limitation regarding the claim for the recovery of the possession of the ground upon which the temple was built, stands upon a different footing. The site of the temple came into the possession of the *mukhia*, Govindram, not as a servant of the plaintiff, but under the terms of the deed of dedication. He took possession of it on behalf of the shebait appointed under the deed. Supposing that the plaintiff under the deed of dedication was entitled to take possession of the land in dispute, his cause of action for the recovery of possession accrued in August 1866. The claim for the possession of the site of the building was, therefore, barred by limitation.

"That being so the claim for the recovery of the possession of the temple also cannot succeed. It is true that a large proportion of the money spent in building the temple was raised by subscription opened in the name of Daoji; but that would not entitle the plaintiff to claim the temple built on another's land, and he must take the consequences of the act of his agent, in allowing the subscribed funds to be thus spent."

The judgment concluded thus:—

"The result, in my opinion, is that the plaintiff is entitled to recover possession of the portrait and the moveables belonging to it, claimed in this suit; but that the suit so far it relates to the possession of the temple and its site, and for other relief, must be dismissed. Under the circumstances of the case I think that both parties should be decreed to pay their own costs on scale No. 2."

This then being the judgment of the Court, the plaintiff appealed from it to Her Majesty in Council, because he had not obtained the temple and its site. The first defendant (alone of the six defendants in the original suit) cross-appealed; because nothing, in his view, should have been decreed, but the claim should have been dismissed. The first defendant having died pending the proceedings, his son, Romanlalji Gossami, succeeded him on the record.

On this appeal, Mr. *T. H. Cowie, Q. C.*, and Mr. *R. V. Doyne* (Mr. *J. H. A. Branson* with them), for the appellant, argued that the evidence and the admissions established that the worship of the portrait was instituted by Daoji, the plaintiff's grandfather, and that the plaintiff became thereby entitled as heir to be custodian of any property dedicated to that worship, in Daoji's time and afterwards. This accorded with Hindu law. Insufficient weight had been attached, in the judgment of the first Court, to the plaintiff's right, as shown to exist before August 1866, when the gift of the land was made by Munni Bibi. The latter had no authority to interfere in respect of the appointment of shebait, nor could her declaration in the deed of gift, whatever her desire in the matter might be, cause the possession, then held by *mukhias* appointed by the plaintiff and on his behalf, as heir of Daoji, to be held as if the *mukhias* had represented Purushottam. In answer to a question by their Lordships, whether the acceptance of Munni Bibi's gift did not involve, to some extent, compliance with this, as a condition made by her, it was argued that the temple was built out of the contributions of the worshippers, the account of which was shewn to have been in Daoji's name, so that there was notice to all concerned that the title to the institution was unchanged. It was further argued that there could not be, under colour of a dedication to Behariji, one of the household deities of the donor's family, and in consequence of this gift, an appropriation of a previously-established institution, with the effect of depriving the plaintiff of the advantages connected with the latter, which he had inherited. It was beyond the power of any donor to introduce an alteration into the management of the temple over which the control, by inheritance, had vested in the plaintiff.

Mr. *J. D. Mayne*, for the respondent, the cross-appellant, contended that the plaintiff had failed to establish his title. In regard to a certain class of temples, of which this temple in question was said to be one, being subordinate to the central

Bullav establishment at Nath Dwar, a restricted custom was set up; and it was claimed by the plaintiff that by this custom he was entitled to possess and control any subordinate temples, in virtue of his being the hereditary head, and all the property connected with the worship; thus being entitled to make the present claim. But that custom had not been made out. It has not been established by the evidence. The Appellate Court, finding like the first that the custom had not been proved, applied the rule of Hindu law as to the office of shebait. That rule might be said to be that the right to be shebait was in the heirs of the founder, unless a contrary rule should be shown by evidence of custom or other matters. That rule, however, did not apply here; because a distinction must be taken between the rights of a founder of a worship, and those of a founder of an institution, or owner of a property, in which that worship was carried on. The whole rule of Hindu law might be summed up by saying that the devolution of the management of a religious institution was *primâ facie* to be judged of by custom. Reference was made to *Greedharee Doss* v. *Nundokissore Doss*(1), *Muttu Ramalinga Setupati* v. *Perianayagun Pillai*(2), *Janoki Debi* v. *Srigopal Acharjea* (3), *Genda Puri* v. *Chatar Puri*(4).

Putting usage aside, where property was given as an endowment for carrying on worship, the holders took the property, not as managers with an interest or property in it of their own, but as trustees—Macnaghten's Principles and Precedents of Hindu Law, p. 102; *Chutter Sein's Elder Widow* v. *The Younger Widow*(5). It was incorrect to say that, if a man started a worship, the property dedicated for its maintenance was vested in him. It might, or might not, be so vested. Thus it was incorrect to assume that, if Daoji gave the portrait as an object or symbol of worship, and subscriptions were made for that worship, he remained proprietor of what he had established. It was more correct to say that by Hindu law the property must be vested in some person as trustee for the worship.

Consequently, there was no authority for the conclusion that any heritable right of management over the property given for the purpose of worship remained to be inherited by any heir of Daoji. The authorities showed that a gift by a worshipper vested in the religious community to which the gift was made, and they might vest it in whom they chose.

[LORD HOBHOUSE inquired if the donor, and his heirs, might not retain founder's rights.]

By custom they might; and if, from want of fixed arrangements, disputes arose, it might be that the donor or his heirs would be the proper persons to be declared entitled. But this suit was not based on any such state of things. Not only was there no suggestion of misapplication of funds, but this was purely a suit for the private benefit of the plaintiff. It was a private suit claiming the personal custody of property devoted to religious objects. All that the plaintiff could assert was that the property had vested in him; but he had laid no foundation for the proposition. The case that the custom of the Bullav Acharjis vested the property in their head was not established. Thus the claim failed upon title without the defence having to resort to that view of the facts, which would, according to the judgment of the Court below, cause limitation to be applicable. The learned Counsel referred to the Limitation Act (XV of 1877), sch. ii, art. 48, and *Gurudas Pyne* v. *Ramnarain Sahu* (6).

Mr. *T. H. Cowie, Q. C.*, replied, referring to the representation of the plaintiff by *mukhias* in the management; and arguing that Munni's dedication of 1866 had not interfered with what had been established in 1825.

(1) 11 Moore's I. A., 405; 2 P. C. J., 306.
(2) L. R., 1 I. A., 209; 3 P. C. J., 344.
(3) I. L. R., 9 Calc., 766; L. R., 10 I. A., 32; 4 P. C. J., 411.
(4) I. L. R., 9 All., 1; L. R., 11 I. A., 105; 4 P. C. J., 726.
(5) Sel. Rep., 1880 (2nd Edn.), 239.
(6) I. L. R., 10 Calc., 860; L. R., 11 I. A., 59; 4 P. C. J., 548.

On a subsequent day (April 3rd) their Lordships' judgment was delivered by

THE RIGHT HON. LORD HOBHOUSE :—

In this suit the plaintiff, who is appellant in the first appeal, claims to be the rightful shebait of a consecrated picture or idol, to which peculiar sanctity is attached by the Bullav Acharji sect or community of Vishnuvites; and as incident thereto, he claims the things which have been offered to the idol, and the possession of a temple in Calcutta in which the idol has for some years been located. His claim is disputed by Purushottam, the principal defendant, whose son and representative is the appellant in the cross-appeal. The controversy, as usual in such cases, has ranged over a wide field, and has given occasion to a great amount of difference in judicial opinion. But their Lordships think that the matters of fact on which the decision should be rested are either undisputed or proved beyond reasonable doubt; and that when they have been ascertained the legal conclusions are plain enough.

The plaintiff is the representative by primogeniture of the founder of the Bullav Acharji community. Purushottam is a cadet of the same family. All the male members of the family are in their lifetime esteemed by their community as partaking of the Divine essence, and as entitled to veneration and worship; but the head of the family has the precedence, and is styled the *tekait*. The plaintiff is the present *tekait*. His principal seat, apparently the principal seat of the community, was Sri Nath Dwar in Oodeypore, but in the year 1876 he was expelled from thence, for some cause not now appearing in evidence.

The plaintiff's grandfather was named Daoji, who was *tekait* in his day. In the year 1825 he paid a visit to Calcutta and presented to his disciples there a consecrated portrait of himself, which has ever since been worshipped, and which is now the subject of contention. It is known as the Thakur Daoji, is one of the very numerous presentments of Krishna, and is shown by the evidence to attract many worshippers. Daoj, the mortal died in the year 1826, and he is worshipped in many places through other consecrated portraits, or images of some kind. But thenceforward for many years the connection of the *tekait*, or of any of the chiefs of his family, with the worship of the Thakur in Calcutta, is very obscure.

We learn from the evidence that for some time prior to 1860 one Tickumji was *mukhia* or ordinary officiating priest. On his death, apparently in 1860 or 1861, his brother Govindram entered on the duties of that post, which he held till his death in 1877. Then, after a short interregnum, Sewlol the son of Govindram was appointed, and he apparently holds the post still. By whom these two persons were appointed, and whose servants they were, are matters of controversy.

In the year 1865 Purushottam, who is described as an inhabitant of Mothoora, and whose principal place of worship was at Patna, came to Calcutta, with which place he had no previous connection. He appears to have been invited there by Govindram, who in Patna had been his disciple. He then took a prominent part in the worship of the Thakur Daoji, as indeed by his family and spiritual position he was entitled to do.

In the next year arrangements were made for the worship of the Thakur, either on a grander scale or in a more decorous fashion. Before that time he was placed in a house in Shama Bhye's Lane, which had then fallen into disrepair. An old and devout lady, named Munni Bibi, was then moved to provide a better habitation for him. She was a disciple of Purushottam, and to him she addressed a deed of gift conveying a new house to Daoji and to her family Thakur Behariji, who is another presentment of Krishna.

The deed bears date the 30th August 1866, and the material passages are as follows :—

"To the auspicious lotus feet of the

most worshipful Sriloo Srijut Purushottamji Moharaj, inhabitant of Mothoora."

She then described a house in Hanspokar Lane, and continued :—

"I by this *orpunnamah* make *debutter* and give to Sri Sri Ishwar Behariji and Sri Sri Ishwar Daoji, Thakurs; the aforesaid Sri Sri Ishwar Behariji and Sri Sri Ishwar Daoji, Thakurs, shall be located in the said house; you and your heirs, whoever shall be here, shall absolutely have charge of the property, the subject of this gift, and perform all necessary *sheva* or worship, &c., of the Sri Sri Ishwar Jios, without having any concern with me or my heirs; you shall engage Srijut Govind *mukhia*, as long as he shall live, *pujari* to carry on the *sheva of* the Sri Sri Ishwar Jios; upon the death of the said Govind, *mukhia*, you shall have absolute power to appoint any one *pujari* during the existence of this *orpunnamah* granted by me.

"Should I or my heirs, or any other Gossami of the Bullav family, set up any claim to the said house or land or to the said *sheva* or worship of the Sri Sri Ishwar Jios, the same shall be void and inadmissible. By this *orpunnamah*, I merely give the said house and land and *sheva* (interview) to you and your heirs; you or any of your heirs shall have no power at any future time to sell this house and land. It simply remains for the location of the Sri Sri Ishwar Jios."

The thakurs Daoji and Behariji were removed to the house so granted, and in the course of a few years Daoji's worshippers desired still further to exalt his worship by building a new temple on the site of the house. A large sum of money, about Rs. 16,000, was collected for that purpose; the temple was built, other accommodation being got for the Thakurs in the meantime; and in the year 1878 they were brought back and installed in the temple. There they remained up to the final decree of the High Court in this suit. There are also some other Thakurs, all presentments of Krishna, in the temple, but it is clear from the evidence that the principal object of worship is Daoji.

In the month of February 1881 the plaintiff for the first time visited Calcutta. He was received with great ceremony by a large number of Vishnuvite worshippers, and was taken to the temple on the following day, when he performed the solemn, apparently the most solemn, ceremony of Arutty. Sewlol, who was *mukhia*, paid him great veneration, and for the next three months regularly brought to him part of the *proshad* or offerings made to Daoji. On the 24th April the plaintiff went to the temple and inspected the valuables belonging to Daoji, which were produced to him by Sewlol. The plaintiff ordered that a list of the articles should be made, and he caused some of them, and also the money in hand, to be locked up, and the keys to be given to Sukloll, who describes himself as having been the plaintiff's jemader for eight years in Udaipur, and for 16 years in Calcutta.

The plaintiff then demanded of Sewlol an account of the money received by him while in charge. It is not very clear what was said or done upon this demand, except that no accounts were rendered, and that soon afterwards quarrels broke out, which culminated on the 19th May in a riot. The plaintiff's people were then forcibly turned out of the temple. On the 16th September the plaintiff brought this suit.

The case was heard in the first instance before Mr. Justice Cunningham, then on appeal by a Division Court consisting of Mr. Justice Wilson and Chief Justice Garth, and on further appeal by a Full Bench consisting of Mr. Justice Pigot, Mr. Justice Mitter, and Mr. Justice Norris. The two last-named learned Judges agreed in the opinion that the plaintiff is entitled to succeed in his claim to the portrait and the valuables, but must fail in his claim to the temple. To that effect, therefore, is the decree of the High Court, from which both parties appeal.

Their Lordships will first address themselves to the plaintiff's claim to the por-

trait. The principal points taken in the elaborate argument of Mr. Mayne, who is Counsel for Purushottam and his heir, may be briefly summarized as follows: Neither by general law nor by special custom is it shown that the shebaitship descends to the heirs of the founder; there is no document or trustworthy evidence to show that, between the mortal Daoji's visit in 1825 and the plaintiff's in 1881, such heirs ever intervened in the affairs of the Thakur Daoji. The reception given to the plaintiff in 1881 was no more than was due to his great position and sacred character, which all admit. It is true that Purushottam did not appoint Govindram or Sewlol; but the Thakur Daoji was given by the mortal Daoji to the community of worshippers; it was their business to tend the Thakur and to appoint *mukhias*; and the evidence shows that a committee of them did appoint Sewlol. Finally, the suit is not a suit on behalf of Daoji, the Thakur, but a personal claim by the plaintiff to moveable chattels, and is barred under Art. 49 of the Limitation Act of 1877.

According to Hindu law, when the worship of a Thakur has been founded, the shebaitship is held to be vested in the heirs of the founder, in default of evidence that he has disposed of it otherwise, or there has been some usage, course of dealing, or some cricumstances to show a different mode of devolution. This principle is illustrated by the decision in the case of *Peet Koonwur* v. *Chutter Dharee Singh*(1), and in the present case some of the learned Judges of the High Court have affirmed it, while none has expressed dissent from it. One learned Judge thought that the principle does not apply to this case, because Daoji was not the founder of the Calcutta worship. But their Lordships adopt the view of the other Judges, and holding that the mortal Daoji was the founder, they must also hold that the plaintiff is, by general law, the shebait of that worship.

There is no proof of any usage or course of procedure at variance with this presumption in favour of the plaintiff. The only circumstance bearing against him on this point is the non-appearance of intervention on the part of his family. So far as the oral evidence goes, it is to the effect that the custom of the Bullav Acharji community is in accordance with the general rule, and is quite sufficient to satisfy the requirements of the case.

With respect to intervention by the plaintiff, there is no evidence that the plaintiff appointed Govindram as he alleges, and though it is clear that Purushottam did not appoint that *mukhia*, it cannot be assumed that the plaintiff did so. But, to begin with the later part of the history, their Lordships consider that the reception given to the plaintiff by the congregation of worshippers in February 1881, and the obedience which Sewlol at first paid to his directions, show that, in their opinion, he occupied a position of the highest authority perfectly well known to them; that those events are inconsistent with the theory that his family had never intervened since the year 1825; and that they are not sufficiently accounted for by the family or spiritual character of the plaintiff.

Going a little further back, we have evidence that Sewlol accepted appointment from the plaintiff in the year 1878, through the agency of his jemadar Sukloll. (Exhibit B is express to that effect.) Some of the learned Judges have rejected that document, because it is not mentioned in this plaint, and because its custody is not clearly accounted for. But its execution in the presence of several people is positively deposed to by four witnesses, all rigorously cross-examined, and so entirely unshaken that Mr. Mayne did not think it worth while to refer to those cross-examinations. The person who could contradict them with effect is Sewlol, who is a defendant, is a partisan of the principal defendant Purushottam, and was in Court when the evidence against him was given. He did not come forward to say a word about it. Their Lordships think it is carrying mere sus-

(1) 13 W. R., 396.

picion too far when it is allowed to get rid of a document so proved, and so allowed to pass by the person most nearly concerned in it. It may be that Sewlol consulted his security by taking appointments from Purushottam and from the committee. But his taking one from the plaintiff shows that the plaintiff was then intervening, and that his position was recognized.

Again, travelling back to an earlier time, evidence is offered of the conduct of Govindram. Whether his mere declarations should be received as something against his interest is a question of some difficulty, which their Lordships would have investigated further if it had been necessary to decide it. But it was shown by Hirji Meghji that, when Govindram made the monthly collections, he pressed for them on the plaintiff's account; and by Suddasuk that he urged that offerings should be made at his *mundir* because it was the *tekait's*. Such conduct is clearly admissible, and is good evidence to show that in Govindram's time the plaintiff's position was acknowledged.

With respect to the bar by lapse of time, their Lordships do not consider this suit to be one in which the plaintiff is seeking merely personal relief. Even apart from the sixth and seventh paragraphs of the plaint, which expressly put forth his spiritual character as the foundation of his claim, the nature of the suit is for the proper conduct of the Thakur's worship. It rests quite as much on the right of the Thakur to have the conduct of his worship and his own custody placed in the right hands, as upon the personal right of the plaintiff to property. The suit would rather fall under Art. 124 or Art. 144 than Art. 49. But under whichever of the three articles it falls, the starting point of time is unlawful possession or adverse possession. And the evidence leads their Lordships to the conclusion that until the affray of May 1881 there has been no possession of the Thakur or of his possessions either unlawful or adverse to the plaintiff.

The result is that on this part of the case their Lordships agree with the High Court, and on very nearly the same grounds as taken by the majority, whose opinion has prevailed there.

As regards the temple, the High Court thought the suit is barred by time. In that their Lordships cannot agree. The ground is dedicated to the Thakurs Behariji and Daoji; and, except during the building time, it has been occupied by them ever since. If the fact was that the Thakur Daoji had been in the custody of, and his worship been regulated by, another shebait than the plaintiff for a sufficient time, the plaintiff might be barred; but the reasoning on the former part of the case disposes of that suggestion. There has been no possession of the temple adverse to the Thakur Daoji, and no possession of the Thakur adverse to the plaintiff till May 1881.

Their Lordships are of opinion that this part of the case must be governed entirely by the terms of Munni Bibi's dedication. She gave the house and land to the two Thakurs, but with the condition attached that Purushottam should be shebait. The Thakur Daoji, or those who speak for him on earth, need not take advantage of this gift. Munni Bibi could not, of her own authority, alter the shebaitship of the Thakur. But if the gift is taken and the condition insisted on, it must be observed. It has now been insisted on, and Daoji must elect whether to change his habitation or to change his shebait.

It is true that money was raised to build the temple, and was raised mainly from the worshippers and in the name of the Thakur Daoji. But the facts of this case are not such as to raise an equity of the kind suggested at the Bar, and favoured by one of the judgments delivered in the Division Court. There is no reason to suppose that the subscribers did not know of Munni Bibi's deed; and there is no evidence that the subscriptions, though given to the Thakur Daoji, were given with any reference to the question who should be his shebait.

The decree of the High Court must be

affirmed and both appeals dismissed, but there will be no order as to costs. Their Lordships will humbly advise Her Majesty to this effect.

Appeals dismissed.

Solicitors for the appellant: Messrs. *Barrow and Rogers.*

Solicitors for the respondents: Messrs. *Wrentmore and Swinhoe.*

20th February 1889.

PRESENT:

Members of the *Judicial Committee*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, and the Right Hon. Sir Richard Couch.

MUHAMMAD YUSUF KHAN* ...*Defendant,*

and

ABDUL RAHMAN KHAN ...*Plaintiff.*

On appeal from the Court of the Judicial Commissioner of Oudh.

Superintendence of High Court—Code of Civil Procedure (Act XIV of 1882), s. 622.

A decision by the judgment of a competent Court, whether right or wrong, which by law is final and without appeal, where the Court has not acted in the exercise of its jurisdiction illegally, or with material irregularity, cannot be set aside under s. 622 of the Civil Procedure Code.

APPEAL by special leave (31st December 1886) from an order (June 22nd, 1886), of the Judicial Commissioner of Oudh.

The suit out of which this appeal arose was brought on the 2nd April 1883, by the present respondent, in the Court of the Subordinate Judge of the Lucknow District, against the appellant, for a declaration that a document purporting to have been signed by the plaintiff on the 1st June 1882, and undertaking that he should pay Rs. 30 a month to the defendant, was a forgery. The defence was that the document was genuine, and to this was added that it had been decided, in a previous suit, so to be.

The Subordinate Judge, on 17th December 1883, found the document genuine, and dismissed the suit. This decree was upheld by the District Judge of Lucknow on the 11th June 1884. According to his judgment, two words, not however material to the effect of the writing, had been added. No appeal (ss. 584 and 585 of Act XIV of 1882) lay to any Appellate Court against these concurrent judgments, but the Judicial Commissioner, on application by the plaintiff, consented, as he conceived himself to be empowered by s. 622 of the Code of Civil Procedure to do, to revise the proceedings of the District Judge. He did so, reversing the decree which had been made in the defendant's favour, and granting to the plaintiff the relief which he sought, on 10th November 1884. His ground for doing so was that, as the District Judge had found that two words had been added to the disputed document, this threw upon the defendant the burthen of showing when they had been added, and as he had offered no evidence upon the point, it was the duty of the District Judge to assume that they had been added after execution, and therefore that he should have cancelled the document. This Judicial Commissioner, Mr. Young, left the Court shortly after this decision, and his successor, Mr. Tracy, on 23rd February 1885, reversed the decision of his predecessor, being of opinion that, even if the District Judge had been wrong, his error was not one that could be set right under s. 622. The Courts had found that the document which the plaintiff had sought to cancel was genuine. He quoted the judgment in *Amir Hussan Khan* v. *Sheo Baksh Singh*(1) as follows: "It appears that they had perfect jurisdiction to decide the case, and even if they decided wrongly, they did not

* 16 Cowell's Ind. Ap., 104; 16 Calc., 749.

(1) I. L. R., 11 Calc., 6; L. R., 11 I. A., 237; 4 P. C. J., 559.

exercise their jurisdiction illegally or with material irregularity." This gave to him, as he considered, no alternative but to find that the order of 10th November 1884 was passed without jurisdiction, and obliged him to set aside this order, which seems to have followed an erroneous ruling of a Full Bench of the Allahabad High Court, *viz.*, *Moulavi Muhammad* v. *Syed Hussan* (1). The result was to restore the decision of the District Judge dismissing the suit.

In 1886, Mr. Young resumed charge of the office of Judicial Commissioner, and to him the plaintiff applied to set aside the last order, *viz.*, that of 23rd February 1885. This application was granted on 22nd June 1886, by the order now under appeal. The Judicial Commissioner pointed out that the application was for the review of an order made in review, prohibited by s. 629; he also considered s. 622 to be inapplicable. But he referred to two cases in which orders made were revised, *viz.*, *Tafazzall Hossein Khan* v. *Raghonath Pershad* (2) and *Rajender Narain Rae* v. *Bejai Govind Singh* (3); and, on the supposed ground that the order of 23rd February 1885 was one which the Court would not have made, if it had been duly informed, reversed it, and restored the order of 10th November 1884.

Special leave to appeal was granted, in regard to the law, by order dated 31st December 1886.

Mr. *J. D. Mayne* for the appellant, submitted that, even if the decision of the District Judge of 11th June 1884 was wrong (which it was not), still his error could not be taken to be within the meaning of s. 622. The order of 23rd February 1885 was accordingly right. The final decision of the Judicial Commissioner of 22nd June 1886 was wholly without jurisdiction.

After his statement of the case, their Lordships called on Mr. C. *W. Arathoon*, for the respondent, who argued that Mr. Young's first order, *viz.*, that of 10th November 1884, was right. The question of the materiality of an addition to a document was a question of law,—*Yama* v. *Lother* (4); and the point that the District Judge had omitted to consider afforded ground for revision. He referred to *Amrit Lal* v. *Madho Das*(5); *Amir Hussan Khan* v. *Sheo Baksh Singh* (6).

No reply was called for.

The judgment of their Lordships was delivered by

THE RIGHT HON. LORD MACNAGHTEN :—

In this case, on the 10th of November 1884, Mr. Young, the Judicial Commissioner of Oudh, set aside the judgment of a competent Court, which by law was final, and without appeal. In so doing, he proceeded on an erroneous interpretation which had been placed on s. 622 of the Civil Procedure Code by the Court of Allahabad, and in ignorance of the fact that the error had been corrected by a judgment of this Board in the case of *Amir Hussan Khan* v, *Sheo Baksh Singh* (6), to which Her Majesty gave effect by Her order of the 26th of June 1884. The order of Mr. Young was brought before Mr. Tracy, who happened at the time to be officiating as Judicial Commissioner in his place. On the 23rd February 1885, Mr. Tracy, having regard to the decision of the Privy Council, discharged the order of Mr. Young. Fifteen months afterwards the matter was again brought before Mr. Young on an application purporting to be made under s. 622. That application was incompetent as being a second application for review, and it would have been out of time if it had been regular in other respects.

On the 22nd of June 1886, Mr. Young discharged the order of Mr. Tracy on the singular ground that it was made *per incuriam*, and that it was an order which the Court would not have made if it had been duly informed. From that order of

(1) I. L. R., 3 All., 203
(2) 7 B. L. R., 186.
(3) 2 Moore's I. A., 209, 252.
(4) L. R., 1 Ex. D., 176.
(5) I. L. R., 6 All., 292.
(6) I. L. R., 11 Calc., 6; L. R., 11 I. A., 237; 4 P. C. J., 559.

Mr. Young, special leave to appeal to Her Majesty has been granted.

Mr. *Arathoon*, who appeard for the respondent, admitted that he could not contend that Mr. Young had any jurisdiction to pronounce the order of the 22nd June 1886, but he argued that Mr. Tracy's order was wrong, and that Mr. Young's first order was right.

Their Lordships, however, are of opinion that Mr. Tracy was perfectly right in discharging the first order of Mr. Young; and that neither of Mr. Young's orders can be supported upon any ground whatever.

Their Lordships therefore are of opinion that the order of the 22nd of June 1886 ought to be reversed, and the order of the 23rd of February 1885 affirmed, and that the respondent should pay the costs of the proceedings before Mr. Young, in which the order of the 22nd June 1886 was made. They will therefore humbly advise Her Majesty accordingly; and the respondent must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Young, Jackson, & Beard.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

20th, 21st 22nd February and 6th April 1889.

PRESENT:

Members of the *Judicial Committee*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, and the Right Hon. Sir Richard Couch.

LUTF ALI KHAN* ... *Plaintiff,*

and

FUTTEH BAHADUR AND OTHERS *Defendants*

On appeal from the High Court in Bengal.

Mortgage—Sale of mortgaged property—Purchase by a mortgagor at a judicial sale of interest under a second mortgage—Rights against the mortgagor of purchaser at a sale in execution of a consent decree upon the first mortgage.

The same property, with other, was mortgaged, first to one mortgagee, and secondly to another. Decrees were obtained upon both mortgages: the terms of the first decree having given effect to a compromise between the mortgagor and the first mortgagee. Sales in execution followed; but before the sale under the decree upon the first mortgage was effected, the sale under the decree upon the second took place, the possession remaining with the purchaser at the first sale, who was acting *benami* for the mortgagor. At the subsequent sale under the decree upon the first mortgage, the plaintiff purchased and now sued for possession.

The High Court decided that the plaintiff was entitled to the first mortgage lien, in consequence of his purchase at the second sale; and, all persons interested in the matter being before the Court, that the proper course was to direct an inquiry as to how much of the mortgage debt was chargeable upon that portion of the property which formed the subject of the appeal; and to direct that so much of the mortgage debt should be realized by the sale of that property.

Held, that this judgment incorrectly treated the plaintiff as mortgagee, refusing him a charge for the full amount of his purchase money. The case depending upon its own circumstances, it would be contrary to equity to allow the mortgagor to set up any right to possession as acquired by his purchase; and that the plaintiff, as against him, was entitled to a decree for possession as purchaser.

APPEAL from a decree (12th June 1885) of the High Court modifying a decree (2nd November 1883) of the Subordinate Judge of Patna.

The question now raised related to the rights of the plaintiff, appellant, as purchaser at a sale in execution of a decree upon a mortgage. The property, possession of which was claimed by the plaintiff, was a five annas four pies share of mouza Jugdispore Tiari, mortgaged first (with an equal share of mouza Ranipore) to Nawab Syed Velait Ali Khan, C.I.E., on 14th July 1875, to secure Rs. 36,000, and mortgaged secondly to Jagarnath Singh and another, on 18th December 1877, to secure Rs. 12,000.

These shares were sold on the 22nd November 1880 in execution of a decree

* 16 Cowell's Ind. Ap., 129; 17 Calc., 23.

upon the latter mortgage obtained by Jagarnath Singh, with notice of the prior lien of the Nawab, and purchased by Ram Padurath Upadhia. The same were sold again on the 15th January 1881 in execution of a decree obtained by the Nawab on his first mortgage, and the plaintiff became purchaser.

Of the six defendants, now respondents (who did not appear on this appeal) the first, Futteh Bahadur, was the mortgagor. The second, Haji Syed Velait Ali Khan, C.I.E., was the first mortgagee. The third, Jagarnath Singh, was the second mortgagee, together with the fourth, Jugalkishwar. The fifth and sixth defendants, Gunga Persad and Ram Padurath Upadhia, were in the same interest, having transferred the one to the other after the second sale.

In their Lordships' judgment are set forth the principal terms of the mortgages, and all the facts.

On the 9th April 1880, attachment at the suit of the first mortgagee was issued, and executed on the 18th May following. On the 13th July 1880, attachment at the suit of the second mortgagees was issued, and executed on the 6th August.

The 22nd November 1880 was fixed for the sale of the attached property; but the first mortgagee's sale was postponed. That of the second mortgagee's took place.

On the 15th January 1881 was held the adjourned sale, at which the plaintiff purchased, and on the 28th March following, that sale was confirmed, and a certificate granted to the plaintiff, notwithstanding the objections of the mortgagor, by the Subordinate Judge executing the decree. Disputes arose as to the entry of the name of the rightful purchaser of the one-third share of Jugdispore, which were decided against the plaintiff, and in favour of the defendant, Ram Padurath Upadhia, on the 16th March and 25th August 1882, by the revenue authorities, who referred this appellant to a civil suit on the question of title.

On the 8th October 1882 the present suit was instituted, alleging collusion between the defendants Futteh Bahadur, Jagarnath Singh, and Jugalkishwar, and claiming that the plaintiff's right to possession as purchaser should be declared as existing under "the prior lien" and that possession should be decreed to him; or, if the Court should be of opinion that he was not entitled to possession without giving to the third, fourth, fifth and sixth defendants, interested in the second mortgage, an opportunity of redeeming the prior mortgage, a decree for Rs. 36,000, his purchase-money, with interest, to be repaid to him, either by them, or by the second defendant, the Nawab, the first mortgagee.

Futteh Bahadur, the mortgagor, filed no written statement. The Nawab admitted the facts alleged, but contended that he was under no obligation to refund what moneys he had received in respect of the purchase by the plaintiff. The defendants Jagarnath Singh and Jugalkishwar denied collusion, and contended that they were not affected by the prior mortgage. Gunga Pershad disclaimed all interest, on the ground that he had sold to Futteh Bahadur, in the name of Ram Padurath Upadhia, what he had purchased; and the latter denied that he was acting *benami* for Futteh Bahadur, asserting that he bought the share from Gunga Pershad *bonâ fide* for himself.

The decree of the Subordinate Judge was in favour of the plaintiff, that he should recover Rs. 36,000, as principal, and Rs. 3,705, as interest, together with costs and future interest, by the sale of the property purchased by him, as he alleged, unless the defendant Ram Padurath Upadhia should pay off the above amounts to him by the 3rd of April 1884. Ram Padurath appealed to the High Court as to the liability thrown on him to pay the plaintiff's purchase-money of the share of Jugdispore, as a condition of redemption. There was another appeal by the third and fourth defendants as to a share of other property which the decree affected, but to which the present appeal did not relate. Futteh Bahadur appealed as to certain costs which he had been

directed to pay. The plaintiff Syed Lutf Ali Khan did not appeal to the High Court, which disposed of the three appeals by one judgment, set aside the decree of the Subordinate Judge, so far as he directed the payment of the Rs. 36,000, with interest and costs to the plaintiff, and directed an inquiry as to how much of the money was chargeable upon the property ordering that he might recover the same by sale of it.

The judgment of the High Court (WILSON and BEVERLEY, JJ.), was as follows:—

"This share was sold on the 22nd November 1880, in execution of a decree of Jagurnath Singh, on the proclamation of Syed Velait Ali Khan, and purchased by Ram Padurath Upahdhia. Subsequently, on the 15th January 1881, this same share was sold again in execution of the decree of Syed Velait Ali Khan, and purchased by the plaintiff. The first purchaser is in possession.

It appears, then, that this property was mortgaged first to Syed Velait Ali Khan. It was mortgaged, secondly, to Jagurnath Singh. Suits were brought upon both mortgages. A decree was obtained and sale effected in the first place under the second mortgage, and the property sold became vested ultimately in, or in the name of, Ram Padurath Upadhia. The property was then sold under the decree obtained upon the first mortgage and purchased by the plaintiff. Now, the Court below has held that the plaintiff is not entitled to recover possession from that defendant Ram Padurath, but that he is entitled to recover from that defendant the amount of the purchase-money which he, the plaintiff, paid upon the purchase of this property. Against the decision this appeal has been brought. The contention in support of the appeal, shortly stated, is this:—It is said that the effect of the plaintiff's purchase under the decree in the suit upon the first mortgage, was to give him certain rights in the property, and in particular the right of enforcing the mortgage lien which the decree-holder, the mortgagee, had upon the property, and no other lien. We think that this contention is well founded, and that after his purchase his right was to enforce the mortgage lien. On the other hand, the right of the purchaser under the decree in the suit on the second mortgage was a right to redeem.

It is argued, therefore, that the decree that has been given cannot be supported; and we think this is so as the decree stands. But on the other hand, it is pointed out that in the Court below there was a contention that the property sold under the decree on the second mortgage vested in Ram Padurath as a mere *benamdar* for the first defendant Futteh Bahadur the original mortgagor. The Subordinate Judge in the Court below has found against that. In that we are unable to agree. We accept what he says with regard to the unsatisfactory character of the witnesses who spoke about the matter. But that evidence stands unrebutted, and we think it ought not to be rejected. If it was not true, Ram Padurath was the man most interested in denying it, and he is a party. But Ram Padurath did not venture to come into the witness-box to say that this was really a purchase by him on his own account and not on account of his master Futteh Bahadur. We are, therefore, unable to agree with the Court below in that finding. We hold that Ram Padurath was a *benamdar* for Futteh Bahadur.

Then it is said that, that being so, a decree against this property in the hand of this man, a mere *benamdar* for the original mortgagor, may properly be made. We think it is not open to the respondent to come forward and ask for a decree other than the decree made by the Court below. But we think he is entitled to dispute the finding on the question of *benami* in order to sustain the decision of the Court below that a decree might properly be made against the property; and we think also that, when the appellant complains that a wrong decree has been given, the respondent is entitled to be heard as to how that decree is to be modified.

Then the question is, what should be the decree? We think that a decree should be given, giving the plaintiff in this case the benefit of that to which he is entitled namely, his mortgage lien. The first mortgage covers ten parcels of property; and the second mortgage covers two out of those ten parcels. The original mortgagees seem to have no interest left in either property; and the person who has acquired title under the first mortgage is the plaintiff. He is before the Court. The persons entitled under the second mortgage are also before the Court. And so is the mortgagor Therefore all the persons interested in the matter are before the Court. There is authority [see *Ramdhone Dhur* v. *Mohesh Chunder Chowdury* (1) and *Yakoob Ali Chowdhury* v. *Ram Doolal* (2)] for saying that in a suit like the present, where all parties are before the Court, an enquiry may be made as to how the benefit and the burden of the mortgage debt should be distributed among various persons interested in the various properties originally affected by the mortgages. The claim for relief in the plaint is not very clear. But we think it is sufficient to cover the relief which we propose to give. We think, therefore, that we may direct an enquiry as to how much of the mortgage is properly chargeable upon that portion of the property which forms the subject-matter of this second appeal before us, and direct that so much of the mort-

(1) 11 C. L. R., 565.
(2) 13 C. L. R., 272.

gage debt may be realized by the sale of that property. The decree may be modified accordingly.

In this appeal, having regard to the nature of the modification made in the decree, we think that all parties should bear their respective costs.

On this appeal, Mr. *R. V. Doyne*, and Mr. *C. W. Arathoon* appeard for the appellant.

The respondents did not appear.

For the appellant it was argued that he ought not to be called on to redeem at all, because he had an absolute right as purchaser. He had shown that at an execution-sale at the instance of the mortgagee, he had acquired by his purchase all the mortgagor's right title and interests therein existing at the date of the mortgage. Consequently, he was entitled to possession as against a purchaser with notice at a sale in execution of a decree obtained upon a subsequent mortgage; and the purchaser upon the latter had not obtained, by his purchase at the sale effected by the second mortgagee, any right as against the present plaintiff, to retain possession or require redemption. It had been rightly found by the High Court that the defendant Ram Padurath Upadhia acted only *benami* for Futteh Bahadur, the original mortgagor, who had not by such a transaction acquired any right as against the present plaintiff to retain possession or to insist upon redemption. If it should be considered that Futteh Bahadur had a right to redeem, redemption should have been made conditional on his repayment to the present plaintiff of the whole sum of which he the mortgagor had had the benefit in the part payment of his debt to the first mortgagee, the Nawab Syed Velait Ali. There was no ground for such an apportionment of the mortgage debt as had been directed by the High Court.

Reference was made to *Abdulla Saiba* v. *Haji Abdulla* (1), *Shringarpure* v. *Pethe* (2), *Kasandas* v. *Pranjiwan* (3), *Rajnarain Sing* v. *Sheera Mean* (4), *Brojokishoree Dossia* v. *Mahomed Suleem* (5), *Muthoora Nath Pal* v. *Chundermoni Dabia* (6), *Enam Montazoodeen Mahomed* v. *Rajcoomar Dass* (7), *Venkata Somayazulu* v. *Kannam Dhora* (8), *Ganesh Lal Tewari* v. *Shamnarain* (9).

Afterwards, on 6th April, their Lordship's judgment was delivered by

THE RIGHT HON. SIR RICHARD COUCH :—

The respondent, Futteh Bahadur, was the proprietor of two-thirds of a revenue-free estate, consisting of mouza Jugdispore and other mouzas and dependencies, of which he had inherited one-half and had purchased the other half. He was also the proprietor of the whole of a revenue-paying estate called Ranipore. On the 14th July 1875 he executed a mortgage bond in the usual form, by which, after stating that he had borrowed Rs. 35,000 on interest from Haji Nawab Syed Velait Ali Khan (the second respondent) stipulating to pay interest at 1 rupee per cent. per mensem, and mortgaging, pledging, and hypothecating the shares of the mouzas specified below, owned and possessed by him, he declared that, in case of non-payment of the principal on the completion of two years, or within that period, Velait Ali Khan should be at liberty to realize the principal with interest by instituting a suit and obtaining a decree, and executing the same till the realization of the whole of the decretal amount from the property mortgaged in the bond, and in case of its not being sufficient, from other immoveable properties and from his person. The mouzas specified below were Ranipore one-third share, Jugdispore one-third share, and one-third of seven other mouzas. On the 18th December 1877, Futteh Bahadur executed a similar mortgage of another

(1) I. L. R., 5 Bom., 8, at p. 12.
(2) I. L. R., 2 Bom., 662.
(3) 7 Bom. A. C., 146.
(4) 7 W. R., 67.
(5) 10 W. R., 151.
(6) I L. R., 4 Calc., 817.
(7) 14 B. L R., 408.
(8) I. L. R., 5 Mad., 184.
(9) I. L. R., 6 Calc. 213, at p. 217.

one-third share of Ranipore and of the same one-third of Jugdispore to Jagarnath Singh, (the third respondent), and another person named Baijnath Singh, to secure repayment in one year of Rs. 7,000, with interest at 3 per cent. per mensem.

In 1878, Velait Ali Khan sued Futteh Bahadur for Rs. 47, 964-7-1-12, principal and interest due on his mortgage. On the 20th December 1878, Futteh Bahadur filed a petition stating that Rs. 4,645-3-2-8 had been remitted by the plaintiff out of the money claimed, on condition that the petitioner should pay the whole of the principal amount, with costs, and interest at the rate of 1 rupee per cent., on the 20th December 1879, and praying that, according to this admission of claim, the case might be decreed in favour of the plaintiff, allowing the mortgage of the property to stand. And on the same day the Court made a decree in accordance with this agreement. Default having been made in payment of the money, Velait Ali Khan, in 1880, took proceedings for execution of the decree, and, on the 9th April 1880, the Court issued an order for attachment of the right and interest of the judgment-debtor, "comprising" the one-third of Ranipore and one-third of Jugdispore "mortgaged in bond and decree." The other mouzas are not mentioned, and it does not appear that anything has been done in respect of them. The attachment was made on the 20th May 1880. In the meantime Jugalkishwar, who seems to have taken the place of Baijnath Singh and Jagarnath Singh, had, on the 2nd April 1879, obtained a decree against Futteh Bahadur on the second mortgage bond, in execution of which, on the 13th July 1880, an order was issued to attach one-third "the right and interest of the debtor" out of the entire of mouza Jugdispore, &c., and one-third "the right and interest of the debtor" in mouza Ranipore. The attachment of Jugdispore was made on the 6th and of Ranipore on the 10th August 1880.

The 22nd November 1880 was appointed for the sale in both executions. On that day Futteh Bahadur petitioned that both sales should be postponed. In the case of Velait Ali Khan the sale was postponed until the 15th January 1881. In the case of Jagarnath Singh an order was made, and the sale was held on the 22nd November. The notification of sale stated that the property to be sold was mortgaged in 1875 to Velait Ali Khan. One Gunga Pershad, who was at the time in the service of Jagarnath Singh, bid Rs. 9, one or two other persons having offered less, and there being no higher bid he was declared the purchaser. On the 19th February 1881 Gunga Pershad executed a deed of sale of what he had purchased to Ram Padurath for Rs. 100, and on the 21st February he presented a petition to the Court praying that, in lieu of his own name, the name of Ram Padurath might be entered, and the sale certificate granted and possession delivered to him. Accordingly, on the 24th February, it was ordered that possession should be delivered to Ram Padurath, the certificated auction-purchaser. This was done in the usual form on the 3rd March; but there never was any actual change of possession, Futteh Bahadur remaining in possession all the time.

According to the evidence of Gunga Pershad, Futteh Bahadur was the real purchaser, Ram Padurath's name being used by him. The first Court considered that Ram Padurath must be held to be the real purchaser, but the High Court, on the appeal, did not agree in this, and held that Ram Padurath was a *benamdar* for Futteh Bahadur. Their Lordships agree in this with the High Court, which properly remarked that Ram Padurath had not ventured to come into the witness-box to say that it was really a purchase by him on his own account.

The sale in execution of Velait Ali Khan's decree, which decree it has been stated was made by consent upon his agreeing to relinquish part of his claim and give time for payment of the remainder, took place on the 15th January 1881. At the sale the appellant became the purchaser of the share of Ranipore for

Rs. 12,000, and of the share of Jugdispore, &c., for Rs. 36,000, the sum to be realized by the execution being Rs. 61,265-6 pies, and there was consequently not sufficient to satisfy the sum due on mortgage by upwards of Rs. 13,000. The sale was confirmed by an order dated the 28th March 1881, and on the 12th September 1881 the bailiff of the Court was ordered to put the appellant, being the certificated auction-purchaser, in possession of the properties. On the 25th October 1881 the nazir reported that he had given formal possession, but the appellant was unable to obtain actual possession, and on the 9th October 1882, he instituted the present suit, and claimed a decree for possession of the share of Jugdispore, &c., or, if that was not granted, a decree for Rs. 36,000, and interest thereon, to be recovered from the disputed property. He also claimed a similar decree in respect of the share of Ranipore, but there is no question in this appeal about that property, he having obtained a decree for possession of it.

The Subordinate Judge, acting on his finding that Ram Padurath was the purchaser, ordered that if he did not pay Rs. 36,000, with interest up to the 3rd of April 1884, the plaintiff should have power to put up to sale the third share of Jugdispore, &c., for the realization of that amount, and also that it might be recovered from his person and property. Ram Padurath appealed to the High Court, which held that the decree could not be made against him, 'a mere *benamdar* for the original mortgagor, and that a decree should be made, giving the plaintiff "the benefit of that to which he is entitled, namely, his mortgage lien," and they directed an inquiry as to how much of the mortgage was properly chargeable upon that portion of the property which formed the subject of that appeal, and directed that so much of the mortgage debt might be realized by the sale of that property.

This direction and the inquiry upon which it is consequent seem to be founded on some misapprehension. The High Court treat the appellant as mortgagee in respect of his purchase, and at the same time refuse to give him a charge for the full amount of his purchase-money. As between the appellant and the other parties to the suit there can be no ground for apportioning the original mortgage debt in the manner proposed.

A question of general importance, on the law relating to Indian mortgages, and one on which the Courts in India are not altogether agreed, was raised by the learned Counsel for the appellant in the course of his argument. Their Lordships, however, do not think it necessary to go into any general question. In their view the decision of the present case must depend on its own special and peculiar circumstances.

Upon the facts which have been stated, they are of opinion that it would be contrary to equity to allow Futteh Bahadur to set up against the title of the appellant any right to possession as acquired by his purchase from Gunga Pershad. The sale to the appellant was in the execution of a decree which was made to give effect to a compromise between the mortgagor and the mortgagee. He undoubtedly acquired by his purchase a right to possession against the mortgagor, and the mortgagor ought not to be allowed to defeat that by having purchased the interest which was sold in execution of the decree upon the second mortgage.

The High Court, instead of varying the decree of the lower Court in the manner it has done, should, in their Lordships' opinion, have varied it by decreeing possession of the share of Jugdispore, &c., as there described, in the same manner as possession of the share of Ranipore is decreed, with the like order as to mesne profits and costs.

Their Lordships will humbly advise Her Majesty to order the decree of the High Court to be varied accordingly. The respondent, Futteh Bahadur, will pay the costs of this appeal.

Decree varied.

Solicitors for the appellant: Messrs. *T. L. Wilson and Co.*

21st and 22nd February 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, and the Right Hon. Sir Richard Couch.

LUCHMAN SINGH* ... *Defendant,*

and

PUNA AND ANOTHER ... *Plaintiffs.*

On appeal from the Court of the Judicial Commissioner of the Central Provinces.

Second Appeal—Code of Civil Procedure (Act XIV of 1882), ss. 584, 585—Jurisdiction to hear a second appeal, on what matters—Admission of secondary evidence—Evidence Act (I of 1872), ss. 65, 66.

Under ss. 584 and 585 of the Code of Civil Procedure 1882, a second appeal is confined to matters of law, usage having the force of law, or substantial defect in procedure.

On an appeal to the Judicial Commissioner from a decree given on first appeal by an Appellate Court, and maintaining a finding of fact by the original Court, the only questions were (1), whether secondary evidence had been properly admitted on a case that had arisen for its admission; and (2), whether the evidence offered constituted secondary evidence of the matter in dispute, which was the making of a document.

Held, that (no special leave to appeal from the judgment of the Commissioner, the first Appellate Court, having been applied for) the facts were not open to decision on this appeal; this Commitee could only do what the Judicial Commissioner on second appeal, under the above sections, could have done; and that, as the case stood, they were bound by the findings of fact of the first Appellate Court.

Both the above questions were decided in the affirmative by their Lordships: the *first*, on the ground that whether the evidence offered would itself prove the making of the document or not, it formed good ground for holding that there was a document capable of being proved by secondary evidence, admissible with reference to the Indian Evidence Act (1 of 1872), ss. 65,66: the *second* also in the affirmative, because, the evidence consisting of a copy which was made of a document, and filed (in another suit) among the records of the Court, and still there, endorsed, "copy in accordance with the original," signed by the Judge who presided in the Court, who alone was authorized to compare and accept such copy, there were grounds for considering it genuine.

16 Cowell's Ind. Ap., 125; 16 Calc., 753.

APPEAL from a decree (13th February 1866) of the Judicial Commissioner, modifying a decree (12th May 1885) of the Commissioner of the Jubbulpore Division, which varied a decree (9th March 1885) of the Deputy Commissioner of the Jubbulpore District.

The suit giving rise to this appeal related to a question of title, and the main question of fact between the parties was decided by the Courts in succession (1) in favour of the plaintiffs, respondents. Thay alleged that Ramchandra their father, by gift from one Kali Baboo, was the proprietor of village Natwara, and upon their father's death his widow Massammat Munna, who succeeded, allowed the defendant appellant to manage for her; with the result that he purchased in his own name other villages out of the profits of Natwara. Such villages they claimed as the heirs of their father on the death of their mother in 1884. They claimed also buildings and moveables.

The defendant's case was that Natwara descended from Kali to his daughter Munna, who made a gift of it on 23rd August 1870 to the defendant, with other property. He had other matters of defence; but this much is all that is necessary to explain what was the deed of gift alleged to have been made by Kali.

Both the original Court, the Deputy Commissioner, and the Court of First Appeal, the Commissioner, found the alleged gift to Ramchandra to have been made. But the original deed of gift was not forthcoming, and a copy was admitted in evidence.

As to this, the Judical Commissioner, in his judgment on appeal preferred to him under ss. 584 and 585 of the Code of Civil Procedure 1882, expressed the opinion stated in their Lordships' judg-

(1) When the suit was filed, 23rd July 1884, the Act giving the series of the Courts was XIV of 1865, then in force. On the 1st January 1886, when the suit was pending in the Judicial Commissioner, Court, Act XVI of 1885, the Central Provinces Civil Courts Act came into operation, repealing the former, and again stating the Courts in their order.

ment; and refused to hold that the Courts below had been wrong in admitting it in evidence.

On this appeal Mr. *R. V. Doyne* and Mr. *C. W. Arathoon* appeared for the appellant for whom the argument mainly was that there was no legal proof that Kali had made the gift in question.

The respondents did not appear.

Their Lordships' Judgment was delivered by

THE RIGHT HON. LORD HOBHOUSE :—

The sole question raised in this appeal is a question of fact, whether Kali Baboo made a gift of his estate to Ramchandra, under whom the respondents claim. If there was no such deed of gift, the title of the appellant is a good one, but if there was, then the respondents, being the heirs of Ramchandra, are entitled to the decree which they have got.

The question has been before three Courts, and they have all decided in favour of the gift. They have held that it is proved by a deed of which secondary evidence was given.

The case is not only within the general rule which this Committee observe, that they will not, unless under very exceptional circumstances, disturb a finding of fact in which the Courts below have concurred, but it is within the more stringent rule laid down by the Code of Civil Procedure. The third Court was the Judicial Commissioner, and to him the appeal was what is called in the Code a second appeal. Section 585 of the Code of 1882 says :—"No second appeal shall lie except on the grounds mentioned in s. 584." Those grounds are: "The decision being contrary to some specified law or usage having the force of law, or the decision having failed to determine some material issue of law or usage having the force of law," or for substantial defect in procedure. It is not alleged here that there is any defect of procedure. Therefore, in order that this appeal may succeed, there must be some violation of law.

This Committee is sitting on appeal from the order of the Judicial Commissioner, and it can only do what the Judicial Commissioner himself could have done. No special leave to appeal from the decree of the Commissioner has been applied for, and their Lordships find that they are bound by his findings of the facts. Therefore the only questions here are, *first*, whether a case arose for admitting secondary evidence, which was a proper question of law; and, *secondly*, whether the evidence that was admitted was really and truly secondary evidence.

With regard to the case for admitting secondary evidence their Lordships refer to the Evidence Act of 1872. It says :—"Secondary evidence may be given of the existence, condition, or contents of a document in the following cases." Two of the cases are: "When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, and when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time."

In this case there is evidence of two witnesses of whom certainly one, and probably both, assisted at what they call a ceremoney, in which Kali Baboo made over the property to Ramchandra, and told the people present, the villagers, the ryots or cultivators, that Ramchandra was the malik. There is the evidence of one witness that he was present at the signing of a deed, which he says was stated to be a deed of gift from Kali Baboo to Ramchandra, and there is the evidence of another witness that Kali Baboo told him that there had been such a deed of gift. Whether that evidence would of itself prove the deed of gift need not now be discussed, but that it formed good ground for holding that there was a deed capable of being proved by secondary evidence, cannot be doubted. The Courts below have found that all the documents belonging to the estate passed into the hands of the appellant, and therefore that the deed

in question is in his power, or has been destroyed or lost.

Then what is the secondary evidence which is let in? It is a copy of a deed which was filed in another suit, and is still on the records of the Court. That deed is endorsed: "Copy in accordance with the original," and it is signed by the Judge presiding in the Court. Their Lordships accept the opinion of the Judicial Commissioner upon the value of that copy. His words are these: "There can be no doubt that the Judge, in the course of the suit in 1864, did accept and file, with the proceedings, a copy of a deed of gift by Kali Baboo, and the only question is whether that copy had been compared with the original, when the copy is enfaced, in accordance with practice, 'copy according to the original,' and the Judge's order to file is also found on it. I cannot doubt that the copy was duly compared. Except the Judge, there was no person who was authorized to compare and accept a copy, and his signature to the order must, it seems to me, guarantee the genuineness of the copy." Their Lordships entirely concur with that opinion. When the copy is looked at it establishes the deed of gift on which the respondents rely.

There was another question raised with respect to some goods and chattels—some moveable property. It was said that the appellant, having been in possesion of the estate rightfully under a deed of gift from Ramchandra's widow, was entitled to the income during that time, and the Judicial Commissioner has, to a certain extent, given effect to that contention by adjudicating to the appellant the ownership of some villages which it appears that, during that period, he purchased out of the surplus or savings from the income. But besides the land, he received a certain quantity of chattels, which we may call stock and plant, and it is now contended that, as the original stock and plant must have worn out, and the appellant was not under any obligation to replace it, therefore that which he has in fact brought in to replace it belongs to him, and not to the estate. So far as there is stock and plant belonging to the three villages, which the Judicial Commissioner has adjudicated to the appellant, that he takes. But with regard to the other property which forms part of the estate which is adjudicated to the respondents, their Lordships think that the appellant is in the position of an ordinary tenant for life who enjoys furniture and plant which wears out from time to time, and which he replaces, and that that which is found attached to the property which the respondents receive must follow the title to that property, and that the decree of the Judicial Commissioner is right in not giving to the appellant any more stock or plant than belongs to the three villages which he has given to him.

The result is that the appeal fails in every respect, and their Lordships, therefore, must humbly recommend Her Majesty to dismiss it. There will be no costs, as the respondents do not appear.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Appeal dismissed.

22nd February 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten and the Right Hon. Sir Richard Couch.

On appeal from the High Court for the North-Western Provinces.

ANAND KUAR AND ANOTHER, REPRESENTATIVES OF CHAUDHRI LACHMAN SINGH* ... } *Defendant,*

and

TANSUKH ... ... *Plaintiff.*

Question in issue—Parties—Admission.

The plaintiff claimed to have inherited estate in the possession of the defendant, who was also related to the last owner, but who set up, independently of other title, a deed of gift from the latter in his favour. It was decided in the

* I. L. R., 11 Alla. 396.

appellate Court that even if this deed had been executed it was inoperative, and on this point the decision of the first Court was maintained. An issue having been fixed as to the execution, and the plaint also showing that the execution was disputed, their Lordships declined to treat the execution as not having been in contest.

APPEAL from a decree (26th May, 1884,) of the High Court, affirming a decree (17th July, 1882,) of the Subordinate Judge of Meerut.

The question raised on this appeal was as to which of two collateral relations of the deceased was entitled to succeed to his heritance.

The question arose thus. Two brothers, one being Rup Singh, whose estate was now in dispute, and the other, Salig Ram, were grandsons of Guman Singh, whose only brother, Ratan Singh, was grandfather of Chaudhri Tansukh, the plaintiff, and of Madho Singh; the latter being nominally a defendant, as he waived any right in this suit. In fact, Salig Ram's son, Luchman Singh, was substantially the sole defendant in the suit which was brought by Chaudhri Tansukh against his two second cousins, Lachman Singh and Madho Singh, to prove his title to inherit to Rup Singh, deceased.

Rup Singh died in 1870; his widow died in 1872. The plaint alleged that Luchman Singh had taken possession, without real title, of Rup Singh's estate on his death, and previously, in 1875, had sued the plaintiff, Chaudhri Tansukh, for a declaration of his right, relying on an alleged deed of gift from Rup Singh, dated 1st March, 1853, which suit failed; the decision having been that the gift was ineffectual. The right of inheritance, resulting from the relationship of Luchman Singh as nephew's son, to the deceased, was negatived, according to the plaint, by his father, Salig Ram's having been adopted into another branch of the family, so as to lose his rights in the line of his natural parent. Madho Singh waived any right he might be held to have. But the substantial defence, that of Luchman Singh, was that the deed of 1st March, 1853, executed by the deceased Rup Singh in his favour, was in operation.

One of the issues in the present suit raised the question of the operation of this deed; the defendant insisting at the hearing that the decision referred to in the plaint was not that the deed had never been executed, but that it had never been accepted or acted upon.

The judgment of the Court in 1875 was that even if the deed had been executed, the gift was inoperative, never having been acted upon, or followed by possession, and Macnaghten's Hindu Law, p. 217, was referred to on this point. This judgment had been upheld by the High Court on 19th November, 1880.

In the present suit the Subordinate Judge held that the right of inheritance from Rup Singh had not devolved upon Luchman Singh, because Saligram, the father of the latter, had been adopted into another family; and in regard to the deed of gift, the decision was that as Luchman Singh had never obtained possession under it of Rup Singh's estate, it could not now be enforced. With reference to the admission of Madho Singh, the Subordinate Judge decreed the plaintiff's claim to his share, as well as his own, decreeing the claim in full.

On an appeal by Luchman Singh, the High Court (OLDFIELD and MAHMOOD, JJ.) found the deed of gift not proved; and held that, even if executed, it never took effect to pass the property. The Court, however, modified the decree; holding that the plaintiff was entitled, upon what he had proved, to only a moiety of the estate claimed, inasmuch as Madho Singh's admission and disclaimer could not be used against the appellant, who had not set up the title of Madho Singh, to defeat the plaintiff, and had not had an opportunity of answering a title which had not been insisted on by the plaintiff. Reference was made to *Amirto Lall Bose* v. *Rajoneekant Mitter* (1.)

Mr. *C. W. Arathoon*, for the appellant, argued that insufficient effect had been given to the fact that Rup Singh in his

(1) L. R., 2 I. A., 113; 15 B. L. R., 10.

lifetime acted as Luchman Singh's guardian, treating him as his son, and living jointly with him: a state of things that rendered it unnecessary, in order to prove the fact of a gift having been made by Rup Singh to Luchman, that actual transfer of possession at any particular time should appear. The evidence of the execution of the deed of gift had not been negatived, but it had rather been the case that the question of its operation had been treated as decided. The question, therefore, of the actual execution, had been left undisposed of, or at least was still a question open to decision, never having been in actual contest.

The respondent did not appear.

Their Lordships' judgnent was delivered by

THE RIGHT HON. LORD MACNAGHTEN:—

Their Lordships are of opinion that there is no foundation for this appeal.

The appeal was based upon an allegation that the appellants, or the person from whom they claim to have derived title, had been in possession under a deed of gift made by Rup Singh. In order to make out their case it was incumbent on the appellants to prove the execution of that deed. Mr. Arathoon desired to proceed on the assumption that the matter had never been in contest. But that is not the case. The respondent referred to the deed in his plaint, and gave what seems to their Lordships to be distinct notice that its execution was not admitted. In the course of the suit the execution of the deed was put in issue in the ordinary way. Two Courts have tried the question, and both have held that the execution was not proved.

Under these circumstances their Lordships will humbly recommend to Her Majesty that the judgment appealed from should be affirmed and this appeal dismissed, but there will be no costs, as there is no appearance on the part of the respondent.

Appeal dismissed.

Solicitor for the appellants: Messrs. *T. L. Wilson & Co.*

23rd, 27th, February and 3rd April 1889.

PRESENT:

Members of the *Judical Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, and the Right Hon. Sir Richard Couch.

HEMANGINI DASI* ... *Plaintiff,*

and

KEDARNATH KUNDU CHAUDHRI ... } *Defendant.*

On appeal from the High Court in Bengal.

Hindu Law—partition—Widow—Maintenance of Hindu widow where there are sons by different mothers, how chargeable.

When the Hindu law provides that a share shall be allotted to a woman on a partition, she takes it in lieu of, or by way of provision for, the maintenance for which the partitioned estate is already bound. According to Jimutavâhana, referred to by Jaganatha (Colebrooke), commenting on v. 89 of Chap. 2, Book V, it is a settled rule that a widow shall receive from sons, who were born of her, an equal share with them; and she cannot receive a share from the children of another wife. So long as the estate remains joint and undivided, the maintenance of widow is a charge on the whole; but where a partition takes place, among sons of different mothers, each widow is entitled to maintenance only out of the share or shares, allotted to the son or sons, of whom she is the mother.

Jeemony Dossee v. *Attaram Ghose* (1) referred to and approved.

APPEAL from a decree (29th July 1886) of the High Court (2), reversing a decree (11th April 1885) of the Second Subordinate Judge of the Hughli District.

The question raised on this appeal related to the rights of a widow to maintenance, her deceased husband having left sons, of one of whom she was the mother, and a partition taking place among them.

The object of the suit was to establish against the whole estate of the de-

* 16 Cowell's Ind. Ap. 115; 16 Calc., 758.

(1) Macnaghten's Cons. H. L., p. 64.

(2) I. L. R., 13 Calc., 336.

ceased, Taracharan Kundu Chaudhri, who died in April 1865, the right of the plaintiff as his widow to maintenance; and when it was instituted on the 13th September 1884, there had been no partition among his sons, who were Hurrish Chander, his son by the plaintiff, and two other sons by a wife, who predeceased her husband, *viz.*, Kedernath and Annoda Pershad. The latter dying in 1882, left a widow and two minor sons, whose guardian was Kedernath. The latter, the present respondent, represented when this suit was brought two-thirds of the paternal estate.

On the 11th November 1884, after the institution of this suit, Hurrish Chunder brought two other suits against Kedarnath himself, and in his capacity of guardian of the wards, for an account and a partition of the joint estate of Taracharan deceased. Hemangini Dasi, the plaintiff in this suit, was stated in Hurrish Chunder's plaints to have been made a party by reason of her having instituted this suit; but no issue was recorded, or decided, as to her rights to maintenance; and, on the 20th February 1886, decrees in those two suits, declaring Hurrish Chunder's right to one-third of his father's estate generally, directed an account and partition.

In the present suit the widow claimed a decree for Rs. 300 for her maintenance, and Rs. 200 for religious observances, and that these sums might be declared charges on the whole estate of the late Taracharan. By the effect, however, of the decrees for partition obtained by Hurrish Chunder, whom his mother had made a defendant along with Kedernath (though Hurrish Chunder did not defend or appeal), two principal questions arose in the present suit, which had been instituted before the other two suits. These questions were the following:—

The first of them was whether the Courts below, when dealing with the question as to the plaintiff's right as a widow to have suitable maintenance awarded to her out of the entire estate of her late husband, were justified in taking into their consideration a state of facts, *viz.*, the decrees above referred to for partition which did not exist till after the institution of the present suit. And the second question was, assuming the affirmative of the first, whether the effect of a partition between the plaintiff's stepson and step grand-children on the one side, and her own and only son on the other, by which partition the latter took a separate third share, was or was not, by Hindu law, to discharge Kedarnath's and his wards' two thirds shares from the plaintiff's claim for maintenance, limiting that claim to the share of Hurrish Chunder, her own son, both in matter of amount and as regards security.

As to the first of these questions, the Subordinate Judge was of opinion that, as the present suit was instituted before the partition proceedings, the latter would not affect the plaintiff's claim. And as to the second, he referred to the case, relied on by the respondent, of *Jugomony Dossee* v. *Attaram Ghose*, cited at p. 64 of Sir F. Macnaghten's Considerations on Hindu Law, where a point is stated as to whether a mother (not a party to that suit) of an only son, her husband having left other sons was entitled on partition between her son and the other sons to a separate share; and it was determined that she was not so entitled, but must look to her son for maintenance. And the Subordinate Judge was of opinion that, as the mother referred to in that case was not a party to the suit, the question as to her right never properly rose in her absence, and the decision could not guide him.

He made a decree for what he considered to be a suitable maintenance (allowing no arrears or back maintenance) *viz.*, Rs. 180 by the year; and he directed that the appellant might realize two thirds of this amount from the respondent, as representing two-thirds of the entire estate, and the remaining one-third from the share of her son, Hurrish Chunder.

Kedarnath appealed to the High Court, the Plaintiff cross-appealing, because the decree gave her less than she claimed.

The High Court (Petheram, C. J., and Ghose, J.) did not maintain the judgment of the first Court, but, as to the first of the above questions, held that they were bound to take the subsequent partition into consideration, and to make such a decree as would be consistent with the true estate of the family, as it existed at the time they were dealing with it.

As to the second question, they held that, up to the time of the decree for partition defining the separate shares of the members of the family, the plaintiff was entitled to claim her maintenance against the whole estate; and subsequently thereto, to claim her maintenance only against the share allotted to her son: but that, as after a separation between the sons and Hemangini in February 1883, the latter had received her maintenance from her own son Hurrish Chunder alone, she had no claim for maintenance against her step-sons; with the result that so far as Kedarnath and his wards were concerned, the suit ought to be dismissed.

Accordingly, reversing the decree of the lower Court, the High Court dismissed the suit agaist him; and their decree declared the plaintiff entitled, from the time of her separating from her son, Hurrish Chunder, to be paid by him out of that portion of the estate of his late father Tarachand Kundu now in his hands, Rs. 150 a month as maintenance. The judgment of the High Court is reported in I. L. R., 13 Calc. 336.

The plaintiff, having obtained a certificate that the suit fulfilled the requirements of s. 596 of the Civil Procedure Code, appealed to the Queen in Council, on the ground that she had a right to maintenance out of the whole estate of her deceased husband, upon which the charge for maintenance should continue, even after partition amongst her son and step-sons.

Mr. *R. V. Doyne*, and Mr. *J. D. Mayne*, for the appellant, argued that the High Court was wrong in holding the effect of the partition to be to make the maintenance of this widow a charge only on her own son's share in the family estate, and proportionate only to the value of that share. They contended that, on the contrary, by the Hindu law, the widow's maintenance was regarded as a charge upon, and proportionate to, the whole estate of her deceased husband. It was in conformity with the family distribution made by that law that the widows should share, and share alike, in the whole estate. It had been rightly taken as beyond a doubt, in the High Court, that her maintenance, if she had been childless, would have been a charge on the whole estate, not affected by any partition. Also, a widow having sons but no step-sons, and having lived with them whilst the family continued joint, would be on a partition entitled to a share equal to that allotted to a son, and her rights might be shown by supposing a case of a widow having three sons of her own, there being three other sons not by her; in such a case her right would be to have a one-seventh share in the whole estate, and not merely a one-fourth of a half. There was no authority for a change being made in the widow's position, as a consequence of a partition which she could neither bring about nor avert. The right of a widow to her maintenance arose by a marriage. It existed during the life of the husband, who could not free himself from it, and it attached upon the whole inheritance which he left, immediately upon his death.

Referrence was made to Strange's Hindu Law, Edn. 1830, Vol. I, pp. 171, 291, Vol. II, Appendix to Chap. VIII, pp. 290, 307; Dayabhaga, Chap. III, sec. I, para. 12, and sec. 2, paras. 29, 30, and 31; Macnaghten's Principles of Hindu Law, Vol. I, Chap. IV, of Partition, Vol. II, Chap. V; Jaganatha (Colebrook's Transl.,) Book V; Macnaghten's Cons. on Hindu Law, p. 60: *Jeeomony Dossee v. Attaram Ghose* (1); *Sheodyal Tewaree* v. *Jadunath Tewaree* (2); *Nittokissoree Dassee* v. *Jogendronath Mullick*(3).

(1) Macnaghten's Cons. H. L., p. 64.
(2) 9. W. R., p. 62.
(3) L. R. 5. I. A., 55, 56.

Madhavkeshav Tilak v *Gangabai*(1).

It was in regard to the mother's rights over the father's estate that she had her claim to maintenance and to a share; and there was no authority for the opinion that the mother took a share of her son's share. It was incorrect to say that a widow's maintenance was a charge on a son's share; it being, on the contrary, a charge that took priority of any rights upon partition, that dated from her marriage, that affected the whole estate of her husband as a charge thereon; and a charge which like the husband's debts must be provided for. More than one text supported the view that it was a charge upon the whole estate.

Strange's Hindu Law, Vol. I, Chap. Partition; Vol. II, Precedent at pp. 351, 352, 353, with notes by Ellis, Colebrooke, and Sutherland, at the latter page; West and Buhler, Hindu Law, (Bombay) p. 791.

Her share, if she took a share, was a charge on the whole property in the hands of all the sons. She was an inchoate heir till she had issue, and with her original right to charge the whole estate she remained, that right being paramount to the son's right to partition. This was not, in effect, contravened by the decision in *Sorolah Dassee* v. *Bhooban Mohun Neoghy* (2). The mother's right was to maintenance attaching over the whole estate; but, it she took a share in lieu, her right was to a share equal to that of her son, and this was the measure of it.

Mr. *T. H. Cowie, Q. C.*, and Mr. *J. H. A. Branson*, for the respondent, argued in support of the decision of the High Court. The question was completely covered by the authority of decided cases, according to which the plaintiff, on the partition of the family estate, was entitled to have her maintenance charged upon and paid out of the share of her own son only, she not being entitled to charge the shares of her step-sons, as well as that of her own son. Upon the partition, the widow ceased to belong to one family with the step-sons, and had no claim upon their shares in the divided estate.

Referencce was made to Jaganatha's Digest (Colebrooke), Book V, Chap. II, para. 89, and a sentence in the Commentary thereon referring to the opinion of Jimutavahana and the rest; Dayabhaga, Chap. III.

Sir. F. W. Macnaghten, in his "Considerations" published in 1824, cited decisions of 1809, 1811, and 1813, (see p. 39; also pp. 48, 51, 60, 66 and 75) showing that this was the settled law in 1814.

In 1821, there was the decision in *Krisnanund Chowdree* v. *Rookeenee Dibia* (3); and in 1866, there was a case to the like effect in *Cally Churn Mullick* v. *Janova Dassee* (4) decided by Mr. Justice Phear.

Mr. *R. V. Doyne* replied.

Their Lordships' judgment was delivered on a subsequent day (3rd April) by

THE RIGHT HON. SIR RICHARD COUCH:—

The appellant is the widow of Taracharn Kundu, who died on the 19th of April 1865. He left one son, Hurrish Chunder, by the appellant, and two sons, Kedernath (the respondent) and Annoda Pershad, by another wife who died before him. Annoda Pershed died in June 1882, leaving a will by which Kedernath was appointed executor of his estate. The suit was brought on the 13th September 1884 by the appellant, against Kedernath in his own right and as executor to the estate of Annoda Pershad, and against Hurrish Chunder, and the plaint prayed to have it held that the plaintiff was entitled to get Rs. 500 a month from the properties left by her husband, for the expenses of her religious acts and her maintenance, and that the Rs. 500 a month might be declared to be a charge upon the whole of his estate. It also prayed for a decree for Rs. 3,016 9-3

(1) I. L. R., 2 Bom., 639.
(2) I. L R., 15 Calc., 292.
(3) 3 Sel Rep, (1827, p. 70
(4) 1 Ind. Jur., N. S, 284

on account of maintenance for the past six months and one day. After the institution of the suit, and before the filing, on the 6th December 1884, of a written statement by Kedernath, Hurrish Chunder, who attained his majority on the 3rd November 1882, instituted two suits against Kedernath, and others, members of another branch of the family, who were co-sharers with Taracharan in different properties, for a partition of the joint family property. This was stated in the written statement of Kedernath, and it was pleaded that, if the plaintiff was entitled to any maintenance, her claim to it would lie against her son, to be paid out of his share of the joint property which would be allotted to him after partition. On the 20th February 1886, decrees for partition were made in those suits. The judgment of the High Court, on appeal from the Subordinate Judge, was given on the 29th July 1886, and they held, contrary to the decision of the Subordinate Judge, that subsequently to the decree for partition, the plaintiff was entitled to maintenance only against the share allotted to her son; and as to the claim for past maintenance, which was for the period since the family had seperated in food and worship, she having been maintained in the family of her son could not claim maintenance from her step-sons or their shares, though her son might possibly claim contribution. Accordingly they dismissed the suit as against Kedernath.

The decision as to the arrears has not been questioned before their Lordships, and they entertain no doubt that the High Court was right in taking into consideration the decree for partition. The main question is one upon which there is no distinct text in the Hindu law books. So long as the estate left by Taracharn remained joint and undivided, the plaintiff was, no doubt, entitled to claim her maintenance out of the whole estate. Does that right continue to exist after partition, or is there substituted for it a right to maintenance out of her son's share? According to the Dayabhaga, Ch. III. sec. I, vv. 12, 13, where there are many sons of one man by different mothers, but equal in number and alike by class, partition may be made by the allotment of shares to the mothers, and while the mother lives, the sons have not power to make a partition among themselves without her consent. In this case the mother seems to take on behalf of her sons. It would seem to follow that, after such a partition, a mother's right to maintenance would be out of the share she took, and not out of shares taken by the other mothers.

When the Hindu law provides that a share shall be allotted to a woman on a partition, she takes it in lieu of or by way of provision for the maintenance for which the partitioned estate is already bound, and thus it is material to see in what way she takes a share. According to Jimutavahana, it is a settled rule that a widow shall receive from sons who were born of her, an equal share with them, and she cannot receive a share from the children of another wife; therefore she can only receive her share from her own sons. (Colebrooke's Digest, Book V, Ch. II, v. 89, 3rd Ed., Vol. II, p. 255.) In Sir F. Macnaghten's Considerations on Hindu Law, p. 64, a case in the Supreme Court of *Jeeomony Dassee* v. *Attaram Ghose* is reported, which was a suit for partition, where a man died leaving two widows and three sons by one, and one son, Attaram, by Luchapriah the other; and it is said that it was understood and admitted that Luchapriah was not entitled to any separate property upon a partition made between her only son and his three-half brothers, and that she was to look to him for her maintenance.

The Subordinate Judge, in his judgment, said the question who was to give the maintenance never properly arose in that suit in the absence of Luchapriah, and if any such question was then decided, it was an *obiter dictum*. The question did arise between Attaram and his half-brothers, and if the contention of the present appellant, that the maintenance is a charge upon the estate and to

be taken into account in making the partition, is right, the Court should have provided for it. The case appears to be a direct authority upon the question in this appeal. Then there is a case reported at p. 75, where a man had three sons by his first wife, two by his second, and two by his third, and all survived him. In a suit for partition, it was declared, in accordance with the authority in Colebrooke's Digest, before noticed, that the first wife was entitled to one-fourth of the three-seven parts of her sons, and the second wife to one-third of the two-seven parts of her sons. Nothing is said as to the third wife, one of whose sons had died, and she was his heir.

The argument addressed to their Lordships for the appellant was that the maintenance is a charge on the estate, and like debts must be provided for previous to partition. But the analogy is not complete. The right of a widow to maintenance is founded on relationship, and differs from debts. On the death of the husband, his heirs take the whole estate; and if a mother on a partition among her sons takes a share, it is taken in lieu of maintenance. Where there are several groups of sons, the maintenance of their mothers must, so long as the estate remains joint, be a charge upon the whole estate; but when a partition is made, the law appears to be that their maintenance is distributed according to relationship, the sons of each mother being bound to maintain her. The step-sons are not under the same obligation.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court, and dismiss the appeal. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Barrow & Rogers.*

27th, 29th March, and 14th May, 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, and the Right Hon. Sir Richard Couch.

TARACHURN CHATTERJI ... *Defendant,*

and

SURESCHUNDER MUKERJI AND OTHERS ... *Plaintiffs.*

On Appeal from the High Court in Bengal.

Hindu law—Will—construction of will of Hindu testator—Power to adopt conferred on testator's widow ended on estate vesting in his son's widow—Gift of beneficial interest.

On a claim by the children of the testator's daughter, as against his brother's son, held that the testator's direction to his executor (who was his elder brother), to make over whatever remained of his estate, after payment of debts, to his, the testator's son ("when he comes of age") had the effect of a gift to that son operating at that time; and that the words in the will, "if my minor son dies," meant, in order to be consistent with the above, "dies before attaining full age."

On the death of the testator's son, after attaining full age and leaving a widow, the testator's widow, although empowered by the will to adopt if the testator's son should die without son or daughter (which he did) could not exercise this power after the estate had, consequently upon the son's death, vested in his widow for her widow's estate.

Thayammal v *Venkatarama Aiyan* (1) referred to and followed.

The testator's son, having succeeded to the estate under the above provisions, himself made his will, whereby he directed that "his cousin brother" (the defendant above-mentioned) on attaining full age, "becoming *dakhilkar* of my share as well as the shares of my elder uncle," should maintain his, the testator's, mother and widow.

Held, that this was not an absolute gift of the beneficial interest, and that the claim of the children of the daughter of the present testator was valid.

APPEAL from a decree (7th March 1886) of the High Court, which reversed a decree (10th September 1884) of the

* 16 Cowell's Ind Ap., 166; 17 Calc., 122.

(1) L. R., 14 I. A., 67; I. L. R., 10 Mad., 205

Second Subordinate Judge of the District of the 24-Pergunnahs.

The present questions related to the construction of two wills. The suit was for a declaration that the plaintiffs, minors suing by their mother, were entitled as heirs to the whole estate of the late Kalichurn Chatterji, only son of the late Madhub Chunder, whose daughter, Thakomoni, having been married to one Jogesh Chunder Mukerji, was the mother who now sued on behalf of her children. Madhub Chunder died in 1845, having been joint with his elder brother, Anund Chunder, who died in 1850, leaving a son, the defendant Tarachurn and a widow Pearimoni, also a defendant. Madhub Chunder by his will, of which his elder brother Anund Chunder was appointed executor, gave a half share in his estate, in case his son Kalichurn should die a minor and without issue, to the son of his daughter, if she should have one; and the other half to Anund Chunder's son, Tarachurn. He also gave to his widow a power of adoption to be exercised in events which however did not occur.

At an earlier stage it was determined, and was not now disputed, that Tarachurn was born before the death of Madhub Chunder. Kalichurn attained full age in 1850, when he, along with his uncle's widow Pearimoni, took the management of the family property. Three years later, in 1854, he died without issue, but leaving a widow Matangini, a minor. He had made a will, dated 14th December 1853, providing as to Tarachurn's becoming *dakhilkar*, and directing the adoption of one of the sons of the latter, in certain circumstances, by Matangini; which provision occasioned some of the doubts in the construction of the document.

Both the wills appear in their Lordship's judgment.

The plaintiffs' case was that they were entitled to their shares upon a partition by right of inheritance. Tarachurn, in his defence, relied upon the wills as negativing the claim. He also set up a surrender to himself by Kalichurn's widow of her estate, and adverse possession beyond the period of limitation.

The Second Subordinate Judge held that, under the will of Kalichurn, the defendant had a life estate in his property, and that the plaintiffs' title would not accrue till his death.

On the plaintiffs' appeal to the High Court, a Divisional Bench (Prinsep and Trevelyan, J.J.) reversed this decision, being of opinion that the plaintiffs' title as heir was not affected by any thing in the will either of Madhub or of Kalichurn, or by surrender or by adverse possession.

That part of the judgment, which bears upon the only questions to be disposed of on this appeal, was as follows:—

"Madhub's will may be shortly described in the following terms:—After appointing his elder brother Anund to be his executor, and making provision for payment of his debts and certain expenses connected with his family, it provides that his widow should receive a certain sum as maintenance. Anund was appointed to manage the estate as heretofore, until the testator's minor son Kalichurn attained majority, when Anund is directed to account to him. Permission to his widow to adopt with the consent of Anund is given, if Kalichurn should die without issue. In the event of Kalichurn dying, it is provided that if Thakomoni, his daughter, should be married and give birth to a son, then on that son attaining majority, he should receive one-half of the testator's estate, the other half going to Anund's son, and in the event of her dying without a son, she would receive maintenance."

In regard to the will of Kalichurn, the Judges expressed the following opinion:—

"On Tarachurn attaining majority, it was further provided that he should become *dakhilkar* of the entire estate, including both his own and Kalichurn's share. The testator's widow is directed to adopt a son of Tarachurn, or, in the event of Tarachurn having no son, to adopt a suitable person. The testator's wish is expressed that the property should

remain joint; that his widow should live with the family; and that, if there should be any disagreement and she should live in her own father's house, she should receive maintenance. In the event of her not making an adoption, it is provided that she should have no concern with, or right to, the goods and properties; but inasmuch as no term is specified within which she was to adopt, this stipulation would have no effect until she became physically incapable of adopting. There is nothing in the will to show any intention on the part of the testator to disinherit his widow. The only portion of the will bearing in that direction, as has been already pointed out, relates to her receiving maintenance in a certain sum in the event of her finding it necessary to leave the family house and reside with her father, and on her failure to adopt, which, for reasons stated, is inoperative.

"The object of the testator in giving her maintenance only in the event of her leaving his house, was not to disinherit her but to ensure that the property should remain joint.

"The will declares that 'he who will be heir for the time being will jointly continue in possession of all the aforesaid properties with his co-sharers.' Looking at the general scheme of the will, we think that the widow would be included in the term 'heir for the time being.'

"In our opinion, therefore, on the death of Kalichurn, his minor widow became entitled to his estate, which was to be under the management, *first*, of his step-mother Srimati Debi, and then on his attaining majority, of the senior male member Kalichurn; that a son was to be adopted, but that no provision was made for the inheritance in the event of failure to make this adoption."

Tarachurn appealed to Her Majesty in Council.

Mr. *T. H. Cowie*, Q.C., and Mr. *R. V. Doyne*, for the appellant, argued that he took an estate for his own benefit in Kalichurn'shalf of the joint family property, liable only to be defeated in case of an adoption by Matangini, in accordance with the power given to her by her husband's will. The appellant did not take as a mere trustee for her and the heirs of Kalichurn. He was, in the event that had occurred, entitled to one-half of Madhub Chunder's estate, under his will, and that this was so, was confirmed by the will of Kalichurn and the expressions used in it.

Mr. *J. D. Mayne*, for the respondents, argued that the High Court had correctly construed the wills of Madhub Chunder and Kalichurn.

Mr. *T. H. Cowie, Q.C.*, replied, claiming in the end that the High Court ought not to have made Tarachurn liable for the costs of the suit.

Afterwards, on 14th May, their Lordships' judgment was delivered by

THE RIGHT HON. SIR RICHARD COUCH :—

The appellant (one of the defendants in the suit) is the son of Anund Chunder, who died in 1850. The respondents (the plaintiffs in the suit) are the grandsons of Madhub Chunder, the brother of Anund. He died on the 14th October 1845. Madhub Chunder had a son, Kalichurn, who died on the 23rd October 1853, after attaining majority, and a daughter, Thakomoni, the mother of the respondents. Kalichurn left a widow, Matangini, who died on the 21st December 1879. The property in suit is the share of Madhub in the joint property of himself and Anund, and the respondents are entitled to it by inheritance if it is not disposed of by the will of Madhub, which was made shortly before his death, or by the will of Kalichurn, by virtue of one or the other of which the appellant claimed to be entitled to the property. It was not disputed that the will of Kalichurn was genuine, and Madhub's was found to be so by both the lower Courts. The only questions in this appeal are the constructions of these wills.

The will of Madhub addressed to his brother Anund, after stating that he had a half share in their joint property, and giving directions for the payment of

debts and the maintenance of his wife and son and daughter, and the education of the son and other matters, says: "God forbid, but if my minor son should die and my daughter should get married and a grandson be born, then on the said grandson's attaining majority you will give him half of my share, what ever it may be, and give half to your son: God forbid, but if she having no son becomes a widow, then you will pay her Rs. 4 a month for maintenance. You shall perform the Sharodia (Durga) puja, srads of parents and others, and pay perquisites and presents to the spiritual guide and family priest according to the circumstances and your sense: God forbid, if you die before my son and daughter attain majority, then you may appoint attorney whomsoever you may think fit. You shall account for and make over whatever remains of the estate after payment of debts to my son when he comes of age. If you be of opinion that my half share should be sold and Company's papers should be purchased (with the proceeds), you may sell it for its proper value. Further, if my only son dies before he gets children, my wife may, with your consent, adopt a son." It has been found by the High Court, and is not now disputed, that Tarachurn was born before the date of this will.

The direction to make over the estate to the son when he comes of age has the effect of a gift to him to take effect at that time, and the words, "If my minor son dies," in order to be consistent with that, must mean dies during minority. On the son's death after coming of age leaving Matangini, his widow, Madhub Chunder's wife would not have power to adopt a son, the estate of Kalichurn having become vested in his widow.—*Thayammal* v. *Venkatarama Aiyan* (1).

The will of Kalichurn is now to be considered, as, if the appellant has any title to the property, it must be under that. In the official translation of it in the Record of Proceedings it is said in several places to be torn and illegible, and it was agreed before their Lordships that the statement of it in the judgment of the Subordinate Judge should be taken as correct. This is as follows (the figures 1, 2, &c., being inserted by the Judge):—

"The testator after describing the properties standing *swanami* and *benami* and in possession and out of it, and stating that his father, Madhub, and Madhub's elder brother, Anund, had jointly acquired them with their own earnings, and were in joint possession and enjoyment (*dakhal voge*) thereof, and were performing the ceremonies and maintaining the family with the profits and their own earnings, says in the will: "As my younger uncle died, leaving no issue or widow, in 1848, during the lifetime of my father and the elder uncle, they remained in possession (or were possessors, *dakhilkars*) of all the estate. In the meantime, through the influence of evil stars, they became heavily involved in debts, and before they were all paid off, my father died in Assin 1252. I was then a minor, and *my mother, Srimati Debi, was my guardian in law Courts under the guidance of my elder uncle*, who (with his own earnings and the profits of the estate, performed the ceremonies and maintained the family, myself and my mother, as before, and paid off a large proportion of the debts) died in Srabun 1257, leaving his minor son, Tarachurn Chatterji, and my aunt, his widow, as his heirs. The said aunt, through evil advice of bad men, being about to divide the properties, I, on attaining my majority in 1257, made statements in some Courts with regard to some of the properties as if they were my father's self-acquired and exclusive properties, with a view to prevent the threatened division (or partition), and, taking upon myself the payment of debts due to some of the creditors, made arrangements with them, and am gradually paying them off. But, in fact, maintaining those properties, debts, and dues still joint, I am in joint possession (*dakhilkar*) of the whole estate in conjunction with my said aunt, and am performing the ceremonies and maintaining the family. But I am so seriously ill now that my life is despaired of, and man is mortal and life is uncertain. I, therefore, deem it proper to make a will of the properties that will fall to my share. So laying down these rules I make my will, that (as) ere this my mother was my guardian according to the *anumatipatra* of my mother and my elder uncle's consent, (1) I appoint my mother (step) the executrix of my said whole estate. So long as my cousin brother Tarachurn does not attain majority, my mother, in conjunction with my aunt, shall maintain and protect my minor wife, Matangini Debi, and perform the ceremonies and maintain the family as before, pay off the creditors' debts, conduct the lawsuits already pending in Courts or to be instituted hereafter,"

(1) L. R., 14 I. A., 67; I. L. R., 10 Mad., 205.

tile documents, pay debts howsoever incurred, take back documents and realize dues. (2) Afterwards on attaining majority, my cousin brother, Tarachurn, becoming possessor (*dakhilkar*) of my share *as well as the share of my elder uncle*, shall maintain my mother and wife. (3) Further, I, being the only son of my father, *it is provided in his said anumati-patra that if I die before the birth of any issue, my mother shall adopt a son according to Shastras.* If my mother does adopt a son, well and good; otherwise on attaining majority my wife shall adopt one of Tarachurn's sons, and shall pass her time (life) under the kurtaship (management and protection) of Tarachurn. God forbid, if Tarachurn does not get issues, then she may adopt a son of somebody else fit for the purpose. (4) When the ijmali properties have not hitherto been partitioned, they shall remain joint. (5) And save and except turuf Belpukhuria chuck lands purchased in auction, *nobody shall have power to dispose of any other property by mortgage, gift, or sale.* (6) The heir for the time being shall remain in possession (*dakhilkar*) of the aforesaid whole estate jointly with the co-sharer and perform the ceremonies and maintain the family, take proper notice of my sister and cousin sister, and my wife shall accept *muntra* (spiritual or religious initiation) according to the *kulachar* (family custom) from my spiritual guide, or whomsoever may be living of the family of my *guru*, and shall live in my house. (7) *My mother and others* shall cause her to perform the proper religious ceremonies. (8) If there be disagreement in any respect and she lives in her father's house, she shall get Rs. 10 per month for her maintainance from my *mother and others.* (9) If she does not adopt a son in the manner heretobefore provided for, there shall remain (or be) no concern (*elaka*) with and right (*satiwa*) to the estate and things, &c., on the part of my wife. (10) My clothes and raiments are left in the care of my mother and aunt. Tarachurn shall get them (*paibek*) when he comes of age. (11) Except those (clothes and raiments) the *ijmali* metal plates and utensils and those used for puja and the whole of the immoveable and moveable estate are left *ijmali.* (12) My mother and aunt may sell the said Belpukhuria chuck lands . . . . to pay off debts or to purchase other properties nearer home.' . . ."

In the lower Courts much stress appears to have been laid on the word *dakhilkar*, which it was contended applied to one holding by virtue of his own title, and not to a possession held on behalf of another as an executor or trustee. The ordinary meaning of the word is "occupant," but the testator where he says he is in joint possession of the whole estate in conjunction with his aunt, and where (at No. 6) he says "the heir for the time being shall remain in possession of the aforesaid whole estate jointly with the co-sharer and perform the ceremonies and maintain the family," appears to give it a large meaning. In order to see what it means in the sentence, "Afterwards on attaining majority my cousin brother, Tarachurn, becoming possessor (*dakhilkar* of my share as well as the share of my elder uncle, shall maintain my mother and wife," the context must be looked at. These are the only words that can operate as a gift to Tarachurn. The testator begins by appointing his step-mother executrix, meaning manager of his estate. So long as Tarachurn does not attain majority, she is to manage in conjunction with his aunt. On attaining majority, Tarachurn is to become possessor of the share, whether in the same capacity as the step-mother or otherwise is doubtful, but what follows assists in discovering the intention of the testator. He alludes to the provision in his father's will that if he dies without issue, his mother should adopt a son, who apparently, he thinks, should take the estate; and he says that if his mother does not adopt a son, his wife shall adopt one of Tarachurn's sons, and if Tarachurn has no sons, she may adopt the son of somebody else. That he wished an adoption to be made is apparent from the direction (9) that if his wife did not adopt a son she was to have no concern with, and right "to, the estate and things, &c.," and the words at (6), "the heir for the time being shall remain in possession," seem to be intended to refer to an adopted son rather than to Tarachurn. If the intention was that Tarachurn on attaining majority was to take the estate for his own benefit, it would be giving him a direct interest to prevent the wife making an adoption, which he might do by refusing to give one of his sons, and thus defeat that intention. It is more reasonable to suppose that the intention was to benefit the family of Anund by obliging the wife to adopt a son of Tarachurn, than by giving the estate absolutely to Tarachurn on his attaining majority. Their Lordships are

of opinion that the proper construction of the will is, that it provided for the management of the property on the death of Kalichurn, and gave power to his widow to adopt, under certain limitations; that, on his death, his widow Matangini became entitled to his estate, and on her death, the plaintiffs became entitled. This was the opinion of the High Court, which made a decree accordingly, reversing the decree of the first Court. That Court had ordered the costs of Tarachurn and another defendant, Ram Krishen Nuskur, to be paid out of the estate of Kalichurn, but the High Court ordered those defendants to pay the plaintiffs' costs in the High Court and also in the first Court, and the other defendants to bear their own costs in all Courts. Their Lordships think that the costs of all parties in the appeals to the High Court and in the first Court should be paid out of the estate of Kalichurn, and they will humbly advise Her Majesty to vary the decree of the High Court accordingly, and in all other respects to affirm it. This variation ought not to make any difference in the order as to the costs of this appeal, and the appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Barrow & Rodgers.*

Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*

27th March, and 3rd April, 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, and the Right Hon. Sir Richard Couch.

HAR LAL* ... *Defendant,*

and

SARDAR ... *Plaintiff.*

On appeal from the High Court, North-Western Provinces.

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* I. L. R Alla., 11 399.

399—400

Assent to and validity of mutation of names in the collectorate record of rights—Act XIX of 1873 (N.-W. P. Land Revenue Act) ss. 94, 97.

The question was, according to the judgment of the High Court, whether a change of names in the collectorate record-of-rights represented a *bonâ fide* transfer, by the plaintiff, or whether there was a mere assent by her to a paper transaction, relating to the ownership of a share in a village, in giving which assent she had not acted freely, but under undue influence. Reversing the decision of the High Court, which was that the plaintiff had assented to the proceedings under intimidation, their Lordships held that, on the evidence, no intimidation had been proved, and that a suit to cancel this "dakhil kharij" and for a declaration of the proprietary right of the plaintiff, in whose name the village stood before the mutation, had been rightly dismissed in the first Court.

APPEAL from a decree (15th January, 1886,) of the High Court, reversing a decree (25th September, 1885,) of the Subordinate Judge of Banda.

The suit out of which this appeal arose was for a declaration of title to a mauza named Nakra in the Banda district, and sought the cancellation of an order of 27th June, 1881, for change of names in the record-of-rights, on the ground that the plaintiff's assent to such change had been obtained by intimidating her (1). The mauza Nakra was formerly owned in equal shares by Thakur Das and Mussammat Sardar Dullia, widow of one Bhojraj, deceased, and was recorded in their names. They were indebted to Bijai Ram, adoptive father of Har Lal, who was now appellant. Bijai Ram had on the 4th August, 1865, obtained a money decree against them, and he proceeded to execute this decree by sale of their lands including Nakra. It was, however, disputed as to whether the

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(1) Act XIX of 1873, the N. W. P. Land Revenue Act, in section 94, requires the Collector to keep and maintain the record-of-rights, registering "all changes that may take place;" and, in section 97, enacts that all succession to and transfers of proprietary rights shall be notified, and if on inquiry they appear to have taken place, they shall be recorded in the register. Should a dispute arise, the entry is to be made subject to any order that may subsequently be passed by the civil court: section 101.

latter mauza had not been excluded by the effect of an arbitration award from liability to be sold for their debts to Bijai.

According to the plaint, it was by purchases at successive judicial sales, first of Thakur Das's share and then of the Mussammat's share, that Ganesh Pershad, the recently deceased husband of the plaintiff, became entitled to the whole of Nakra, the sales being in execution of decrees in favour of Bijai Ram, who afterwards disputed, but without success, the right of Ganesh Pershad, as purchaser, on the ground of collusion with the debtors. However, after the death of Ganesh Pershad in April, 1861 (he having been murdered on account of a quarrel not connected with the present dispute), his widow, the present plaintiff, assented to the name of Mussammat Sardar Dullia being entered in the collectorate record of proprietors as owner of the eight-annas share of Nakra which the latter had possessed before the sale in execution of Bijai Ram's decree.

The plaint asked that "the mutation proceeding of 1881 be declared null and void, and that the plaintiff's right of proprietary possession as widow of Ganesh Pershad be declared." It alleged a gift of her assumed share in Nakra by Mussammat Sardar Dullia to the defendant, Har Lal, in July, 1872, and the latter, at first, was sued alone. But Har Lal in his defence maintained that the suit could not proceed against him alone, without Mussammat Sardar Dullia being impleaded.

The Subordinate Judge, Manmohun Lal, Rai Bahadur, made the order on 17th December, 1884, that she should be made a defendant under s. 32 of the Code of Civil Procedure. She referred to herself in the following written statement filed by her as defendant No. 2:—

"During the lifetime of the plaintiff's husband there was unity of interest between him and defendant No. 2, with their mutual consent. On the death of the plaintiff's husband an application was filed by defendant No. 2 for entry of her name in respect of the entire mauza Nakra, on the declaration of her being the actual proprietor thereof; then the plaintiff, of her own accord and free will, and without any compulsion or coercion, filed an application before a competent authority for the entry of defendant's name in respect of an 8-anna share in mauza Nakra, and the defendant No. 2 waived her right to the other 8-anna share. Therefore, the plaintiff cannot now deviate from her former declaration, according to s. 115 of the Evidence Act."

The Subordinate Judge found it clearly proved that all the proceedings relating to the mutation of names were taken by the plaintiff willingly, and that the entry of names was duly made. He found that the plaintiff's late husband, Ganesh Pershad, was in his lifetime in the employment of Mussammat Sardar Dullia as a mukhtiar, and that not until she had executed a deed-of-gift in favour of Har Lal, for the entire mauza of Nakra (including the 8-anna share claimed by the plaintiff) had been entered in the name of Har Lal, did the plaintiff raise any objection. Not till then did she file her objection to the entry of Har Lal's name, which she ultimately did, and carried the question through the offices up to the Commissioner and to the Board of Revenue. The Subordinate Judge also found that the plaintiff had been lambardar, while Mussammat Sardar Dullia had only been pattidar of her share, so that collections of rent by the former proved nothing in her favour as between the two. He declined to pronounce whether the possession of Ganesh Pershad had been proprietary on his own account or only *benami* for his employer, Mussammat Sardar Dullia, because "when she" (the latter) "had become owner of the share in Nakra by the admission of the plaintiff she had power to make the gift in favour of Har Lal, and that the plaintiff had no concern therewith."

He, therefore, dismissed the plaintiff's claim.

On an appeal to the High Court by the plaintiff, a Division Bench (PETHERAM,

C. J., and TYRRELL, J.,) reversed the above decision, and decreed the plaintiff's claim. Their judgment was as follows:—

"It is unquestionable that up to May, 1881, the legal estate in the whole village vested in the representative of the deceased Ganesh Pershad, and whatever other statements may have been imported into the case, it is clear—and this was accepted by the Court below—that the defendant's title is based exclusively on the transaction between her and the plaintiff in the Revenue Court and the dakhilkhafij proceedings. So that the real question is, whether this was a *bonâ fide* transfer by the plaintiff, or whether there was a mere assent by her to a paper transaction relating to the owner ship of the 8-anna share, and she did not act freely but under coercion. We have heard all the evidence in the case, and we entertain no doubt, not only that, under the circumstances which have been proved, the plaintiff's allegations were extremely probable, but that the direct evidence produced by her was sufficient to establish her allegations. On the other hand, it appears to us to be almost impossible that the defendant's story should be true, and the alleged reason why the defendant should, according to her story, leave any part of her estate in the plaintiff's hands, is incredible to us. We cannot believe that the defendant would give half her property to the plaintiff from motives of commiseration for the murder of the latter's husband; and it seems probable that the plaintiff's apparent acquiescence in the defendant's wishes regarding half the village is rightly explained by the intimidation which she has alleged. It therefore appears that the lower Court should have decided in favour of the appellant, and the decree must therefore be reversed, and the appeal allowed with costs of both Courts."

On this appeal,

Mr. *R. V. Doyne*, for the appellant, argued that the earlier relations of the parties, not sufficiently adverted to by the High Court, explained the conduct of the respondent in assenting to the proceedings at which the change of names had been effected, a change which she had since sought to have disallowed. The contention, and actual state of the facts, was that Mussammat Sardar Dullia had been the real purchaser, although she had used the name of her agent Ganesh Pershad *benami* for her. To show this, he referred to an application of 12th May, 1881, to the Deputy Collector, in which she alleged that by reason of her being *parda-nashin*, she had the name of Ganesh Pershad, her "karinda," fictitiously entered against mauza Nakra in the column of proprietors: also that Ganesh Pershad having lost his life, her own name should be entered. Reference was also made to a petition of the 18th of the same month presented by Mussammat Sardar, the respondent, stating the death of her husband "shareholder and lambardar of Nakra," and requesting that her own name and that of Mussammat Sardar Dullia should be entered in respect of equal shares. Also to a statement of the respondent that her claim was only to the half of Nakra purchased by her husband at the auction sale, (*i. e.*, Thakur Das's moiety), and that Mussammat Dullia was entitled to the other half, *i. e.*, that which had been the subject of sale apparently to Ganesh Pershad. Moreover, as held by the first Court, the burden of proof was on the respondent to prove intimidation and coercion exercised upon her, and in this she had failed.

The respondent did not appear. Their Lordships' judgment was delivered by

THE RIGHT HON. LORD HOBHOUSE:—

The only question in this case is as to the validity of certain transactions which took place in the months of May and June, 1881, affecting the title to a moiety of a village called Nakra. The parties to the transaction were, first, the plaintiff, who is the widow of one Ganesh Pershad, and, secondly, the defendant, Sardar Dullia, under whom the other defendant,

Har Lal, claims by virtue of a deed-of gift.

The nature of the transactions is this: The village Nakra stood in the name of Ganesh Pershad, husband of the plaintiff, who had been the servant and agent of Dullia's husband, and afterwards of herself, and who had when in their service acquired the ownership of the village. He was recorded in the Collector's books as the owner. In May and June, 1881, the plaintiff came before the patwari, acknowledged Dullia's title to one moiety of the village, claiming the other moiety for herself, and a mutation of names was effected from that of Ganesh Pershad into those of the plaintiff herself and of Dullia, one moiety each. The mutation of names was followed by possession on the part of Dullia by receipt of rents and profits, and she was found to be in possession in a proceeding before the Revenue Court in November, 1883, when she executed the gift to Har Lal, and he applied for possession. The plaintiff now says that in effecting this mutation of names she was acting under intimidation and fear; that Dullia had incited a caste or sect in the village called Lodhis, hostile to Ganesh Pershad, who threatened the plaintiff with death unless she would transfer half the estate to Dullia. If the plaintiff fails to prove that case, her suit must fail altogether.

Now, Ganesh Pershad was murdered on the 13th of April, 1881, and his murder was imputed to this caste of Lodhis, five of whom were committed for trial. But it turned out that though the real culprit was a Lodhi, he was a person who had a private grievance against Ganesh Pershad, who, he said, had deprived him of his estate. He killed him out of private revenge. He was convicted and sentenced to death, and the other four who were tried with him were acquitted. The suggestion made in the suit now is still that the real murderers were the caste of Lodhis, and that they effected the murder because they were at enmity with Ganesh Pershad and favoured Dullia, and that the same motives operated to make them threaten the plaintiff unless she would transfer a moiety of the estate to Dullia. To prove that case several witnesses were called. The Subordinate Judge disbelieved the witnesses. He considered that their character was such as to make them not very trustworthy; that there were discrepancies in their evidence; and, above all, that the improbability of their story was so great that it should be rejected. On those grounds he dismissed the suit.

The plaintiff appealed to the High Court, and the High Court say as to the evidence:—"We have heard all the evidence in the case, and we entertain no doubt, not only that under the circumstances which have been proved the plaintiff's allegations were extremely probable, but that the direct evidence produced by her was sufficient to establish her allegations." That is the whole of their comment on the evidence. They do not mention any point on which they think the Subordinate Judge has gone wrong in disbelieving the witnesses, but they differed with him in the result, and they reversed his decree, and gave the plaintiff a decree for the moiety of the estate that she claimed.

Such being the difference between the Courts below, the duty is thrown upon their Lordships of looking into the whole of the evidence, and of examining which of them is right.

The substantial story told by the witnesses is this: that one day after the murder of Ganesh Pershad—nobody says exactly how long, but one of them says a month after—the plaintiff and Dullia were sitting at the doors of their respective houses, which closely adjoined one another; that on that occasion Dullia spoke to a number of Lodhis who were present, and incited them to threaten the plaintiff with death or injury if she did not give Dullia half the estate; that the plaintiff at first refused; that she refused several times, but the mob of Lodhis went on repeating the threats, until at last the plaintiff yielded and promised to give the moiety of the estate. There-

fore what the Court is asked to believe is that, while five of these Lodhis were accused of a capital crime and were on their trial, another group of Lodhis assembled to commit another heinous offence by intimidating the widow of their former victim into parting with some of her property, from the very same motive that instigated the murder of Ganesh Pershad, and that the person who was to profit by that crime sat by and openly incited it. That is a story which would require proof by clear consistent testimony from persons who are above suspicion. Six witnesses are called to prove it. Three of them are tenants of the plaintiff, one of them is a servant of the plaintiff, and one of them is the plaintiff's brother, and the sixth is apparently an independent man.

What has been the conduct of the parties? The plaintiff herself does not go to any Magistrate, and does not seek any assistance. Shortly afterwards—we cannot tell exactly how long, but probably a fortnight or three weeks afterwards—she appears openly before the patwari, is examined by him in the presence of her own general mukhtiar, one Debi Pershad, and gives evidence that Dullia is the proper owner of one moiety of the estate, and that the two have agreed to share that which stood in the name of Ganesh Pershad. The witnesses—these tenants, servants, brother, and neighbour—all appear to have been perfectly supine. Having seen this heinous crime committed, knowing that their mistress or their friend was under threats against her life, they do not appear to have gone to anybody to seek any assistance at all.

Their Lordships cannot agree with the High Court that that is a probable story. On the contrary, it seems to them to be a story of the highest improbability and one not to be believed without the clearest and most cogent evidence.

Then as to the amount of contradiction. The only independent witness is also the only one who speaks in any detail to the transactions, and he contradicts himself in a very material point. In the course of his examination he is asked whether he knew Dullia, whom he says he saw inciting the mob to threaten the plaintiff. He answered thus: "I did not hear"—by which he means I never heard—"the voice of Mussammat Sardar Dullia, except on that day. I have seen Sardar Dullia on several occasions and recognise her also. On the day she asked the Lodhis to threaten the plaintiff her face was visible by the side of the door. I recognised her." But then in a subsequent part of his examination he says: "When the said Mussammat"—that is Dullia—"was seated in her dehliz and asked to have the plaintiff threatened, I took her for the said Mussammat because the people said it was her." "I did not see her face, nor could I recognise her." So that on the important point of the identity of Dullia this witness tells first one story and then the exact contradictory of it. Moreover, the witnesses mention several persons as having been present on the occasion. Three of those persons are called. Two of them deny that there was any enmity between the Lodhis and Ganesh Pershad, and all three deny that there was any intimidation whatever. There seems to have been a conference of some kind, and according to these three witnesses Dullia required the plaintiff, whether on legal or moral grounds does not appear, to give her some advantage out of the estate, and the agreement ultimately was that she should have half.

So much for the evidence that was given. But then there was evidence which might have been given, and was not given, of a very important kind. The plaintiff herself, who would be a very important witness, is not one of those Indian ladies who could not be expected to come forward in a Court of justice. She is in the habit of appearing in public with her face uncovered, and she did appear before the patwari and was examined in the mutation case. Therefore there is no reason why she should not have appeared in this case, and yet she is not called. Moreover, the witnesses said that her general Mukh-

tiar, Debi Pershad, was present on the occasion of the threats. He appeared also on the question about possession after the conveyance to Har Lal, and he deposed to the appearance of the plaintiff before the patwari and to the story that was told there, and he said nothing then about any threat used to the plaintiff. He did say that after the mutation into Dullia's name he received the rents and that he paid over a moiety to Dullia because he was afraid of the villagers; but it appeared that he very soon abstained from paying the moiety, and, when asked whether he was not still afraid of the villagers he said he was, but he had not an opportunity to pay the rents. So that he gave somewhat ambiguous evidence on that occasion. But it is obvious that he would be the most important witness to prove the plaintiff's story if it were true, and yet he is not called, although he is still living.

Having regard then to the strange nature of the plaintiff's story; to the position of her witnesses; to her conduct and theirs at the time of the alleged threat; to the contradictions, internal and external, of the evidence adduced; and to the omission of evidence that ought to have been adduced, their Lordships think that her story is entirely incredible; that the Subordinate Judge was quite right in rejecting it; that the High Court ought to have dismissed the appeal to them with costs; that a decree to that effect should now be made; and that the respondent should pay the costs of this appeal. Their Lordships will humbly advise her Majesty to that effect.

Appeal allowed.

Solicitors for the appellant: Messrs. *Pyke* and *Parrott*.

3rd April 1889.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Lord Watson, the Right Hon. Lord Macnaghten, and the Right Hon. Sir Richard Couch.

RAJAB ALI* ... *Plaintiff*,

and

AMIR HOSSEIN AND OTHERS... *Defendants*.

On Appeal from the High Court in Bengal.

Security for costs—Discretion of Court to refuse security—Civil Procedure Code (Act XIV of 1882), s. 549.

An original Court rejected, as insufficient, security offered for the purpose of conforming to an order of the High Court under s. 549 Civil Procedure Code; and refused to receive other security offered, in lieu, after the time fixed by the order had expired. This was affirmed by the High Court; *Held*, that as the High Court had a discretion to enlarge the time allowed for finding security, and to accept other security in lieu of that rejected, or to refuse to do either, it had, under the circumstances, judicially exercised that discretion in refusing.

APPEAL from a decree (29th June 1885) of the High Court affirming a decree (30th August 1884) of the Subordinate Judge of the Patna District.

The suit, out of which this appeal arose, was brought by the present appellant for land left by Sayed Enayat Hossein, deceased, valued at Rs. 4,000; and having been dismissed with costs by the Subordinate Judge on 30th August 1884, an appeal was preferred. The High Court ordered, on 11th March 1885, that Rajab Ali the plaintiff should within one month furnish security, under s. 549 of the Code of Civil Procedure, to the satisfaction of the Judge "for costs of the appeal and in the original suit."

Rajab Ali accordingly, on 2nd April 1885, filed a security bond executed by one Bande Ali for Rs. 4,000 hypothecating mouza Abdulpore Pipla, perganna Balia, zila Patna, alleged to be worth

* I. L. R., 17 Calc., 1.

Rs. 15,000. The respondents, Syed Amir Hossein and others, objected to the security, alleging that the mouza was not the property of Bande Ali.

On the 17th June 1885, the Subordinate Judge found that the security, in reference to title, was insufficient, and rejected it. The Court also refused to allow other security to be given in lieu, as the time fixed by the Appellate Court for filing security had then expired.

On an appeal from this order, urging that the grounds of the rejection were not made out, and that the security tendered in lieu immediately on the passing of the order of rejection, should have been accepted, the High Court said: "As regards the first point, we have no means of ascertaining or forming any opinion regarding the grounds of the Subordinate Judge's order. No objection was taken until the actual hearing of this matter; and consequently the requisite record has not been forwarded to us. As regards the second objection, we think that the terms of the judgment in the case of *Haidri Bai* v. *East Indian Railway Company*(1), which has been followed by a Division Bench of this Court, *Budri Narain* v. *Sheo Koer* (2), is conclusive. The appellant took the risk of furnishing security which was found to be insufficient, and he therefore cannot be allowed the opportunity, after the expiry of the prescribed period, of furnishing a fresh security." The appeal in the suit was rejected.

On the 13th January 1886, the appellant obtained leave to appeal to Her Majesty.

Mr. *James Tatlock*, for the appellant, argued that there was no default within the meaning and intent of s. 549 of the Code of Civil Procedure, such as would call for the extreme measure of rejecting the appeal; and the High Court was in error in supposing that it had no discretion in the matter to allow the appeal to proceed. That discretion it had. And the High Court was wrong in not sending for the record of the enquiry as to the security made by the Subordinate Judge. He referred to *Balwant Singh* v. *Dowlut Singh*(3), where the High Court having apparently treated an appeal as though, after rejection of it under s. 549, a petition tendering security and asking restoration could not be entertained, it was held by this Committee that to restore it was within the Court's discretion. *Haidri Bai* v. *East Indian Railway Company*(4) was also cited.

The respondents did not appear.

Their Lordships judgment was delivered by

THE RIGHT HON. LORD WATSON.

Their Lordships have come to the conclusion that this appeal ought not to be allowed. They are not disposed to agree with the view taken by the learned Judges of the High Court, to the effect that the Court had no discretion to enlarge the time allowed for finding security, or to accept another security in lieu of the bond which had been filed by the appellant upon the 2nd April 1885. At the same time they are very clearly of opinion, in the circumstances of the case, that if the Court had assumed the discretionary power, which their Lordships think they possess, they would not have excercised it rightly if they had acceded to the motion which is said to have been made on behalf of the appellant.

Their Lordships will humbly report to Her Majesty that this appeal ought to be dismissed.

Appeal dismissed.

Solicitor for the appellant: Mr. *Geo. Thatcher.*

(1) I.L.R., 1 Allahabad, 687.
(2) I.L.R., 11 Calcutta, 716.
(3) I.L.R., 8 Allahabad, 315; L.R., 13 I.A., 57; 4 P. C. J., 707.
(4) I. L. R., 1 Allahabad, 687.

5th and 9th April, 14th and 31st July and 30th November 1889.

PRESENT AT FIRST HEARING:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, and the Right Hon. Sir Richard Couch.

AT THE SECOND:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Lord Hobhouse, the Right Hon. Lord Herschell, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL* ... } *Defendant,*

and

FAHAMIDANISSA BEGUM AND OTHERS ... } *Plaintiffs.*

On Appeal from the High Court in Benyal.

Act IX of 1847—Assessment to revenue, finality of, upon land within an estate permanently settled—Non-liability to assessment of alluvial land re-formed within such an estate, no abetment having been made on account of previous deluvion—Act IX of 1847, construction of—Jurisdiction of the Civil Courts in regard to orders of revenue authorities.

A review of the legislation anterior to Act IX of 1847 shows that whilst it was intended to bring under assessment lands not included in the permanent settlement, whether waste or gained by alluvion or dereliction from sea or rivers, yet all such lands as were comprised in permanently-settled estates were to be rigorously excluded from further assessment.

Lands included in the permanent settlement having afterwards been covered by water, and having then been formed again on the same site, *held* not to be lands "gained" from the river by alluvion or dereliction within the meaning of Regulation II of 1819, that expression being confined to meaning lands gained since the period of the settlement.

The effect of Act IX of 1847 was merely to change the mode of assessment in the case of land already liable to be assessed under legislation in force when that Act became law. It was not the object of that Act to bring under liability land re-formed on the site of land previously lost, within the area of a permanently-settled estate, the revenue upon which had been paid without abatement since the permanent settlement.

Where an order of the Board of Revenue, purporting to be made under Act IX of 1847, subjected land included in the permanent settlement to assessment, held that the District Civil Court had jurisdiction (which, therefore, might be invoked as a matter of right) to entertain a suit brought by the landowner contesting that order, and to declare it unauthorised by law.

APPEAL from a decree (14th August 1886) founded upon the judgment of a Full Bench of the High Court, and reversing a decree (28th November 1884) of the Judge of Faridpur, and affirming a decree (21st March 1883) of the Subordinate Judge of that district.

This appeal, which was twice argued, questioned the correctness of the High Court's decision that the respondents, as proprietors of a mauza within the area of an estate, permanently assessed to the revenue in 1792, were entitled to hold, without further assessment, land within it that had accreted, by the action of water, upon the site of land previously lost by deluvion; notwithstanding that the Board of Revenue, purporting to act under Act IX of 1847, had maintained orders assessing the land to the revenue as an alluvial increment, falling within the scope of their powers under that Act.

The decree of the Court below gave effect to a judgment of a Full Bench (1), delivered by WILSON, J., in which concurred a majority, consisting of PETHERAM, C.J., PRINSEP, J., and O'KINEALY, J. (from whom MITTER, J., differed) upon the two questions referred by a Division Bench (FIELD and MACPHERSON, JJ.).

The two questions are stated at the commencement of their Lordships' judgment upon this appeal.

Mauza Mohun Sureswar, part of a

* 17 Cowell's In. Ap., 40; 17 Calc., 590.

(1) I. L. R., 14 Calc., 67.

zemindari, in the Faridpur district, was originally within a divided share belonging to those whom the plainliff represented. A smaller part of the same share belonged to Sama Churn Ganguli, who was made a co-defendant in the suit, not having been willing to join as a plaintiff. The principal defendant was the Government, whose local officers had contested the plaintiff's claim to hold the entire mauza free of assessment, alleging that the recent accretions were not parcel of the original mauza, and maintaining a right to assess them under Act IX of 1847.

This mauza in the year 1792, when partition of the whole zemindari was made, contained an area of 69 drones, or 10,042 bighas. In 1793, under the permanent settlement, revenue was paid upon the mauza, and had been paid down to the date of the present dispute without any deduction on account of loss of area by diluvion, by which however the mauza had lost much from time to time, being near the confluence of the rivers Ganges and Brahmaputra. Before the year 1839 the 69 drones had been reduced to about 37. The Commissioner of the division made an order, dated 27th April 1838 (apparently in accordance with Regulation II of of 1819, sections 3, 7, 20, and others), to the effect that as part of permanently-settled lands the mauza Sureswar should be released to the parties then entitled to it as proprietors. After that, further diluvion occurred, and when, in 1859, the thakbust survey preliminary to the regular survey was made, only 4½ drones or 652 bighas of the mauza were left above water. At the survey in 1860, which followed the thakbust, the whole mauza was under water, the residue having entirely disappeared.

In the meantime Act IX of 1847 was passed. Of this, the first section is quoted in their Lordships' judgment; the third enacted that in all districts of Bengal of which a revenue survey might be completed and approved by the Government, it should be lawful for the latter "to direct from time to time, whenever ten years from the approval of any such survey shall have expired, a new survey of lands on the banks of rivers and on the shores of the sea, in order to ascertain the changes that may have taken place since the date of the last previous survey, and to cause new maps to be made according to such new survey." The fifth section provided for proportionate reductions of revenue where it had appeared from inspection of the new maps that land had been lost by a revenue-paying estate, and the sixth enacted that "whenever, on inspection of any such new map, it shall appear to the local revenue authorities that land has been added to any revenue-paying estate, they shall without delay assess the same according to the rules in force for assessing alluvial increments, and shall report their proceedings forthwith to the Sadr Board of Revenue, whose orders thereupon shall be final." The seventh section empowered the revenue authorities to take possession of islands thrown up in large and navigable rivers coming within the provisions of Regulation XI of 1825, section 4, clause 3, with a proviso that any party aggrieved by the act of the revenue authorities in taking possession of any island should be at liberty to contest it in the Civil Court. The ninth section enacted that, except as regarded the proprietary right to islands, no suit should lie against the Government or any of its officers, on account of anything done in good faith in the exercise of the powers conferred by this Act.

The next survey, termed the Diara survey, made by the Government, ten years after the last, under the powers conferred by Act IX of 1847, was for the purpose of ascertaining to what extent the estates bordering on the great rivers had increased or decreased in extent or area. In the interval between 1860 and 1867 there had been a large accretion to Mohun Sureswar, and at this survey 2,000 bighas were measured as newly thrown up. Upon the objection of the proprietors of the mauza about

650 bighas, part of the above, were released to them by the local revenue authorities as re-formed land of their estates, with reference to what had been proved to be the ground of the estate in 1859. The proprietors, however, still objected, and claimed that the whole 2,000 bighas should be released to them as forming part of the original estate, and that no part thereof should be assessed as accretion. They accordingly appealed as to the remaining 1,350 bighas. On the 19th April 1881 the Board of Revenue found the facts against them; finding that it was not proved that this land existed at the time of the permanent settlement on its present site, but, on the contrary, that this land had certainly accreted since the survey preceding the last. The Board of Revenue decided upon the appeal of the proprietors, who were now respondents upon this appeal, that they were not entitled to the 1,350 bighas as a reformation upon the site of their original estate. They rejected the appeal, thereby approving and confirming the assessment of the land as an accretion, within the meaning of the Act IX of 1847, by the local revenue authorities.

The present suit was instituted on 10th April 1882, claiming a declaration that what was part of Mohun Sureswar had been wrongly subjected to assessment, and presenting the case that the land had before the diluvion been assessed as part of the zemindari, upon which the revenue had been paid without any abatement, so that the local authorities had no right upon its re-appearance to assess it.

The Government, in their defence, denied that the land was a re-formation on the site of any part of the permanently settled estate, and alleged that it was an accretion liable as land added to a revenue paying estate within the provisions of Act IX of 1847, which rendered the assessment final and not questionable in the Civil Courts. The written statement said:—"The disputed land having been assessed by the revenue authorities under the provisions of Act IX of 1847, as being added to an estate paying revenue to Government, no civil suit is maintainable against Government." The issues raised the question of the competence of the Civil Courts, and also whether the land was or was not a re-formation on the site of formerly assessed land.

The Subordinate Judge found that the identification of the land with former parcels was beyond reasonable doubt, and held the Civil Courts to be competent to enquire into the legality of the assessment.

This judgment was reversed by the District Judge, who held that the revenue officer had acted rightly in assessing the land which he found to have been newly formed on the site of old land since the last survey but one. As to the competence of the Civil Courts, he decided in the negative in regard to the provisions of Act IX of 1847 and the decision of the High Court in *Dewan Ramjewan Singh* v. *Collector of Shahabad*(1).

The Division Bench of the High Court, to which the plaintiffs appealed, in making their reference to a Full Bench, stated their own opinion to be that the Civil Courts were competent to try whether the revenue authorities had in any case acted within, or exceeded, as they held them to have done in this case, their authority(2). They observed that it had been found as a fact by both the Courts below that the land which formed the subject of suit was a re-formation at one time or other on the site of land which had formerly been within the plaintiff's estate, as settled at the decennial and permanent settlements. The Judges added that there was no doubt that the plaintiffs had paid the full amount of revenue fixed at the permanent settlement on the sixty-nine drones, never having received any abatement for land diluviated or washed away.

The general effect of the Full Bench

(1) 14 B L. R., 221; 18 W. R., 64.
(2) I. L R., 14 Calc., 68—77.

judgment (1) was that by the substantive law no land included in a permanently-settled estate was liable to further assessment: on the other hand, any land not so included was liable. Also, that the jurisdiction to decide the question of the liability of lands to assessment was no longer vested in the Collectors as revenue authorities, but in the Civil Courts. Although, in regard to lands of which the liability to be assessed was not in dispute, the assessment, as to the amount of it, was final, when made by the ultimate revenue authorities, the Civil Courts were competent, where the liability to any assessment at all was in question; and it was for them to try whether the liability existed.

The result was that by the decree of the High Court the land in question was held, as part of mauza Mohun Sureswar, comprised within the permanently-settled estate of the plaintiffs, not to be liable to further assessment by the revenue authorities, notwithstanding the order of the Board of Revenue.

Upon this the Government appealed.

Mr. *W. F. Robinson, Q. C.*, and Mr. *J. H. A. Branson* for the appellant.—The question being one of the construction and effect of Act IX of 1847, it was essential to consider the law enacted in the Regulations which preceded it. They referred to Regulations I of 1793, II of 1819, VII of 1822, XI of 1825, and III of 1828. The effect of the coming into operation of Act IX of 1847 in the districts of Bengal was that land such as that now in question, which had been assessed by the highest revenue authorities as land gained by the action of the river, had been finally assessed, and the Civil Courts were not competent to entertain this suit. The land had been reformed in the period between a former and the last Diara survey, and it had been assessed to the revenue under section 6 of Act IX of 1847 by means of the machinery provided, the maps showing it to be an excess over what had been measured at the preceding survey. The order of the Board of Revenue of 19th April 1881 was final under the Act. It could not be questioned in a Civil Court, and the land was liable to the assessment imposed An examination of the revenue law of Bengal showed that there was no absolute right vested in the proprietor of land to complain in the Civil Courts that his land had been wrongly assessed by the revenue authorities, or assessed too highly; the province having been, by the Civil and Revenue Regulations, placed under two distinct systems, for the civil and fiscal administration, under which it was not conceded that there should be an appeal from the revenue to the civil authorities. The resort to the Civil Courts must rest upon such enactment as might be found. The true construction of Act IX of 1847 had been to take it away in such a case as that of the assessment of the accretion to Mohun Sureswar; and though there had been considerable difference of opinion on the subject, the decision followed by the District Judge in this suit was correct.

They referred to—*Dewan Ramjewan Singh* v. *Collector of Shahabad* (1); *Chunder Sikhur Bundopadhya* v. *Obhoy Chunder Baychi* (2); *Collector of Moorshedabad* v. *Roy Dhunput Singh* (3); *Narain Chunder* v. *Tayler* (4); *Sarat Sundari Debi* v. *Secretary of State for India in Council* (5); *Wise* v *Ameerun Nissa Khatoon* (6); *Budru Nissa Chowdhrain* v. *Prosonno Kumar Bose* (7.)

Field's Law of Evidence, 3 edn., p. 203.

Rules for guidance of the Revenue Department by R. B. Chapman.

Mr. *T. H. Cowie*, Q.*C.*, and Mr. *R. V. Doyne*, for the respondent, contended that the exclusive jurisdiction of the revenue authorities, under Act IX of

(1) I. L. R., 14 Calc., 79—92.

(1) 14 B. L. R., 221; 18 W. R., 64; 19 W. R.,127.
(2) I. L. R., 6 Calc., 8.
(3) 15 B. L. R., 49.
(4) I. L. R., 4 Calc., 103.
(5) I. L. R., 11 Calc. 784.
(6) L. R., 7 I. A., 73; 4 P. C. J., 127.
(7) 6 B. L. R., 255 (267).

1847, to decide on what assessment should be fixed, did not empower them to assess land included in a permanently-settled estate. When the fact was in dispute whether land which the revenue officers proposed to assess was included within already settled and revenue-paying land or not, the Civil Courts could alone decide the question. The assessment in this case purported to be under Act IX of 1847, of which section 5 provided for the proportionate reduction of rent where it appeared that land had been taken from a settled estate by diluvion, and section 6 provided the mode of assessment where land had been gained by accretion. But this Act, while it suspended the further continuance of Regulations II of 1819 and III of 1828, which established tribunals, and fixed the procedure, for investigations regarding the liability of land gained from rivers, did not substitute any tribunal, or rules of procedure for determining contested questions as to the liability of any alluvial formation to be assessed at all. It did not even enact that persons interested should have an opportunity of objecting to the survey maps as to correctness. No mode of trying title in the Revenue Courts was established by this Act, nor was any appeal provided for. The whole aim of the Act was to provide a new mode of assessing, not revenue-paying land, but land never before assessed, and liable to be newly assessed. It was not designed to impose any new liability to assessment, which remained as fixed by the law before then in force. Its language precluded its application to the accretion to Mohun Sureswar, which was not land "gained" from the river, but land which, having been covered by water, had again re-appeared without change of ownership, as in *Lopez* v *Muddun Mohun Thakoor* (1).

The following cases were also mentioned on both sides in reference to "gained" *Nogender Chunder Ghose* v. *Mahomed Esof* (2); *Imambandi* v. *Hurgobind Ghose* (3); *Mani Lall Sahu* v. *Collector of Sarun* (4); *Collector of Rajshahye* v. *Shamasoonderee Debea* (5).

Mr. *W. F. Robinson, Q.C.*, replied.

Their Lordships' judgment, on a subsequent day (November 30th), was delivered by

THE RIGHT HON. LORD HERSCHELL:—

Two questions arise in this case. They were stated in the reference to the Full Bench by the Divisional Bench of the High Court in the following terms:—

1*st.*—Whether the provisions of Act IX of 1847 are applicable to land re-formed on the site of a permanently-settled estate, the revenue of which estate has been paid without abatement since the permament settlement.

2*nd.*—Whether, if these provisions are not so applicable, a Civil Court should, in the exercise of its discretion, make a decree declaring that the proceedings of the revenue authorities in respect of such land are *ultra vires.*

In their Lordships' opinion the second question which arises should be stated somewhat differently, viz. whether, if these provisions are not so applicable, a Civil Court has jurisdiction to review the decision of the Board of Revenue and to declare that the proceedings of the revenue authorities in assessing such land were *ultra vires.*

The distinction is not material in the present case, but it appears to their Lordships that if the Civil Court has jurisdiction at all that jurisdiction may be invoked as a matter of right, and that it is not a case for the exercise of the Court's discretion. If the party appealing to the civil tribunal can establish that the Court has jurisdiction, and that the Board have acted *ultra vires*, he is,

(1) 13 Moore's I. A., 467; 5 B. L. R., 521; 2 P. C. J., 594.

(2) 10 B. L. R., 406; 18 W. R., 113.
(3) 4 Moore's I. A. 403 (467); 1 P. C. J., 371.
(4) 6 B. L. R., Ap., 93.
(5) 14 B. L. R., 219; 22 W. R., 324.

in their Lordships' opinion, entitled as of right to a decree.

Both the questions involved in this case depend upon the construction to be put upon the Act of 1847. The 1st section of that Act enacts "that such parts of the Regulations of the Bengal Code as establish tribunals and prescribe rules of procedure for investigations regarding liability to assessment of lands gained from the sea or from the rivers by alluvion or dereliction, or regarding the right of the Government to the ownership thereof, shall from the date of the passing of this Act cease to have effect within the provinces of Bengal, Behar, and Orissa, and that all such investigations pending before the Collectors and Deputy Collectors in the said provinces at the said date shall be forthwith discontinued; and that no measures shall hereafter be taken for the assessment of such lands, or for the assertion of the right of the Government to the ownership thereof, except under the provisions of this Act."

The terms of this enactment make it clear that its intention and effect were merely to alter the machinery by which lands gained from the sea or rivers by alluvion or dereliction were to be assessed, and not to subject to assessment any lands which would not have been liable thereto under the law in force at the time the Act was passed. It is therefore essential to a right interpretation of the enactment to examine carefully the state of the law at that time, and to see what lands were then liable to assessment, and whether the prior legislation throws any light upon the meaning of the words "lands gained from the see or from rivers by alluvion or dereliction."

By clause 3 of Regulation 1 of 1793, by which the decennial settlement was made permanent, it was declared to the proprietors that they and their successors would be allowed to hold their estates at such assessment for ever.

Regulation II of 1819 defines the right of the Government to the revenue of lands not included within the limits of estates for which a settlement had been made, and provides a machinery for their assessment. Clause 1 renounces all claim on the part of the Government to additional revenue from lands included within the limits of estates for which a permanent settlement had been concluded. Clause 3, after declaring and enacting that lands which were not included within the limits of estates for which a settlement had been concluded were to be liable to assessment, provides that the foregoing provisions were to be deemed applicable "to all lands gained by alluvion or dereliction since the period of the settlement, whether from the introcession of the sea, an alteration in the course of rivers, or the gradual accession of soil on their banks." It then provides the mode of investigation in relation to the liability of lands to be assessed. It is not necessary for the present purpose to enter into the details of the machinery provided for: it is enough to say that the Collector is to make a judicial inquiry after full notice to the party interested, taking evidence upon oath and examining the documents presented. After the Collector has notified his decision to the party concerned, the Board of Revenue are, upon a day to be fixed by public notice, and after hearing anything which the party may have to urge on his own behalf, to proceed to pass judgment in the case. If the Board of Revenue decide against the assessment, their decision is to be final except on proof of fraud or collusion; but if the Board declare the lands liable to assessment, the party may institute a suit in the Civil Court to try the justness of the demand. It may be further noticed that, by clause 7 of the Regulation, in cases where land is supposed to be liable to assessment under the provisions of clause 3, the Collector is to institute a full and particular inquiry into the circumstances and condition of the land in question at the period of the decennial settlement, and, in cases of the alluvial land, into the period of its formation. The 31st clause appears to their Lordships to be also very important. After providing that nothing in the Re-

gulation should be considered to affect the rights of proprietors of estates for which a permanent settlement had been concluded to the full benefit of waste lands included within the boundaries of the estate which may have been since reduced into cultivation, it proceeds:—"The exclusive advantages resulting from the improvement of all such lands were guaranteed to the proprietors by the conditions of that settlement, and it being left to the Courts of Judicature to decide in all contested cases whether lands assessed under the provisions of this Regulation were included at the period of the decennial settlement within the limit of estates for which a settlement has been concluded in perpetuity, and to reverse the decision of the revenue authorities in any case in which it shall appear that lands which actually formed at the period in question a component part of such an estate have been unjustly subjected to assessment under the provisions of this Regulation, the zemindars and other proprietors of land will be enabled, by an application to the Court, to obtain immediate redress in any case in which the revenue authorities shall violate or encroach on the rights secured to them by the permanent settlement."

The next enactment is perhaps even more important. "It is further hereby declared and enacted that all claims by the revenue authorities on behalf of Government to additional revenue from lands which were, at the period of the decennial settlement, included within the limits of estates for which a permanent settlement has been concluded, whether on the plea of error or fraud or any pretext whatever, saving of course lands expressly excluded from the operation of the settlement, shall be considered wholly illegal and invalid."

It is only necessary to notice in addition Regulation III of 1828. That Regulation recited that, partly from the number of revenue cases, and partly from the practice of the Courts in treating the appeals made to them as original suits, little or no progress had been made towards the settlement of the matter, and heavy arrears of such cases had accumulated. It accordingly provided for the appointment of Special Commissioners, to whom were entrusted the powers of the Court, all appeals to the ordinary Courts being abrogated in those districts in which such Commissioners had been appointed. So far the Regulation only altered the tribunal; it made no substantive change in the law. And inasmuch as no Special Commissioner now exists having authority in the district in which the lands in question are situate, the provisions relating to these Special Commissioners may be disregarded. The Regulation however modified in some respects the provisions of Regulation II of 1819. It enacted that decisions of the Board of Revenue declaring the liability to assessment of lands should be carried into immediate execution, notwithstanding that the parties against whom the decisions had passed had sued to contest the decision in one of the established Courts of Justice. It further provided that all suits which might be instituted in the established Courts of Justice under the provisions of Regulation II of 1819 to contest decisions of the Board of Revenue should be heard and determined in the same manner as regular appeals, and no further pleadings should be required or received than the objections of the appellant to the decision of the Board, and the reply to these objections on the part of the revenue authorities, and that it should not be competent to the Courts to take further evidence, oral or documentary, unless it should appear that such evidence was tendered by the party adducing it to the Collector or the Board and was then rejected on insufficient grounds, or that such evidence was essential to the ascertainment of some fact material to the issue not fully inquired into in the course of the previous investigation. It will be observed that these modifications of the law of 1819 only affect the procedure in cases of appeal to the ordinary civil tribunals of the country. They do not touch the right of appeal to such tribu-

nals, or alter any of the rights previously assured to the owners of permanently-settled lands.

This review of the legislation prior to 1847 makes it, in their Lordships' opinion, clear that whilst it was intended to bring under assessment lands not included in a permanent settlement, whether they were waste or gained by alluvion or dereliction, all such lands as were comprised in permanently-settled estates were to be rigorously excluded from further assessment. And in addition to this, the proprietors of such estates were assured that they could protect themselves against any action of the revenue authorities which would tend to infringe upon their rights by appeal to the Civil Court. Their Lordships think it equally clear that lands within the limits of settled estates which had become covered with water, and afterwards re-formed, were not lands "gained from the river or sea by alluvion or dereliction" within the meaning of this legislation, which is confined to lands so gained "since the period of the settlement."

Returning now to the Act of 1847, it appears to their Lordships, as has been already observed, that its purpose was merely to change the mode of assessment in the case of a class of land already liable to be assessed under existing legislation, viz. land gained by alluvion or dereliction, which was not included within the limits of a permanently-settled estate. The terms of the 1st section point to this and nothing more, and the details of the legislation support the same conclusion. It is only to lands "gained" from the sea or river by alluvion or dereliction that the legislation is applicable. Their Lordships have shown from an examination of the previous legislation the construction which must be put upon these words, that they must be limited to lands gained since the period of the settlement. It is only in relation to these lands, therefore, that the previous enactments are to cease to have effect. The 3rd section empowers the Government of Bengal, in any district in which a survey has been completed and approved by the Government, to direct decennially a new survey of lands on the banks of rivers and on the shores of the sea, in order to ascertain the changes that may have taken place since the last previous survey, and to cause new maps to be made according to such new survey. Section 6 provides that "whenever, on inspection of any such new map, it shall appear to the local revenue authorities that land has been added to any estate paying revenue directly to Government, they shall without delay duly assess the same according to the rules in force for assessing alluvial increments."

Their Lordships cannot think that it was intended by such a provision as this to deal with the case of lands in permanent settlement which had become derelict of the sea or a river. They cannot be said to have been "added" to the estate to which they already belonged. Considering the solemn assurance given by the Government to the owners of permanently-settled estates that they should not be liable to further assessment in respect thereof, their Lordships find it impossible to hold that it was ever intended by this enactment to subject them to an added assessment in respect of land for which they were already assessed because they had had the misfortune to be practically deprived of it for a time by an incursion of the sea or river. And no violence is done to the language of the enactment by rejecting a construction which leads to such a conclusion. On the contrary, it would be straining the language unnaturally to include such a case as that with which their Lordships are dealing. If, indeed, such legislation as is contained in the preceding section 5 had been in force from the outset, so that as soon as land had been washed away from a permanently-settled estate there had been a proportionate reduction of the revenue payable to the Government, it would not have been unreasonable to regard the land when again free from water as land "added" to the estate, and to assess it accordingly. And it may

be that when the new map shows that land has been washed away from a settled estate since the previous survey, a proportionate abatement ought to be made under the Act of 1847. Upon this it is unnecessary to pronounce an opinion. It is clear that the Act provides no machinery for making such abatement where the land was covered with water at the time of the original survey. It is only "when on inspection of the new map" it appears that land has been washed away that there is any legislative authority for making an abatement.

Their Lordships arrive then at the conclusion that the first question propounded by the Divisional Bench of the High Court ought to be answered, as all the Judges have answered it, in the negative.

But then it is said that the local revenue authorities having assessed the land, and the Board of Revenue having made an order confirming their action, such order is, by the very terms of section 6, made final, and that there is an express provision in section 9 that no action in any Court of Justice shall lie against the Government or any of its officers on account of anything done in good faith in the exercise of the powers conferred by this Act. Their Lordships cannot conceive that it was intended by these enactments to deprive the owner of a permanently-settled estate of the protection assured to him by the Regulation of 1819. When once the conclusion has been reached that the provisions of the Act of 1847 are inapplicable to the case of reformed land being part of settled estate in respect of which the full assessment has continued to be paid, it appears to follow that neither the local revenue authorities nor the Board of Revenue can effectually render such land liable to assessment. It has been shown that under the previous legislation the owner of such lands was expressly given an appeal to the Civil Court as a protection against any attempt of the revenue authorities to subject him to additional assessment. The provisions contained in clause 31 of the Regulation of 1819 are in no way repealed or affected by the Act of 1847. The action of the revenue authorities was, therefore, in their Lordships' opinion, wholly illegal and invalid. Their Lordships cannot hold that the Board of Revenue can, by purporting to exercise a jurisdiction which they did not possess, make their order upon such a matter final, and exempt themselves from the control of the Civil Court. It is argued that where the acts done were within the powers conferred by the Act of 1847 the protection afforded by section 9 would be necessary, and that it must be applicable to acts done in assumed exercise of the powers conferred but really in excess of them. But full effect can be given to this section without holding that it deprives the owner of a permanently-settled estate of that right of appeal which is given to him in order that he may have determined in a Civil Court "the justness of the demand" of the revenue authorities.

The case, as it appears to their Lordships, may be shortly put thus. The Board of Revenue have, in violation of the right solemnly secured to the owner of a permanently-settled estate, claimed to subject his land to an additional assessment, a claim which has been declared by legislation to be wholly illegal and invalid. Thereupon the owner exercises the right conferred upon him by the Regulation of 1819, and appeal by suit to the Court of Judicature to reverse the decision of the revenue authorities. In bar of this suit the answer set up is that a subsequent law empowers the revenue authorities to assess, by new machinery, lands of a description within which the land in question does not fall, and makes the orders of the Board of Revenue thereupon final. Their Lordships are at a loss to see how this can be any answer. If it had been intended to take away from the proprietors of estates the power, by application to the Courts, to obtain immediate redress in any case in which "the revenue authorities shall violate or encroach on the rights secured to them by

the permanent settlement," it would have been done in express terms and not by such enactments as are contained in the Act of 1847. It seems to their Lordships that it would be an erroneous interpretation of that statute to hold that it rendered the Board of Revenue supreme, and enabled them to make valid and effectual a proceeding on their part which the law had declared to be wholly illegal and invalid.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitor for the appellant: *Solicitor to the India Office.*

Solicitors for the respondents: Messrs. *Barrow & Rogers.*

6th and 12th April 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, and the Right Hon. Sir Richard Couch.

IN THE MATTER OF CA'NDA'S NA'RRONDA'S NAVIVAHU AND OTHERS * } *Objectors,*

and

C. A. TURNER, (OFFICIAL ASSIGNEE) AND OTHERS } *Petitioners.*

On Appeal from the High Court at Bombay.

Limitation to execution of judgment of Court for the relief of insolvent debtors entered up in the High Court under Section 86 of 11 and 12 Vic., cap. 21—Indian Limitation Act, XV of 1877, Sch. II, Art. 180—Starting point of limitation—Jurisdiction, "ordinary" and "extraordinary."

The Indian Limitation Act XV of 1877, Schedule II, article 180, applies to a judgment of a Court for the relief of insolvent debtors entered up in the High Court, in accordance with section 86 of the Statute 11 and 12 Vic., cap. 21. Although a Court held under the latter statute determines the substance of the questions relating to the insolvent's estate, the proceedings in executions and the judgments are the High Court's. The judgment is entered up in the ordinary course of the duty cast upon the High Court by the law, not by way of special or extraordinary action, but in the exercise of its ordinary original civil jurisdiction. The latter expression in the charter of 28th December, 1865, being opposed to the "extraordinary" jurisdiction, which the High Court may assume, at its discretion, upon special occasions and by special orders, includes all such jurisdiction as is exercised by the High Court in the ordinary course of law without any step taken to assume it.

When an order has been made, under section 86 of the Statute 11 and 12 Vic., cap. 21, that execution be taken out, a present right accrues to the Official Assignee to apply for it; and, therefore, article 180 of Schedule II assigning, in reference to judgments of High Courts exercising ordinary original jurisdiction, a starting point of time depending on the accrual of the right to enforce them, is the article applicable.

APPEAL from an order (10th December, 1886,) of the High Court, reversing an order (5th July, 1886,) of a single Judge, who dismissed an application, as barred by time, for execution of a judgment entered up under 11 and 12 Vic., cap., 21, sec. 86, in the High Court; and remanding the proceedings in execution.

The High Court's order, from which this appeal was preferred, declared that an application by the Official Assignee of the estate of an insolvent debtor, for the issue of execution upon a judgment entered up in the High Court under section 86 of the Statute 11 and 12 Vic., cap. 21, was not barred by time; and the question now raised was, whether execution was, or was not, barred under any, and, if any, which, of the articles in Schedule II of the Indian Limitation Act XV of 1877, or whether the Act was inapplicable to such a judgment.

The material facts were that on the 19th August, 1868, a Court for the relief

* 16 Cowell's Ind. Ap., 156; 13 Bom., 520.

of insolvent debtors at Bombay, under the Statute 11 and 12 Vic., cap. 21, ordered that judgment should be entered up against one Cándás Nárrondás, an adjudged insolvent, in the name of Henry Gamble, the then Official Assignee, and his successor or successors, for Rs. 1,64,08,276, being the amount of the debtor's scheduled debts.

On the 5th April, 1886, on the application of the succeeding Official Assignee, Mr. C. A. Turner, it was ordered that "execution to the extent of Rs. 49,43,952 be taken out, upon that judgment, against the moveable and immoveable properties mentioned in the indenture bearing date the 16th December, 1863, and made between the insolvent of the one part, and one Premchand Rovchand and one Ardesir Bomanji Káká of the other part, and which are now in the possession of Chotilál Jugulbhoy and Purshotam Mangaldás, as trustees."

On the 13th April, 1886, the Official Assignee applied to the Prothonotary of the High Court for execution against the representatives of the insolvent, and against the trustees above mentioned.

This application was dismissed by the order of Mr. Justice Scott, who, after referring to the judgment of the High Court in *In re Bhagwándás Hurjivan*(1), to the effect that a judgment entered up under section 86 of the Statute 11 and 12 Vic., cap. 21, is a judgment of the High Court, and must be executed under the Civil Procedure Code, held section 227 of that Code to be applicable to the judgment, as a judgment belonging to the original civil jurisdiction; but raised the question of limitation as follows:—

"Eighteen years have elapsed between the judgment entered up and the order for execution. But twelve years is the period fixed within which a judgment may be enforced, if it is a judgment within the meaning of section 180 of the 2nd Schedule of the present Limitation Act, and by section 179 three years is fixed for the execution of a decree of any Civil Court not provided for by section 180. This same period was given by the Act for the limitation of suits in force at the time this judgment was entered up in the Supreme Court. (See Limitation Act XIV of 1859, secs. 19, 20.) It may be added that the principle of limitation was fully recognized before any Act of limitation was passed in India. The Privy Council has held that the English law of limitation applied in India—*The East India Company* v. *Ochterlony Paul*(2): and in a subsequent case about the same time—*Her Highness Ruckmaboye* v. *Lulloobhoy Mottichaund*(3)—their Lordships extended the application of that law to Hindus and Mahomedans as well as to Europeans in civil actions in the Supreme Court.

"We may take it, therefore, that the general policy of limitation was applicable in India at the date of the Insolvency Act. But it was argued that all limitation of time was expressly excluded by the terms of section 86 of the Insolvency Act. The words relied upon are, 'and no *scire facias* shall be necessary to revive or to execute such judgment on account of any lapse of time, but execution shall at all times issue thereon by virtue of the order of the Insolvent Court.' These words, in my opinion, were intended to give a special value to the special publicity of the entering up by the order of the Court, but were not intended to exclude the vested right of every debtor to the privileges of limitation. The fair interpretation of the passage of the section relied upon, in my opinion, is as follows: the words 'no *scire facias* shall be necessary to revive or to execute such judgment on account of any lapse of time,' only dispense with the formalities in the nature of a writ of *scire facias* ordinarily required as a preliminary to the execution of a judgment not executed within a year of its date. The other words relied upon, *viz.*, 'execution shall at all times

(1) I.L.R. 8 Bombay, 511.

(2) 5 Moore's Ind. Ap., 43; 1 P. C. J., 394.

(3) 5 Moore's Ind. Ap., 234; 1 P. C. J., 423.

issue,' must, in the absence of any specific exclusion of the general law of limitation, be read subject to the operation of that general law. It is a well-known principle that Acts must be construed so as not to affect any vested rights unless those rights are excluded in express terms; or, to put the same principle in other words, the Legislature must not be taken to intend any alteration in the law beyond what it explicitly declares in express terms, or by unmistakeable implication. General words, such as these in question, must, if possible, be read as bearing on the immediate object of the Act, and not as altering the general policy of the law. The scope and object of this section was to keep alive the ordinary, legal liability of the debtor to his previously accrued debts, not to deprive him of any vested right, such as that of limitation, or to cast upon him any extraordinary or new liability such as that of perpetual liability. To hold otherwise would be to repeal by a side wind, so to speak, a general principle of law. I must, therefore, hold that section 86 of the Insolvent Act does not exclude the operation of the law of limitation."

From this order the Official Assignee appealed to the High Court, which reversed it, remanding the case to the Court below. For this reversal the Judges differed in their reasons. The judgment of Mr. Justice West was as follows:—

"As the decision in *In re Bhagwándás Hurjivan*(1) has determined that a judgment entered up under an order of the Insolvent Court ranks as a judgment or decree of the High Court, we must so regard the judgment in the present instance. The Court, in the case referred to, held that the judgment must be executed, like one passed by the Court itself, according to the provisions of the Code of Civil Procedure; and whether the judgment is to be deemed one sent to the Court from another Court under the provisions of section 227 of the Code or not, makes no practical difference. In either case the order of the Court for the Relief of Insolvent Debtors would be good for its own purpose; in either case it would not justify the Court in disregarding a bar by limitation coming into existence and operating against execution of the decree subsequently to the High Court becoming seized of it. It is argued that such a bar has come into existence; that the decree cannot be other than a decree of the High Court, and is subject as such, to limitation. Under the English law in force when the Indian Insolvency Act (Stat. 11 and 12 Vic., cap. 21), was passed, and from which that statute was largely copied, the insolvent, as a condition of obtaining his discharge, had to execute a warrant of attorney to confess judgment in favour of the assignee. This, when duly recorded, became a speciality against which limitation did not run under the Act of James I. Execution could, therefore, be had after any time. The need for a '*scire facias*' was removed by the insolvency statutes; but, at the same time, a discretion was accorded to the Commissioners in Insolvency of granting, refusing, or limiting the execution sought at any time against the after-acquired property of the insolvent. Subject to this qualification, the confession of judgment would come into operation whenever property worth seizing came into the insolvent's possession, until the whole amount of the scheduled debts was discharged. The English Statute 1 and 2 Vic., cap. 110, sec. 88, further provided that the insolvent might be forced to transfer stock which the assignee could not get at under the judgment entered up, and it was under this provision that the case of *Ex parte Pain*(2) arose. The general principle was that all property that should become the insolvent's should be available for the satisfaction of his creditors, and this was carried out in the case of *Barton* v. *Tattersall*(3), and those which followed it, to the extent of allow-

(1) I. L. R., 8 Bombay, 511.

(2) L.R., 3 Ch. Ap., 639.

(3) 1 Russ. & Myl., 237.

ing a creditor who was also assignee, to obtain satisfaction in an administration suit without seeking execution of the judgment. The Indian Act replaces the process of a confession of judgment by a direct order of the Insolvency Court. It enables the same Court to order that execution be taken out of the judgment entered up in the Supreme Court, and 'against the property of the insolvent, whether the same may or may not be by law vested in his assignee.' This last provision is meant apparently as a substitute for the one in the English statute under which the case of *Ex parte Pain*(1) was disposed of.

"The perpetual responsibility of an insolvent debtor ceased in time to be part of the policy of English legislation. By the Statute 32 and 33 Vic., cap. 83, bankruptcy was substituted for insolvency, and all pending cases of insolvency were to be closed within prescribed periods. The meaning of this last provision is discussed in *In re Clagett's Estate; Fordham* v. *Clagett*(2). Effect was in this case given to a rather ambiguous provision by construing it in the light of the obvious policy of the Act, and declaring that, after the given time, the insolvent was free from all responsibility under the proceedings in insolvency, and consequently that after his death his estate was free also. The lien on an insolvent debtor's whole future property has thus disappeared from the English law; but the Legislature expressed, as well as it could, in direct terms, its purpose of making a radical change.

"In India it would seem as if the Insolvency Act had almost escaped the notice of the Legislature in dealing with cognate subjects. The judgment of the older law is replaced by the judgment and decree of the Code of Civil Procedure. The execution of a decree has ceased to be a merely ministerial act and a matter of course; a Judge must be applied to, and be satisfied that execution is rightly sought. As, then, the judgment entered up by order of the Insolvent Court is to be deemed a decree of the High Court itself, it is plain that the former state of things with regard to it has necessarily changed. This is recognized when, on the order of the Insolvent Court to take out execution, the assignee applies to a Judge as for execution of a decree under the Code of Civil Procedure. It seems, then, that the decree must be subject to the same rules generally as other decrees of the High Court in the absence of any special exception. There was much perhaps to be said for a distinction between the judgments entered up under order of the Insolvent Court and ordinary decrees under the Code; but, once included in the same category, they must needs be subject to the same rules. Article 180 of Schedule II of the Limitation Act XV of 1877, therefore, is, I think, applicable to the judgment in the present case. The Insolvency Act did not contemplate its being entered up otherwise than as a judgment of the Supreme Court. It ranked then as a judgment of a Court established by Royal Charter in the execution of its ordinary original civil jurisdiction. The same description may be applied to it now, and hence the execution is limited, as in the case of other judgments and decrees of the High Court. The principle of perpetual liability to execution can no longer be deemed a principle. The English law has discarded it, as we have seen; the Indian law has made all judgments subject to limitation, and amongst them those of the Insolvent Court, Mr. Inverarity sought to make out that the endless responsibility was a proper price paid for protection from imprisonment. It was rather an inducement to give up property. The moral obligation to satisfy an ordinary decree is the same as in the case of one that combines many claims; and there is no reason why the policy of applying limitation to the one should not extend to the other. An insolvency law for the District Courts is provided with the Civil

(1) L. R., 3 Ch Ap, 639.
(2) L R., 20 Ch. Div., 637.

Procedure Code itself; but he who profits by it is not, therefore, deprived of the benefit of the limitation against decrees."

The judgment then referred to article 180 of Schedule II of Act XV of 1877, the Judge being of opinion that no present right to enforce the judgment accrued to any person, in such a case as the present until the making of the order by the Insolvency Court that execution be issued. The Commissioner exercised a discretion in allowing execution or not. The right to execution, which arose on the date of the order of 5th April, 1886, could not have been affected by article 180, a few days afterwards. He, therefore, held that the application was not barred by limitation, and that the order of the Court below must be reversed.

The Chief Justice, Sir C. Sargent, was of opinion that limitation under Act XV of 1877 was not applicable. He said:—"The Indian Insolvent Act was framed on the same lines as the English Insolvency Acts, beginning with 53 Geo. III, caps. 1 and 2, down to the passing of the Bankruptcy Act of 1861, which abolished the distinction between insolvency and bankruptcy; and the principle of those Acts, though varying the modes of giving effect to it, has always been held to be that the future property of the insolvent should be liable for his debts."

He quoted the judgment in *Barton* v. *Tattersall*(1) and that in *Ex parte Pain* (2), in the latter of which cases, Lord Hatherley, discussing the effect of sections 87 and 88 of the Statute 1 and 2 Vic., cap. 110, the former of which is similar in its practical effect to section 86 of the Indian Act by providing that the insolvent before his discharge must give a warrant of attorney to enable the provisional assignee to obtain execution against his future property for the benefit of his creditors, says: "The insolvent cannot obtain his discharge except upon the condition of his making over all his future property of every kind for the benefit of his creditors." The judgment continued thus:—"Such being the policy of the Indian Insolvent Act, it is plain that it would be to a great extent defeated if judgment entered up by the order of the Insolvent Court under section 86—the machinery provided for effecting that object—could only be executed within a limited time. The spirit, therefore, of the well-established rule of construction of Acts, that *generalia specialibus non derogant*, requires that the Limitation Acts should not be deemed applicable to judgments entered up under section 86, unless their language clearly requires it.

"Such is not the case, in my opinion, with the language of the two clauses of the Act of 1877 which have been relied on as constituting a bar to the judgment in question. Article 180 relates to an application to enforce a judgment, decree, or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction. Now a judgment entered up under section 86 is doubtless a judgment of a Court established by Royal Charter, but it is not a judgment entered up in the exercise of its ordinary civil jurisdiction, but under section 86 of the Insolvent Act, the jurisdiction under which formed no part of the ordinary civil jurisdiction. Again, the period of limitation fixed for such judgments, namely twelve years from the time a present right to enforce the judgment accrues to some person capable of releasing the right, is quite inapplicable to judgments which could only be enforced by order of the Insolvent Court and could not be released by any person, which must clearly mean lawfully released. As to section 178, it is to be remarked that a fresh right to execute the judgment is constantly accruing under section 86, whenever the Insolvent Court orders it."

"I am of opinion, therefore, that the judgment in question was not barred, and that the order of the Court below should

(1) Russ. & Myl., 237.
(2) L.R., 3 Ch. Ap., 639.

be discharged, and that execution should issue on the judgment."

On this appeal,

Mr. *J. Rigby*, Q.C., and Mr. *J. D. Mayne*, for the appellants, argued that there was error in both the judgments given in the Appellate Courts below. The Chief Justice had incorrectly held that the Indian law of limitation was inapplicable to a judgment entered up under section 86 of the Statute 11 and 12 Vic., cap. 21. The judgment of Mr. Justice West, though correct as to the general application of Act XV of 1877, was wrong in not concluding that execution in this instance was barred under article 179. It was submitted that, under article 179, execution of the judgment of 1868 was barred; that article, and article 180, exhausting all cases of application to a Civil Court for execution. But here article 180 was inapplicable, the present not being "an application to enforce a judgment of any Conrt established by Royal Charter in the exercise of its ordinary original civil jurisdiction." It was not in its "ordinary" jurisdiction that the High Court entered up a judgment of the Insolvent Debtors' Court; but such entry up was one of those matters that were provided for by special enactments, and not belonging to the ordinary procedure. Therefore this application did not fall under article 180. Article 179, however, operated, by clause 5, to bar it.

Reference was made to section 19 of Act XIV of 1859; also to *In re Bhagwándás Hurjivan*(1).

Mr. *A. Cohen*, Q.C., and Mr. *J. Macpherson*, for the respondents, argued that the execution was not barred by limitation, and that the order of the High Court was correct in remanding the decree for execution. The Code of Civil Procedure did not apply to the Insolvency Court, (section 638 of Act XIV of 1882); and the application to the Insolvency Court to have the judgment entered up in the High Court was made under Rule 42 of the Rules relating to the former Court(2). The Insolvency Court acted in the matter under the statute 11 and 12 Vic., cap. 21. Referring, then, to the decision of the High Court in *Bái Mánekbái* v. *Mánekji Kávasji*(3) that article 178 of Schedule II of Act XV of 1877 was applicable to applications made under the Code, and no others, article 178 was excluded here. It was submitted that the latter Act did not apply to, or affect, applications to execute judgments entered up under section 86 of 11 and 12 Vic. cap., 21. Analogy was to be found in the law under the Statute 1 and 2 Vic., cap. 110, sec. 87, as applied in *Sturgis* v. *Joy*(4) which decided that a judgment entered up in one of the superior Courts at Westminister, in the name of the assignee of an insolvent debtor, on a warrant, pursuant to section 87 of the above Act, was not a record over which such superior Court exercised control; but that the Insolvency Court alone could decide when satisfaction was to be entered. If, however, it should be held that the Indian law of limitation was applicable, then the only applicable article would be found to be article 180, and this because such a judgment as the one entered up under section 86 was within the language of the article. Upon the question under what category of jurisdiction this judgment fell, all the High Court's proceedings, as an original Court, that were not extraordinary were ordinary; and this judgment was entered up in the exercise of ordinary original jurisdiction. The High Court entered up the judgment of the Insolvent Court of 19th August, 1868, not under the 18th clause of the Amended Letters Patent, but under the

(1) I. L. R., 8 Bombay, 511.

(2) Rule 42.—"The Prothonotary of the High Court shall, upon the production of an order made by the Court pursuant to 86th section of the Act 11 Vict., cap. 21, forthwith enter up judgment for the amount against the Insolvent therein named that the Court may be enabled at any future time, if it shall see fit, to issue execution on the same against the future assets of the Insolvent."

(3) I.L.R., 7 Bombay., 213.

(4) 2 E. & B., 739.

9th section of 24 and 25 Vic., cap. 104, relating to the jurisdiction and powers of the High Courts.

The result of the argument for the respondent was that, first, it had not been made out that the Indian law of limitation was applicable here; secondly, that assuming Act XV of 1877 to be applicable, the only applicable article of Schedule II was article 180. In this, the period of limitation, not commencing to run from a fixed date, but being dependent for its starting point on the date when the right accrued to the Official Assignee to apply for execution, had only commenced when the application was made; and it was consequently not barred by time.

Mr. *J. Rigby*, Q.C., replied.

Cur. adv. vult.

Their Lordships' judgment was delivered on 12th April, 1889, by

THE RIGHT HON. LORD HOBHOUSE:—

On the 19th August, 1868, the Insolvency Court of Bombay ordered that a judgment should be entered up in the name of the Official Assignee against the insolvent Cándás Nárrondás for a sum exceeding sixteen millions of rupees. That judgment was accordingly entered up in the High Court.

It does not appear whether anything was done under the judgment till the 5th April, 1886, when the Insolvency Court ordered execution for a sum of nearly five millions to be taken out against certain properties described in the order.

The representatives of the insolvent, being summoned to show cause why the judgment should not be executed, assigned as cause that under the operation of the Indian Limitation Act, 1877, the right to have execution was barred by lapse of time. It will be convenient to state here the effect of the articles in the schedule of the Act of 1877 which have been put forward as applicable to the case, taking them in reverse order. The amendments of this Act by Acts XII of 1879 and XIV of 1882 do not affect the present question.

By article 180 an application to enforce a judgment of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction is barred unless made within twelve years from the time when a present right to enforce the judgment accrues to some person capable of releasing the right. By article 179 an application for the execution of a decree or order of any Civil Court, not provided for by article 180 or by the Code of Civil Procedure, section 230, is barred, unless made within three years from various points of time;—it may be taken, for the purpose of the present case, that the starting point of time would be in the year 1868. By article 178 an application, for which no period is provided elsewhere in the schedule to the Act or by the Code of Civil Procedure, section 230, is barred unless made within three years from the time when the right to apply accrues.

This case was heard before Mr. Justice Scott, who held that the application was barred by time. From his judgment it is to be gathered that he thought the case was governed by either article 179 or article 180, but it does not appear which. There is a great difference between the two; for article 179 assigns a fixed starting point of time, where as article 180 assigns one that is dependent on the right to enforce the judgment.

On the appeal of the Official Assignee the case was heard before Chief Justice Sargent and Mr. Justice West, who reversed the order of the Court below, and directed that execution should issue. West, J., held that the case fell under article 180, and that no present right accrued till the order of the Insolvency Court made on the 5th April, 1886. Sargent, C. J., held that the case is not provided for by the Limitation Act at all. From this order of the High Court the present appeal is brought. And the first question is, whether the judgment of 1868 was entered up in exercise of the ordinary original civil jurisdiction of the Supreme Court.

By section 86 of the Indian Insolvency

Act, it is provided that the Insolvency Court may direct a judgment to be entered up in the Supreme Court; that the production of the order of the Insolvency Court shall be sufficient authority to the officer of the Supreme Court for entering up the judgment; that if at any time it shall appear to the satisfaction of the Insolvency Court that the insolvent is of ability, or has left assets, to pay debts, that Court may order execution to be taken out upon the judgment; that such further proceedings may be had upon the judgment as the Insolvency Court may from time to time order, until the debts are fully paid; and that no *scire facias* shall be necessary to revive or to execute the judgment on account of any lapse of time, but execution shall at all times issue thereon by virtue of the order of the Insolvency Court from time to time.

By the High Court Act of 1861 Her Majesty received power to erect High Courts, and section 11 enacts that all provisions applicable to the Supreme Courts and to their Judges shall be taken as applicable to such High Courts and to their Judges respectively.

The Royal Charter which regulates the Bombay High Court, under the provisions of the High Court Act, is dated the 28th December, 1865. Sections 11 to 18 are a group of clauses headed "Civil Jurisdiction of the High Court." Sections 11 and 12 describe the local limits of the ordinary original civil jurisdiction, which is said to extend to all kinds of suits within those limits except small cause suits. Section 13 gives to the High Court power to remove, and to try as a Court of extraordinary original jurisdiction, any suit falling within the jurisdiction of any Court subject to its superintendence, when it shall think proper, either on agreement of the parties, or for the purposes of justice. Sections 15 and 16 confer appellate jurisdiction. Section 17 confers authority over infants, idiots and lunatics. Section 18 ordains that the Court for relief of insolvent debtors shall be held before one of the Judges of the High Court, and that the High Court and any such Judge shall have such powers as are constituted by the laws relating to insolvent debtors in India.

From this brief statement of the material statutes and charters it appears that though the Insolvency Court determines the substance of the questions relating to the insolvent's estates, such as the amount of the judgment to be entered up against him, and the propriety of issuing execution upon it, the proceedings in execution are the proceedings of the High Court, and the judgment itself is the judgment of the High Court. And it is clearly entered up in the exercise of civil jurisdiction, and of original jurisdiction.

But it was strongly contended at the bar that this jurisdiction though civil and original, was not ordinary; and Mr. Rigby argued that the passages of the Charter which have just been epitomized divide the jurisdiction into four classes—ordinary original, extraordinary original, appellate, and those special matters which are the subject of special and separate provisions. But their Lordships are of opinion that the expression "ordinary jurisdiction" embraces all such as is exercised in the ordinary course of law and without any special step being necessary to assume it; and that it is opposed to extraordinary jurisdiction, which the Court may assume at its discretion upon special occasions and by special orders. They are confirmed in this view by observing that, in the next group of clauses which indicate the law to be applied by the Court to the various classes of cases, there is not a fourfold division of jurisdiction, but a threefold one, into ordinary, extraordinary, and appellate. The judgment of 1868 was entered up by the High Court, not by way of special or discretionary action, but in the ordinary course of the duty cast upon it by law, according to which every other case of the same kind would be dealt with. It was, therefore, entered up in exercise of the ordinary original civil jurisdiction of the High

Court; and no present right accrued to the Official Assignee to move for execution until the order of 5th April, 1886, was made.

The order of the High Court, which is appealed from, is dated the 10th December, 1886. After the appeal was presented, and on the 2nd March, 1888, the High Court amended the order, by remanding the case to the Court below, with a declaration that the application for execution was not barred, instead of directing execution at once. Strictly speaking such an alteration of the order appealed from was beyond the competence of the Court, but their Lordships accept the alteration as indicating the opinion of the High Court as to the best form of order. The present order, therefore, should be that of 1886, as varied by the High Court itself in 1888. Subject to this variation the appeal must be dismissed, and with costs, and their Lordships will humbly advise Her Majesty to this effect.

Appeal dismissed.

Solicitors for the appellants:—Messrs. *Macfarlane and Lefroy.*

Solicitors for the respondents:—Messrs. *Payne and Lattey.*

10th April 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, and the Right Hon. Sir Richard Couch.

TILUKDHARI SINGH AND OTHERS* ... } *Plaintiffs,*

and

CHULHAN MAHTON ... *Defendant.*

On Appeal from the High Court in Bengal.

Abwabs, Meaning of—Long period of payment of Abwabs—Effect of ss. 54, 55 and 61 of Regulation VIII of 1793.

Payments over and above rent, and described as abwabs in the zemindar accounts, for which, as abwabs, the tenant was sued, were held to be rightly treated as abwabs, and not as forming part of the rent fixed. They were held not to be recoverable from the tenant, although they had been paid for a period of unknown length and according to a long standing practice, not having been, if payable at the time of the permanent settlement, consolidated with the rent, as they should have been if then payable, under s. 54 of Regulation VIII of 1793. Not having been so consolidated, they could not be recovered under s. 61. If not payable at the time of the permanent settlement, they came under the term of new abwabs, and in that case were illegal under s. 55.

APPEAL from a decree (19th January 1885) (1) of the High Court, reversing on second appeal a decree (21st March 1883) of the Judge of the Gaya District, and restoring a decree (30th June 1882) of the Subordinate Judge of that District.

The question raised on this appeal was whether the appellants were entitled to recover, as landlords, from the respondents as tenants, sums entered in the zemindari papers, as customary abwabs, and paid for a long period. The suit out of which this appeal arose was brought by the appellants, thikadars of mouzas in the Gaya District, to recover from a ryot holding under them, Rs. 1,105, arrears of rent, both *nakdi* (or cash) and *bhaoli* (in kind), for the years 1286 to 1288 (Bengali), together with customary abwabs alleged to have been paid from time immemorial. The defendant admitted holding land under the plaintiffs, some at *nakdi*, other at *bhaoli*, rent; and also admitted that one anna, "*hajjatana*," and three pice for "batta company" were payable by him. It was also found by both the Courts in the district that a sum was payable for road-cess. Other items claimed as abwabs, other than the *assul* rent, were denied by the defendant. They are set forth in a list printed in the report of the reference of this case by a Division

* 16 Cowell's Ind. Ap., 152; 17 Calc., 131.

(1) I.L.R., 11 Calc., 175.

Bench to a Full Bench at p. 176, I. L. R., 11 Calc., amounting to fourteen items in all; comprising, among other things, contributions for the pay of watchmen and other village servants; also dak-cess, &c.

The Subordinate Judge of the Gaya District, Babu Dwarkanath Mitter, held that these items could not be decreed under the law. He referred to s. 11 of the Rent Law (Bengal Act VIII of 1869,) and to s. 54 of Regulation VIII of 1793 (1). For the rent both as regards the cash and the quantity of produce, he found the claim proved, and decreed it, together with the items of abwabs admitted. He stated in his judgment: "The expediency of the law is fully demonstrated by the facts of this case. Here the plaintiffs claim several kinds of abwabs, *bundhwara*, *purohi*, *necha*, *sidha*, *khurcha* and *mangan*. The evidence is discrepant as to the rate of each kind of impost, and even the plaintiffs' gomashta, whose business it is to realize them, cannot state all the rates. Add to these the abwabs claimed in respect of the *nakdi* jote, and the number becomes very large indeed. These abwabs are fees payable to the village watchman, the putwari, the gomashta, the barahil, the weighman, the purohit, and the landlord. These fees, which are exacted over and above the rent, have been repeatedly held by the High Court to be illegal and unrecoverable through the Court, unless the ryot has distinctly agreed to pay them."

The Subordinate Judge added: "I think it right to add here that the plaintiffs have attempted to show that, in lieu of the abwabs claimed, the ryots enjoy certain corresponding advantages: an allowance of two seers per maund of grain is made them, and they get all the straw and chaff. The plaintiffs' Pleader offered to give up the claim for the abwabs if the defendant agreed to give half of the straw and chaff. This was, to my mind, a fair offer but the defendant refused to accept it. The total of the abwabs, I am told, would, on calculation, come up to two seers two chittaks per maund. The landlord, besides, has to maintain an irrigation scheme, peculiar to this part of the country, at his own cost."

Both parties appealed to the District Judge, who reversed the decision as to the abwabs. Regarding the *bhaoli* rents, he said: "I may notice a few of the salient features of this system. In the first place, the landlord does not get a full half share. The straw, chaff, &c., is appropriated entirely by the cultivator It will be noticed that the lower Court offered the defendant to divide the whole produce equally between him and the landlord, but this offer was refused; and why? because it has always been the custom for the ryot to take the straw, &c. If so, the landlord should surely be allowed to plead that he is entitled to the dues he claims, because the ryot has always been in the habit of paying them. Again, the expenses connected with the maintenance of irrigation works, on which depend the crop, fall on the landlords; they also have to defray the costs of any litigation connected therewith. The very existence of the crop in this district depends on an artificial system of irrigation, which has to be kept up at the landlords' expense." He also found that such cesses had, without doubt, been, from time immemorial, prevalent in the district.

The District Judge concluded his judgment as follows:—"In the present case the evidence adduced establishes two facts, *first*, that these dues have been

(1) Section 54 of that Regulation enacts: "The impositions upon the ryots under the denomination of abwab, mahtoot and other appellations, from their number and uncertainty having become intricate to adjust, and a source of oppression to the ryots, all proprietors of land and dependent talukdars shall raise the same in concert with the ryots, and consolidate the whole with the *assul* into one specific sum." The end of the Fasli year 1198 is then fixed as the time within which the consolidation was in the Behar Districts to be effected.

Section 55 provides that "No actual proprietor of land or dependent talukdar of whatever description shall impose any new abwab, or mahtoot upon the ryots under any pretence whatsoever."

collected and paid from time immemorial; *second*, that having regard to the peculiarities of the *bhaoli* system, they are not excessive. In the case of *Budhua Orawan Mathoon* v. *Juggessur Doyal Singh* (1), it was held by the High Court that certain payments, which were not so much in the nature of cesses as of rent in kind, and which were fixed and uniform, and had been paid by the ryot from the beginning according to local custom, were not illegal cesses; and so in this case I find that these so-called abwabs are not illegal cesses, and I may here notice that in many cases which have been tried by the Collector, the putwari has succeeded in establishing as against the zemindar his right to these dues; and I hold, therefore, where the custom is proved, that the zemindar is entitled to levy a half share thereof from his tenants. For the above reasons I set aside that portion of the decision of the lower Court which disallows the dues claimed both on the *nakdi* as well as on the *bhaoli* tenure."

The defendant then preferred a second appeal to the High Court. A Division Bench (Sir R. Garth, C. J., and Beverley, J.) doubting whether, under the present Rent Law, this claim for abwabs could be enforced and pointing out that the authorities upon the point were apparently conflicting, referred to a Full Bench the question whether, assuming that the abwabs had, by the custom of the estate of which the lands formed part, been paid by the defendant and his ancestors for a good many years, they were legally recoverable by the plaintiffs, although they were not actually proved to have been paid, or to have been payable, before, or at the time of, the permanent settlement.

A Full Bench (Sir R. Garth, C.J., with Mitter, Prinsep, Tottenham and Pigot, J.J.,) answered the question in the negative. Their judgments are printed at length in the report of the appeal at p. 175 of I. L. R., 11 Calc.

(1) 24 W. R., 5.

The judgment of the District Judge was accordingly reversed, and that of the Subordinate Judge restored.

The plaintiffs appealed to Her Majesty in Council.

Mr. *C. W. Arathoon*, for the appellants contended that the ruling was erroneous. The liability of the tenant for the abwabs in question was the result of the incidents and circumstances of the tenancy; and, though not expressed in the contract between the parties, was plainly deducible from the usage or custom with reference to which the contract was made. The evidence established that abwabs were prevalent in the district, and were paid according to custom established from time immemorial. A distinction must be drawn between legal and illegal cesses. Those which had been collected for a long period, extending back, presumably, to the permanent settlement, were not illegal, nor had any enactment prohibited their recovery by the landlord. On the contrary, under Regulation V of 1812, s. 3, such cesses might be enforced in certain cases; also s. 9 of Regulation IX of 1825, saved certain cesses, levied according to ancient custom. Abwabs existing at the time of the permanent settlement could be recovered, notwithstanding the provisions of Regulations VIII of 1793, IV of 1794, or anything in Act X of 1859, the Bengal Rent Law, or in the Bengal Act VIII of 1869. Section 54 of Regulation VIII of 1793 contained merely a direction for the consolidation of abwabs with the *assul* rent; but no penalty for the omission was enacted. He referred to *Lachman Rai* v. *Akbar Khan*(1) regarding the question of each cess as a separate issue; and he contended that the items claimed were in effect, in themselves, part and parcel of the rent, referring to *Bholanath Mookerjee* v. *Brijomohun Ghose* (2). In *Budhua Orawan Mahtoon* v. *Juggessur Doyal Singh*(3) the High Court said: "With respect to what are

(1) I. L. R., 1 All, 440.
(2) 14 W. R., 351.
(3) 24 W. R., 5.

called the cesses in this case, we think they are not so much in the nature of cesses as of rent in kind; and it is not describing them correctly to say of them that they are uncertain and indefinite," and a decree was given.

Reference was also made to *Serajgunge Jute Company* v. *Sorabdee Akoond*(1).

No writing, nor any other formality was required by law in regard to such items; and s. 61 of Regulation VIII of 1793 in providing that persons suing on engagements in which the *assul* and abwabs shall appear to have been consolidated, shall be non-suited, does not prohibit or render illegal the collection of payments such as those now in dispute. The latter were lawful at the time of the permanent settlement, and nothing had, since then, rendered them illegal. Although they had been described in the plaint as "old usual abwabs," yet they were part of the rent, and a definite and certain addition to it; this, in itself, excluding them from being rendered illegal by the operation of Regulation VIII of 1793, s. 55, or in any other manner.

On the question of the intention of the Legislature, he referred to Harington's Analysis, Vol. II, p. 19, Regulation XXX of 1803, Regulation VII of 1822, where, in reference to the North-West Provinces, the rules as to the formation of the records of rights contained a provision for the recording of cesses. Regulation XII of 1817, also, in connection with the payment of putwaris, treated such a payment as legal. The edition of the Regulation of the Bengal Code by Mr. Justice Field, at p. 61, was also referred to and Mr. A. Philips' work on 'Tenures.' In regard to the finding of both Courts, that these were abwabs payable under old custom, the landlord receiving an equivalent, they were not, within the meaning of the sections of Regulation VIII of 1793 on the subject, illegal from any cause.

(1) 25 W. R, 253.

Reference was made to *Dhalee Puramanick* v. *Anund Chunder Tolaputtur*(2), *Sonnum Sookul* v. *Elahee Buksh*(3), *Juggodish Chunder Biswas* v. *Turrikoolah Sircar*(4), *Kamalakanta Ghose* v. *Kalu Mahomed Mundul*(5), *Bholanath Mookerjee* v. *Brijomohan Ghose*(6) and *Yecatoolah Paramanick* v. *Jugodindro Narain Roy*(7).

The respondents did not appear.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD MACNAGHTEN.

Their Lordships are of opinion that this appeal ought to be dismissed. The first question seems to be this: Are these payments, over and above rent, properly so called, abwabs, within the meaning of the word as used in Regulation VIII of 1793? They are described in the plaint as "old usual abwabs;" and they are also described as abwabs in the zemindari accounts. It appears to their Lordships that the High Court was perfectly right in treating them as abwabs, and not as part of the rent. Unquestionably they have been paid for a long period; how long does not appear. They are said to have been paid according to long standing custom. Whether that means that they were payable at the time of the permanent settlement or not is not plain. If they were payable at the time of the permanent settlement, they ought to have been consolidated with the rent under s. 54 of Regulation VIII of 1793. Not being so consolidated, they cannot now be recovered under s. 61 of that Regulation. If they were not payable at the time of the permanent settlement, they would come under the description of new abwabs in s. 55; and they would be in that case illegal.

(2) 5 W. R., Act. X Rul., 86.
(3) 7 W. R., 453.
(4) 24 W. R., 90.
(5) 3 B. L. R., A. C., 44; 11 W. R., 395
(6) 14 W. R., 351.
(7) 22 W. R. 12.

Under these circumstances it appears to their Lordships that the High Court was right in treating them as payments or cesses which could not be recovered.

Their Lordships will, therefore, humbly advise Her Majesty to dismiss the appeal.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *T. L. Wilson and Co.*

10th April 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, and the Right Hon. Sir Richard Couch.

MAHAMMUD AMANULLA KHAN* ... } *Plaintiffs,*

and

BADAN SINGH AND OTHERS... *Defendants.*

On Appeal from the Chief Court of the Punjab.

Limitation Act (XV of 1877), Sched. ii, Arts. 142, 144—Proprietors having refused at the first regular settlement to engage, and others having been admitted as malguzars of the land, effect of lapse of time—Discontinuance of possession.

Article 144 of sched. ii of Act XV of 1877, as to adverse possession, only gives the rule of limitation where there is no other article in the schedule specially providing for the case.

The proprietory right would continue to exist until, by the operation of the law of limitation, it has become extinguished; but if a claim comes within the terms of Art. 142 (enacting that when the plaintiff, while in possession of the property, has been dispossessed, or has discontinued possession, limitation shall run from the date of the dispossession or discontinuance), in such a case, by the law of Act XV of 1887, and previously of Act IX of 1871, adverse possession is not required to be proved in order to maintain a defence.

At the regular settlement in the Delhi District (1843) the plaintiffs' ancestors, *ex-mafidar*- of a plot on which the rent-free tenure had been resumed in 1838, declined to engage for the revenue; and the plot was assessed along with the village in which it was; the village-proprietors through the *lambardars* engaging for and obtaining the land.

At the revision of settlement, more than thirty years after, the plaintiffs claimed possession, alleging their title, and that the village co-parceners held only in farm from the Collector for the period of settlement.

Held, that there had been a dispossession, or discontinuance of possession, within the meaning of Art. 142; and that whether any proprietary right had existed or not in the plaintiff's ancestors, the twelve years' limitation ran from the date of the dispossession or discontinuance.

APPEAL from a decree (8th May 1885) of the Chief Court of the Punjab, reversing a decree (24th June 1884) of the Commissioner of the Delhi Division, and restoring a decree (29th October 1883) of the Judicial Assistant Commissioner.

The ancestors of the plaintiff, who now appealed, were said to have been the owners of about 320 bighas of land, formerly a *mafi* plot, of which the *mafi* was resumed in 1838 before settlement, in Mouza Ghanaur in the Sonipat Pergunnah of the Delhi District. To recover possession of this land the suit was brought by the descendants of the *ex-mafidars.* The defendants, respondents, who were the zemindars and *lambardars* of that village, having engaged for the revenue upon the whole of it, including the plot in question, at the first regular settlement in 1843, when the plaintiffs' ancestors declined to engage, now relied upon limitation, besides denying the plaintiffs' title.

The question now raised was whether, in regard to the defendants having obtained possession of the land from the Collector, there was a dispossession or discontinuance of possession on the part of the plaintiffs, from which time had run under Art. 142 of sched. ii of Act XV of 1877.

The plaintiffs were descended from one Lutuffulla Sadik, who held the land as *mafi*, and was "*malik.*" The earliest

* 16 Cowell's Ind. Ap., 148; 17 Cal., 137.

sanad produced was a grant from one Afiz Khan in the sixth year of the reigning King of Delhi. The *mafi* was resumed, by an order, dated 9th October 1837; and the *ex-mafidars* were offered an engagement for the land revenue, which they declined on the 5th April 1838. The *lambardars* at the first regular settlement, as they regarded the land as belonging to the village, would not engage for it separately, and the result was that it was for some time held by the Collector "*kham tahsil.*" In 1842, however, engagement for the *jama* of the whole village was made with the *lambardars*, as part of the settlement operations, and lasted throughout the settlement.

At the revision in 1879 of the old regular settlement, the plaintiffs claimed the land. By their plaint, filed in August 1883, they claimed that, their ancestral rights having remained under suspension during the term of settlement, they now were (having been by their ancestors, proprietors all along, as well as *mafidars* and *ex-mafidars* of the plot) entitled to re-entry and possession, upon cancellation of what they designated as "the farm" from the Collector to the defendants, which they alleged was only for the term of settlement. The defendants insisted on their title as village proprietors; and that the plaintiffs having been deprived of possession, as the result of the orders of the revenue authorities, made as far back as 1837, and again acted upon in 1843, the suit was barred by time.

The Judicial Assistant Commissioner, Delhi, dismissed the plaintiffs' claim; but the Commissioner, reversing his decision, decreed for the plaintiffs. The latter was of opinion that, independently of the presumption arising in their favour, one which was recognised under Regulation XXXI of 1803, the plaintiffs had proved their rights as proprietors, prior to the resumption of the quality of freedom from revenue assessment which was taken away from the lands in 1837; and that they had also proved that they were set aside from the possession simply for refusing to engage at settlement. He did not consider that this refusal, and the fact that the land was managed *kham tahsil*, "abrogated the plaintiffs' proprietary right," or gave a starting point for limitation. Nor had, in his opinion, the subsequent occupation of the defendants, which he concluded to be that of farmers, from 1842, for the terms of settlement, any such effect. He quoted Regulation VII of 1882, which, in s. 4, refers to the kind of arrangement which had been made in this case; that section enacting as follows:—"In admitting particular parties to engage, it was in no decree the intention of Government to compromise private rights or privileges, or to vest the *sadr malguzars* with any right not previously possessed by them; &c., &c., &c., On the contrary, it is the anxious desire of Government, and the bounden duty of its officers, to secure every one in the possession of the rights and privileges which he may lawfully possess, or be entitled to possess." He held that the suit was within limitation, and that the plaintiffs were proprietors at the time when the defendants got a farm of the land for the period of settlement, the plaintiffs being therefore entitled to recover possession.

On appeal to the Chief Court, a Bench (C. A. Roe, and T. W. Smyth, J.J.) reversed the above judgment. The Judges agreed with the Commissioner that, in 1838, the plaintiffs' ancestors were proprietors; but they held that the claim must be dismissed as barred by limitation. "The plaintiffs had not shown that the defendants in exercising, as they had done, all the rights of proprietors over the land, exercised those rights, not as proprietors under the old settlement of 1843, but as farmers; nor had they shown that limitation did not begin to run against the plaintiffs until the expiration of the settlement in 1879. A continuous possession the plaintiffs had not shown. There was no documentary evidence to show that the defendants held as farmers; nor were there sufficient grounds for the inference that their hold

ing was only upon such terms. The inference to be drawn from the settlement proceedings was that the defendants had the land made over to them. At the settlement in 1842, the land was entered in the record by the description "*milk mafi*" of Bakar Ali, who had died three years before, and from whom the plaintiffs were descended. But the land was treated as part of the *shamilat* of the village, and had remained as such with the defendants ever since. The plaintiffs had exercised no rights over it of any kind, certainly since 1842; and, as far as could be seen, not since the resumption in 1838." The Judges, accordingly, held the suit barred by limitation, and dismissed the suit; but, considering that the result of the order was to confirm the defendants in the possession of the property which once belonged to the plaintiffs' ancestors, without costs.

The first plaintiff, the Nawab Amanulla Khan, appealed alone to Her Majesty in Council.

On this appeal, Mr. *R. V. Doyne*, and Mr. *C. W. Arathoon* appeared for the appellant.—They contended that the claim did not fall within the terms of any one of the articles of sched. ii of the Limitation Act XV of 1877. They referred to Act XXXIII of 1871, and to a case in the Chief Court in 1881, *Latf Ali* v. *Khushwakt Rai*(1). There was no effective dispossession, or discontinuance of possession, within the meaning of Art. 142 of sched. II; nor was there, on the other hand, any adverse possession on the part of the defendants which could render Art. 144 applicable.

The respondents did not appear.

Counsel for the appellant having been heard, their Lordships' judgment was delivered by

THE RIGHT HON. SIR RICHARD COUCH.

The plaintiffs in this suit are descendants of one Lutuffulla Sadik, who held the land which was the subject of the suit as *mafi*. The earliest sanad appears to have been, as far as the evidence shows, a grant by one Afiz Khan in the sixth year of the reign of the King of Delhi. It is not material when the title commenced. This *mafi* was resumed in 1837 and at that time the ancestors of the plaintiffs, who had the *mafi*, were offered an engagement for the land revenue. They, on the 5th of April 1838, declined to take the land and engage for payment of the revenue. Then the defendants, who are called in the judgments of the lower Courts the *lambardars*, and were the representatives of the villagers, and held a large quantity of land in the village, undoubtedly as proprietors, were asked if they would take up the engagements. They appear, in the first instance, to have declined to do so, alleging that they had got a settlement which included this land. However, it was found that this was not correct, and for a time the settlement operations were discontinued, and the Government appears to have held the land as khas. In 1842 a settlement was made, and then an engagement was made with the *lambardars*, or representatives of the villages, for the whole of the village, including the land which is the subject of this suit, and making no distinction between the way in which this land and the other land, of which the villagers were undoubted proprietors, was to be held. That settlement was to last for thirty years, and would expire in 1872. Steps do not appear to have been taken immediately upon the expiration; but on a revision of settlement in 1879, the plaintiffs applied for what they called a cancelment of the farm to the defendants, and to have possession of the land as their ancestral estate. The defendants refused to surrender the land, and consequently the plaintiffs were referred to the Civil Court, and then the present suit was brought.

Two questions were raised in the suit. One was, whether the plaintiffs or rather their ancestors were the proprietors of the land, as they alleged; and the other

(1) Reported in the Punjab Record, Civil Judgments, 1881, p. 89. This is the case referred to in their Lordships' judgment.

was, whether the suit was barred by the law of limitation.

Upon the first question, the Commissioner, before whom the case came by way of appeal, and whose finding on this matter was conclusive in the further appeal to the Chief Court, found that the plaintiffs were the proprietors; and no question remains about that.

The question which has now to be determined is, whether the suit is barred by the law of limitation. The Chief Court, upon ths further appeal from the decision of the Commissioner, has held that it is barred. The Act applicable to to the case is Act XV of 1877, and the Article is No. 142, which says that for possession of immoveable property when the plaintiff, while in possession of the property, has been dispossessed, or has discontinued the possession, the time from which the period allowed for bringing the suit begins to run is the date of the dispossession or discontinuance. It appears to their Lordships to be clear that when there was this refusal on the part of the plaintiffs, or their ancestors, to make the engagement for the payment of the revenue, and the Government made the engagement with the villagers, the defendants, there was a dispossession, or a discontinuance of possession, of the plaintiffs within the meaning of this article.

It is to be observed that the lower Courts in their judgments treat it as being a dispossession. The Commissioner, where he deals with the facts of the case, says: "Independently therefore of the presumption afforded by Regulation XXXI of 1803, the plaintiffs have, in my opinion, afforded most satisfactory evidence of their character as proprietors prior to the resumption of the lands in free tenure." Then he goes on: "And their dispossession for refusing to engage at settlement." In his opinion what took place was that at the time when they so refused they became dispossessed. Then Mr. Justice Plowden, in the passage which is quoted from his judgment, treats it also as a dispossession, for he says: "When, upon the occasion of a settlement, a proprietor is in proprietary possession of the estate, and asserts his proprietary title, and it is formally recognised, but in consequence of his refusal to engage for the revenue, he is excluded from the enjoyment of his estate" (which was the case here) "which is therefore transferred to a farmer for a defined period, it is intelligible that there is not such a discontinuance of possession or dispossession as would support a plea of limitation;" and he goes on to give as the reason that the dispossession is not "adverse," which word is not in Art. 142. The Chief Court in their judgment say also: "All this shows that in 1838 plaintiffs were undoubtedly proprietors; but the land is now, and has been since 1842, equally undoubtedly in the possession of the defendants, who have exercised over it all the rights of proprietors." There has been no possession of any description in the plaintiffs or their ancestors since the period of the engagement with the defendants; and whether any proprietary right may have existed is not the question: it is whether there has been a dispossession or discontinuance, which there clearly was. No doubt the proprietary right would continue to exist until by the operation of the law of limitation it had been extinguished; but upon the question whether the law of limitation applies, it appears to be clear that it comes within the terms of the Art. 142, and if there has been any doubt in the minds of the Courts in the Punjab as to what was the effect of the law of limitation in cases of this description, it seems to have arisen from the introduction of some opinion that there must be what is called adverse possession. It is unnecessary to enter upon that inquiry. Article 144, as to adverse possession, only applies where there is no other article which specially provides for the case.

In this case their Lordships think Art. 142 does provide for the case, and that the suit is barred by the law of limitation. Consequently the decision of the Chief Court should be affirmed and the

appeal dismissed, and their Lordship will so humbly advise Her Majesty.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

11th and 12th April, and 14th May 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, and the Right Hon. Sir Richard Couch.

GREGSON * ... *Plaintiff,*

and

UDOY ADITYA DEB ... *Defendant.*

On Appeal from the High Court in Bengal.

Specific performance—Contract—Disability to contract—Temporary disability of Zemindar to contract, his estate being subject to the provisions of Act VI of 1876 (Chutia Nagpur Encumbered Estates Act), amended by Act V of 1884—Effect of continuance of transactions after the release of his estate from management under that Act.

It is competent to a person, who has been, but is no longer, in a state of disability, to take up and carry on transactions commenced while he was under disability, in such a way as to bind himself as to the whole. He may be bound by a contract of which the terms are to be ascertained by what passed whilst he was disabled from contracting.

The defendant's ancestral zemindari was placed under management by an order made under s. 2 of Act VI of 1876, and he became incapable of contracting in reference to it. He, however agreed with the plaintiff that the latter should advance money on mortgage, and take a lease of part of the estate. Afterwards by an order, whether well founded or not at all events effectively made, under s. 12 as amended by Act V of 1884, he was restored to the possession of his estate, again acquiring the right to contract about it. He carried on the transaction with the plaintiff, retaining the benefit of money paid by him, but in the end not completing.

Held, that he was bound by the contract, though its terms were to be ascertained by what had passed while he was disabled from contracting, and that specific performance could be decreed against him. Whether his entering into the contract was against the policy of the Act, and whether the order under s. 12 had or had not been made on good grounds, did not affect the question.

APPEAL from a decree (2nd December 1886) of the High Court, reversing a decree (20th May 1885) of the Subordinate Judge of Manbhum, and dismissing the appellant's suit with costs.

The suit was brought by the appellant against the respondent, the Zemindar of Patkum in the Manbhum District, for specific performance of an agreement, of which the general terms were that the latter was to accept from the former a loan of Rs. 40,000, paying interest at 10 per cent., and, as security for the repayment, was to execute a mortgage; also granting to Gregson an *ijara* of his zemindari lands for nineteen years, *viz.*, from 1889 to 1903.

The question now was whether negotiations to this effect commenced between the plaintiff and the defendant in the year 1884, while the zemindari was under the management of the Deputy Commissioner of Manbhum, in virtue of Act VI of 1876, the Chutia Nagpur Encumbered Estates Act, and intended to bring about the restoration of the defendant to the possession of his estate, could be insisted upon as a contract and made the subject of a decree for specific performance. The material provisions of the Act VI of 1876, as amended by Act V of 1884, are stated in their Lordships' judgment, as well as the facts giving rise to this suit.

The plaint stated that an agreement had been entered into, and that a petition for the release of the zemindari had been presented to the Deputy Commissioner of Manbhum on 5th September 1884. It also alleged that the defendant had orally agreed with the

* 16 Cowell's Ind. Ap., 221; 17 Cal., 223.

plaintiff to make over to him the right of digging limestone and of levying dues on iron-smelting; and stated the times when payment was to be made according to the agreement. The plaintiff's demand was that a decree should direct the defendant to execute to the plaintiff an *ijara pottah*, and to execute first a mortgage deed for Rs. 15,000, and another mortgage deed for Rs. 25,000, within three months from the date of the giving and receiving the *pottah* and *kabuliat*; the decree also to award to the plaintiff possession in *ijara* right of the Patkum zemindari, excepting certain mouzas.

The defendant admitted by his written statement the fact of his having agreed to lease his zemindari to the plaintiff, but he contended that he was not bound by his having done so, for, amongst others, the following reason: because, at the date of the agreement his estate was under management in accordance with Act VI of 1876, and he was "legally" disqualified thereby to make that agreement. He denied having agreed to give the plaintiff the right to dig limestone and levy dues on iron-smelters: and declared his willingness to repay to the plaintiff, with interest, the moneys paid to obtain the release of the estate, and also the amount which the plaintiff had paid for the revenue.

Issues were fixed raising the questions of the competence of the defendant to contract to grant the alleged lease; and whether or not the defendant, by his subsequent conduct, had ratified the alleged agreement; also as to the facts relating to the limestone and dues leviable.

These were decided by the Subordinate Judge in favor of the plaintiff, and a decree was made as follows:—

That the suit be decreed; that the relief sought for in the plaint be granted, *viz.*, that in consideration of an advance of Rs. 40,000 to be paid by the plaintiff in two instalments, to the defendant, the latter be and hereby is directed to execute in favour of the plaintiff a lease of the Patkum zemindari including the right to dig limestones for building purposes, and to enjoy the profits obtainable from *loharkar*, for a period of nineteen years, in compliance with the terms of the draft submitted by the defendant for the approval of the Deputy Commissioner of this District on the 5th September last, as also to execute the two mortgage bonds, as prayed in the demand of judgment, and further that immediate possession of the said zemindari under the operation of the said lease, be given to the plaintiff, and that the defendant do pay all the costs of the suit, with interest on the plaintiff's costs at 6 per cent. per annum from the date of the decree to that of realization.

On the defendant's appeal the High Court (Wilson and O'Kinealy, JJ.) reversed that judgment and decree.

The principal grounds upon which the High Court proceeded were in substance as follows:—That there was no sufficient material before the Court to support a finding of a concluded agreement between the parties; that the defendant, was under the provisions of the Chutia Nagpur Encumbered Estates Act, incompetent to contract with reference to his estate; and that the contract was of such a character that the Court would not decree specific performance of it.

The suit was accordingly dismissed.

The plaintiff appealed to Her Majesty in Council.

Sir *Horace Davey*, *Q.C.*, and Mr. *R. V. Doyne*, for the appellant, argued that the judgment of the High Court was wrong; because the contract to execute a mortgage and a lease of the defendant's estate, such execution to be after the release of the estate by the manager, acting under the Chutia Nagpur Encumbered Estates Act, 1876, did not fall within the meaning of the 3rd section of that Act, specifying the disabilities imposed. If, as had been the case here, the Zemindar, after the release of his estate, and it had not been contemplated that anything would be done before such release, took up the engagement and expressed himself willing to act upon it, he ratified it. There was nothing to prevent a ratification. That having been established, there were no grounds why, in the exercise of the due judicial discretion, a Court of Justice should have refused to decree specific performance of the defendant's contract, upon which the plaintiff had acted in paying the money, the balance

of the schedule debt, and the current instalment of revenue. These acts, added to the admissions and evidence, established the agreement to the effect stated in the plaint. But, even if the evidence might fall short of this result, the appellant was entitled to have the contract specifically performed according to what might be held to be the true terms of it.

Mr. *J. D. Mayne*, for the respondent, contended that the transactions of September 1884, between the plaintiff and defendant, on which the former relied to prove the alleged contract, and all the matters refefred to in the petition of the 5th September 1884, were null and void, by the operation of the Enactment VI of 1876. That which was in itself null and void, or so rendered by legislative enactment, was not susceptible of ratification; nor was there any evidence of a new agreement after the 8th of October when the estate was released. What the Act rendered void, with a view to preventing its taking place, could not be ratified, or recognised, or made to serve the purpose of founding future proceedings. This was not a case where what was done might be void under a statutory enactment as to some purposes, and valid as to others; operative as regarded some persons, and not as to others. The disabilities imposed by the Act were express, and for an express purpose, to clear the estate of liability. Pending the management there was to be no encumbering the estate afresh, yet here this was the very transaction alleged to be enforcible. He referred, by way of illustrating this part of this case to *In re Northumberland Avenue Hotel Company*(1), *Hamilton* v. *Bucknaster*(2). To separate the evidence as to what occurred before and what after the release of the estate, could not be effected so as to leave proof of any clear agreement or transaction in which the intention of the parties could be collected. The evidence, also, related to a loan by way of mortgage which might be repaid the moment it was made; a transaction of which specific performance would not be decreed. Reference was made to *Rogers* v. *Challis*(3), *Sichel* v. *Mossenthla*(4), *Larios* v. *Bonany-y-Gurety*(5). For these reasons specific performance could not be decreed, and to them must be added that to decree it would be to contravene the declared policy of the law, *i,e.*, of the Chutia Nagpur Encumbered Estates Act. It could hardly be allowed that a Zemindar should obtain the release of his estate by the very means, which the Act, with a view to its own operation, prohibited, adding to, or at all events in no way diminishing, the burdens on his estate.

Counsel for the appellant were not called upon to reply.

Their Lordships' judgment was afterwards delivered (14th May) by

THE RIGHT HON. LORD HOBHOUSE:—

The plaintiff seeks specific performance of an agreement under very peculiar circumstances. The agreement, at first oral, was afterwards reduced to writing. At that time the defendant, who is the Zemindar of Patkum in Chota Nagpore, was subject to the operation of Act VI of 1876, passed to relieve the owners of encumbered estates in that district. The transactions between him and the plaintiff were intended to release him from that restraint, and had the effect of doing so. When released he continued to deal with the plaintiff on the footing of the agreement. And the question is whether he has thereby rendered himself liable to a decree for the specific performance.

The defendant's estate was put under management on his own application in July 1879. He is a man in middle life and of at least average mental capacity. But during the management he was placed under legal disability, which con-

(1) L. R., 33 Ch. D., 16.
(2) L. R., 3 Eq., 323.
(3) 27 Beav., 175.
(4) 30 Beav., 371.
(5) L. R., 5 P. C., 346.

tinued until his estate was released in the year 1884. By September 1884 his debts, which in 1879 were about Rs. 26,000, were reduced to Rs. 7,639.

The material provisions of Act VI of 1876, as amended by Act V of 1884, with regard to property put under management and its owners, are as follows: The manager is to ascertain the debts and liabilities and to schedule them, and make a scheme for discharging them out of the surplus income. While the property is under management the holder is made incapable of mortgaging, charging, leasing, or alienating the same, and of entering into any contract which may involve him in pecuniary liability. On payment of all the scheduled debts and liabilities, or if an arrangement is made for their satisfaction which is accepted by the creditors and approved by the Commissioner, the holder is to be restored to the possession and enjoyment of his property.

In the early part of the year 1884 the plaintiff and defendant were in negotiation for a lease of the Patkum estate, by the latter to the former, but it was not till the month of September that the defendant would offer terms acceptable to the plaintiff. On the 5th of that month the defendant presented the following petition to Mr. Clay, the Deputy Commissioner in the Encumbered Estates Department :—

"Petition of Maharaj Udoy Aditya Deb, inhabitant of Ichagurh, Pergunnah Patkum, is to the following effect :—

"For the liquidation of my debts and for the improvement of my estate, my ancestral zemindari, pergunnah Patkum, in zillah Manbhum, is under the management of the Encumbered Estates Department under Act VI of 1876. Considering that there would be a great improvement in my zemindari if I let out the same in *ijara* to Mr. C. B. Gregson, I made a proposal to grant that *ijara* settlement at a rent of Rs. 16,441-13-6, and to take a loan of Rs. 40,000 within three months from this date for the purpose of discharging my liabilities to the *mahajuns*. As the aforesaid Saheb Bahadoor agreed to these proposals, so, preparing a draft of the *ijara pottah*, determining to grant the *ijara* settlement to the aforesaid Saheb for a period of nineteen years from the beginning of the present year 1291 up to the year 1309, I have been filing it along with this petition; and I pray that receiving from the aforesaid Saheb Bahadoor the amount of my liabilities, in the account of the Encumbered Estates, you will kindly pass an order for releasing the mehal from the management under Act VI. On the release of the aforesaid mehal from the Encumbered Estates management I shall properly grant the *pottah* and receive the *kubuliat* according to the draft filed along with it, and separately execute registered bonds, and receive Rs. 15,000 for the present. The money that will be deposited by the aforesaid Saheb Bahadoor in the Encumbered Estates Department shall be credited against the rent of the *ijara* mehal for the present year. If on the release of the mehal I delay the granting of the *ijara*, then the aforesaid Saheb Bahadoor shall be able to take possession of the aforesaid mehal in *ijara* right and to get the *pottah* executed according to the draft filed along with it. As the property is under the control of the Encumbered Estates Department, I am now incompetent to grant the the aforesaid settlement. I therefore pray that your worship will release the aforesaid mehal from the control of the Encumbered Estates Department. The *ijara pottah* and *kabuliat* will have to be executed on stamped papers, and at that time I shall enter the boundaries in the same. At present a draft only being prepared, is filed along with this petition.

MAHARAJ UDOY ADITYA DEB."

"*The* 21*st Bhadro* 1291."

The draft lease filed with the petition specified a number of particulars with respect both to the loan of Rs. 40,000 and to the demised property, and to the payments by the lessee, which it is not necessary now to mention. And it contained the following stipulation:—"Except the land fit for indigo cultivation you shall not be able to take any settlement or *ijara* of any lands within the *ijara* mehal from any tenants, and especially from Birinchi Narain, and if you take it I shall not be bound by this *pottah*."

The draft lease was communicated to the plaintiff, who, on the 9th September, objected that it omitted certain stipulations relating to limestone and to iron-smelters. On this point there is dispute between the parties. It is not of any great importance, nor if it were decided against the plaintiff would it impair his right to have the rest of the agreement performed. The High Court have expressed no opinion which of the par-

ties is right on this point. The Subordinate Judge has found in favour of the plaintiff, and no reason for disputing his opinion has been assigned.

On the 10th September the plaintiff paid into the Collectorate Treasury the sum of Rs. 7,639-5-10, and got a receipt as follows :—

"By whom brought.	On what account.	Amount.
		Rs. A. P.
Mr. C. B. Gregson, through Anund Chunder Roy.	On the proposal to take an *ijara* of pergunnah Patkum, according to the prayer of the Zemindar of the aforesaid pergunnah, and under the order of the Commissioner, deposited on account of (illegible) estate for the purpose of the releasing the aforesaid mehal from the control of the encumbered estates	7,639 5 10
	Total Rs. ...	7,639 5 10

"Examined and entered.

T. CHATTERJI, *Accountant.*

"(Illegible) SINGH, *Treasurer.*"

On the 15th September the sub-manager reported to the Deputy Commissioner as follows :—

"*Dated* PURULIA,

The 15*th September* 1884.

I have the honour to report for your information that Mr. Gregson having deposited Rs. 7,639-5-10 for releasing the Patkum Encumbered Estate from attachment under Act VI of 1876, all the scheduled debts have been paid off, and that from the balance still at the credit of the estate, the law charges and other management charges still due by the estate can be easily paid. It is therefore not necessary to apply for Commissioner's sanction to release of the estate."

The Deputy Commissioner, however, thought that it was necessary to obtain the Commissioner's sanction, and he applied for it on the same day, stating the circumstances as stated to him by the sub-manager. The formal order for release, which is not in the record, was not made until the 8th October.

It is contended by the plaintiff that on and after the 15th September the defendant was freed from the operation of the Act, and that in the whole of his subsequent action with reference to the agreement he must be taken to have been *sui juris*. So far as regards the question whether the agreement has been validated or called into action so as to bind the defendants, their Lordships think it makes little difference which of the two dates is taken as the date of emancipation. But the personal position of the defendant bears on another portion of the case, *viz.*, whether such an agreement of this is the proper subject of a decree for specific performance against a person so situated. The High Court have thought that it is not, and the correctness of their opinion is challenged in this appeal. Their Lordships certainly think that there is nothing in the transactions themselves to operate as a release of the estate. The scheduled debts were not paid; they were only transferred to another creditor, and the transfer was coupled with an agreement for a fresh loan by which the defendant was loaded with debt more heavily than in 1879 when he sought the benefit of the Act. It is a matter of wonder to their Lordships that any order for release should have been made under such circumstances; but at all events they are clear that the defendant was not *sui juris* until the order was made.

Returning to the narrative of transactions between the parties, we find a considerable amount of correspondence, oral and written after the 15th September. Each deals with the other on the footing that the agreement is valid and binding. On the 3rd October the defendant wrote to the plaintiff requesting him to pay the current instalment of revenue, Rs. 633-9-8, and the plaintiff did pay that sum on the 6th. The defendant never offered to repay that sum nor the larger sum paid to meet the scheduled debts.

On the 12th November, five weeks after the formal release of the estate, the defendant wrote on the subject of Birinchi Narain. It has been seen that in the

draft lease he stipulated that the plaintiff should not acquire Birinchi's interest in the property; and both the written correspondence and the oral evidence of the plaintiff show that he attached great importance to that matter. In point of fact the plaintiff had received a lease from Birinchi before the defendant presented his petition of the 5th September, and the defendant knew all about it. In his letters previous to the 8th October he recurs more than once to the requisition that Birinchi's lease to the plaintiff shall be cancelled as a condition of the defendant executing his lease to the plaintiff. On the 12th November he wrote to Anund Roy, the plaintiff's agent, thus:—

"If the Saheb has come back from Calcutta, please speak to him and get the *pottah* of Birinchi Narain Aditya Baboo returned. When this is done, I will go to Purulia, and I shall have no objection to register it. Before this, my only condition (*lit.*, objection) was that the *pottah* of Birinchi Narain Aditya Baboo should be returned, and I still hold to this condition. After these matters are settled, you will write to me in reply, and on that I will go and get it registered. Settle the matter and write to me in reply.

"*The 28th Kartick* 1291."

The plaintiff answered this on the 18th November:—

"Yesterday I came here from Calcutta. The *ijara* settlement that was made with Birinchi Narain Aditya Baboo has been cancelled. I am now sending you the palki and bearers, and hope that you will without delay come to this place and finish the execution &c."

It is not suggested that Birinchi's lease was not cancelled as stated in this letter.

The negotitions still went on, the plaintiff urging performance of the agreement, the defendant making excuses but always treating the agreement as a subsisting one. On the 30th November he wrote to his own agent, but for the purpose of communicating with the plaintiff, excusing himself for not having gone to Purulia to execute the lease, asking that the plaintiff would come to the defendant's residence, and adding "I will surely execute the instrument. I have no objection," with more assurances to the same effect. On the 4th December he wrote requesting an advance of the whole loan at once, "albeit it has been arranged that the Rs. 40,000 should be taken in two instalments." Not long after this the plaintiff became convicted that the defendant was trfling with him, and commenced the present suit.

In support of the decree of the High Court, which reversed that of the Subordinate Judge and dismissed the suit, Mr. Mayne first argued that the transactions of September were wholly void as against the defendant; and then that what is wholly void cannot be validated. But the answer is that such an argument does not meet the facts of this case. It is quite competent to a person emerging from a state of disability to take up and carry on transactions commenced while he was under disability in such a way as to bind himself as to the whole. The present defendant has done that and more than that. Not only has he taken and, up to the time of suit and for anght that appears till now, retained the benefit of the plaintiff's payments, but he has since the 8th October 1884 exacted from the plaintiff a part of the consideration which was to move from him. At the defendant's instance the plaintiff has given up the lease that he had obtained from Birinchi Narain, nor is it possible for the defendant to replace the plaintiff in his former position. The defendant therefore is clearly bound by the contract, though its terms are to be ascertained by what passed when he was disabled from contracting.

Then it is contended that, though the contract may be binding, specific performance is not the proper remedy, and that on two grounds: *First*, because it is a contract for morgage. But it is also a contract for a release, and that the two parts are easily separable. So far as the plaintiff is concerned, he is bound, if he asks for the lease, to grant the loan. And he is willing to do that, but he is also willing to take the lease without insisting on the loan. It is true that it would be an idle thing to compel the defendant to receive a loan which, there being

no contract to the contrary, he might repay at once, or on reasonable notice. But if he wishes to be released from that part of the contract, it will not be carried into effect by the Court.

The *second* reason alleged for not awarding specfic performance is that the contract is against the policy of the Encumbered Estates Act; and on this point their Lordships confess to having felt much difficulty, owing to the very peculiar circumstances of the case. But after careful consideration they think that they must not look beyond the order of the 8th October 1884. They have before intimated that the order is difficult to reconcile with the policy, or indeed with the literal terms, of the Act. But, *factum valet*, the Commissioner was acting within his jurisdiction, and his order is not under review. By it the estate was in fact released from management; and it must be taken that its owner then became as free to manage his affairs as any other man. He has used his freedom to adopt the documents of the 5th September 1884 as binding on himself, and he must now be compelled to act according to their tenor.

In their Lordships' judgment the High Court should have dismissed with costs the appeal from the Subordinate Judge; and that decree should now be made. If the plaintiff desires to have an account of the profits of the property during the time he has been kept out of possession, he has a right to that, he on his part accounting for the rents which would have been due from him. The respondent must pay the costs of this appeal. Their Lordships will humbly advise Her Majesty accordingly.

Appeal allowed.

Solicitors for the appellant: Messrs. *Slaughter and Colgrave.*

Solicitors for the respondent:—Messrs. *T. L. Wilson and Co.*

8th 9th and 14th May 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

MARIAM BEGUM AND ANOTHER * ... } *Defendants,*

and

MIRZA AND ANOTHER ... *Plaintiffs.*

WAZIR BEGUM * ... *Defendant,*

and

MIRZA AND ANOTHER ... *Plaintiffs.*

On Appeal from the Court of the Judicial Commissioner and Oudh.

Treaty, Construction of—Money settled upon members of Royal Family of Oudh, and their heirs—Perpetual pensionsbypayments arranged between sovereign powers—Construction of the word "issue," as used in a treaty between them, and in subsequent correspondence.

An arrangement between two sovereign powers, *viz.*, the King of Oudh and the East India Company, whereby members of the Royal Family of Oudh had secured to them and to their issue pensions in perpetuity, although a settlement of pensions in perpetuity could not under the Muhammadan Law be validly made by a private individual, took effect as a contract or treaty between the powers.

Held on the construction of a treaty made in 1838 between the King of Oudh and the East India Company, that it was the intention of the King thereby to provide pensions for certain members of the Royal Family in perpetuity; that if any of the pensioners should die without issue, his or her pension should revert to the King; that the words "heirs" and "issue" were used as convertible or equivalent terms; and that they meant persons who would be heirs according to Muhammadan Law

Held also, that the King intended in 1842 to provide for the ancestor of the plaintiffs an additional pension of the same kind as the pension which he had provided for her in 1838; and that according to the letter written by the King in that year to the Government of India, after her death, if she should have left issue, the additional pension was to be payable to such of her

* 16 Cowell's Ind. Ap., 175; 17 Cal., 234.

issue as should be also her heirs, according to the rules of the Muhammadan Law of Inheritance.

APPEAL from a decree (11th February 1886) of the Judicial Commissioner, reversing a decree (4th March 1885) of the District Judge of Lucknow.

The principal question which arose between the parties was whether in construing the terms of a settlement, not questioned in other respects, made in 1842 by Muhammad Ali Shah, then King of Oudh, in favour of his queen, Malka Jahan Sahiba, and her "issue," the latter word should be construed as referring to the Imamiya, or Shiah Law of Inheritance, giving to males double the share of females. For this construction the plaintiffs, now the respondents, contended. While on the other hand the case for the defendants, now the appellants, was that the word "issue" had reference to the law relating to the endowments, and that its meaning depended on the intention of the founder or settler. The former law, if it was that to which the word referred, would also restrict the sharers; while the latter, if it should be applied, would include all persons tracing their parentage to Malka Jahan, and would put all descendants being in the same degree of remoteness on an equality as to their shares.

The plaintiffs, now respondents, were Nawab Sahib Mirza and Imdad Ali Khan, grandchildren, and heirs according to the Muhammudan Law, of the late Nawab Malka Jahan, one of the widows of Nawab Muhummad Shah, third King of Oudh. The defendants, now appellants, Nawab Sultan Mariam Begum and Nawab Amir Jahan Begum, were also grandchildren of the same. But the defendant Nawab Wazir Begum, who appealed seperately, was the daughter and only child of one Bahadur Mirza, brother to the plaintiffs respondents, who died in the lifetime of his grandmother Malka Jahan; so that Nawab Wazir Begum was great-grandchild of the latter. Consequently, if this case had to be governed by the ordinary Shiah Law, Nawab Wazir Begum would have been wholly excluded by her two uncles and her two aunts, parties to the other appeal, and they while differing among themselves as to their respective rights, were all equally opposed to the claims of Nawab Wazir. Accordingly she filed her separate defence and separate appeal.

When the East India Company contracted what was known as the 6th Oudh Loan, the deed of engagement, dated 22nd November 1838, declared that the King of Oudh had paid and the Governor-General of India, on the part of the East India Company, had received, in perpetuity, the sum of Lucknow sicca Rs. 12,00,000. On this, interest at 4% was to be paid, in pensions, quarterly, to the persons named, among whom was Nawab Malka Jahan (whose stipend was Rs. 400 a month), and to their heirs in perpetuity, on their receipts under their seals. On any of the pensioners dying without issue, his or her pension was to revert to the King.

The similar terms, upon which another loan was taken in 1842, appear in the King's letter of 4th January 1842, stated in their Lordship's judgment.

The promissory note for twelve lakhs of rupees issued in favour of the King was not produced, but according to the plaint it bore the enfacement, "this note is not negotiable and is to remain in deposit with the Resident at Lucknow, the interest on it is to be paid to Nawab Malka Jahan during her lifetime and after her decease to her issue." Afterwards, when interest on Company's paper, was reduced from five to four per cent., Malka Jahan received interest at the latter rate down to July 1881, when she died. At her death her heirs, according to the ordinary Imamiya Law, were the two present appellants, her granddaughters, and these respondents, her grandsons. Under that law the grandsons would each be entitled to a share double that of a granddaughter, and Wazir, the appellant in the second of these appeals, would be excluded; the interest upon the twelve lakhs of rupees would be divided into six

shares of which these respondent would have the right to receive each two-sixths, and the present appellants each one-sixth.

Doubts existing as to the proper proportion of shares distributable under the settlement, the present suit was instituted in March 1884. The plaint asked that the rights of the parties should be declared, alleging that the plaintiffs were according to the law prevailing among Shiahs, entitled each to a one-third part of the interest of the promissory note, and adding that the defendant Wazir Begum was not under that law entitled to come in as a sharer at all. Wazir Begum filed her separate written statement, claiming the same amount that her father might have had, if he had been alive. The other defendants, by their written statement, admitting that their family was governed generally by the Shiah Law, contended that the rights of the present parties to the interest upon the loan were governed by "the Instructions of Muhammad Ali Shah, the original grantor, and not by the ordinary law of inheritance;" and that as those instructions did not specify any particular shares, the plaintiffs and the defendants were, by the law relating to endowments, entitled to equal shares, and that by the words, "*naslan bad naslan*," as well as by the true construction of the rest of the King's words, Wazir was excluded.

Issues having been fixed raising these questions, the finding of the District Judge was by him expressed as follows:—

"It appears to me that these are words indicating a plain intention on the part of Muhammad Ali Shah to benefit his children. The transaction is neither a gift nor a will; it is a *wakf* or appropriation, by which the principal was tied up and the fruit given away. The rights of the parties depend on the intention of original debtor, and are not based on inheritance."

It was the opinion of the District Judge that, in the absence of any special directions to the parties, equality of partition must take place among all the descendants of Malka Jahan without reference to sex or proximity; and he considered that there were no grounds for applying "*hajb*," or exclusion, where the law of inheritance did not apply.

The paintiffs appealed from the District Judge's decision to the Court of the Judicial Commissioner, on the ground that the ordinary Shiah Law should have been applied, and that such application would have excluded Wazir Begum, and would have reduced the shares of the present appellants to one-half of those of the plaintiffs. The present appellants filed objections, in the nature of a cross-appeal, by which they contended that the first Court should, according to the Muhammadan Law governing the Shiah sect, have held that Wazir Begum was excluded.

The Judicial Commissioner allowed the plaintiffs' appeal, so far that he declared Wazir Begum disentitled, and the plaintiffs entitled, each to one-third. The defendants Mariam and Amir Jahan, he held entitled each to one-sixth of the interest in question, that being the share which the ordinary law of inheritance prevailing among Shiahs would give to each. The rest of the plaintiffs' claim he dismissed. Having set forth in his judgment the principal provisions of the Treaty of 1838, and the entire correspondence which passed in 1842, the Judicial Commissioner held that the arrangements then entered into instituted a trust as to the interest of the twelve lakhs of rupees then lent by the King to the East India Company in favour of Malka Jahan and her issue; and that, having regard to that correspondence, and its relation to the "deed of engagement of 1838," the words "her issue," in the documents of 1842, must be read as meaning the "heirs of her body." The material portion of his judgment was as follows:—

"The transaction evidenced by the documents of 1842, which have been set out in the opening portion of this judgment, appears to me a contract between the Governor-General of India in Council on the one part and the King on the other, the latter agreeing to pay into the Residency

Treasury twelve lakhs of rupees as a supplement to the payment acknowledged by the duplicate deed of engagement of the 22nd November 1838, and the latter agreeing to receive the money as a loan, perpetual as regards the lender (the King), but as regards the borrower the (Governor-General,) capable of discharge three months after notice of such intention in the *Calcutta Gazette*, and covenanting further to pay up to the date of discharge as aforesaid, the interest on the loan to Malka Jahan and her issue. The transaction would seem, therefore, to have been of the nature of a trust terminable at the option of the Government on three months' notice.

"The view that I take of the transaction of 1842 being that it constituted a trust, I have now to find what was in the mind of the King when he made, and in the mind of Governor-General when he accepted, the trust. And it seems to me impossible, after reading together the King's letter to the Governor-General, dated 4th January 1842, and the Governor-General's reply, dated the 15th February, which are after all the documents evidencing the intention of the parties; I say it seems to me impossible after reading these documents, to doubt that the King intended to make a provision for Malka Jahan of precisely the same nature as, and as a continuation of that made by, the transaction of November 1838, and that the Governnor-General concurred in 'the hearty desire and wishes' of the King. Now it is plain from a perusal of Articles 3, 4, 5, and 6 of the 'duplicate deed of engagement' (2 Aitchison, 141, edition 1876), that 'heirs' and 'issue' are therein used as convertible terms, and in the settling article of the 'engagement,' the words used are 'heirs in perpetuity.' I think therefore that the words 'her issue,' in the documents of 1842, must be read as meaning 'the heirs of her body.' The question then, if the view which I have taken of the matter be correct, narrows itself to this: What would the King have meant when referring to the 'heirs of the body,' of his wife? Would he have intended to designate such persons absolutely, or relatively to the provisions of the Muhammadan Law? It seems to me inconceivable that the King, a Musalman of a day when the laws and instiutions of the country were Muhammadan, should have intended to designate his wife's direct heirs otherwise than relatively to the provisions of the Muhammadan Law . . . . . .

. . . . . .

I think that, as regards the declaration sought by the plaint, the appeal must prevail. But I find myself unable to direct the refund by the defendants to the plaintiffs of money paid to the defendants by Government Officers."

Sultan Mariam and Amir Jahan together appealed to Her Majesty in Council.

Wazir appealed separately.

Mr. *T. H. Cowie, Q.C.*, and Mr. *C. W. Arathoon*, for Sultan Mariam and Amir Jahan, argued, that in adjudging to the plaintiffs each a one-third share, and to the defendants each a one-sixth share, the Judicial Commissioner had wrongly regarded the rights of the parties as regulated by the rules of the ordinary law of inheritance. He should have held that their rights depended on the intention of the settlor, as shown in the Treaty of 1838, and in the correspondence of 1842. The King probably enough had in his view the operation of the ordinary law to which he was accustomed, but nowhere had he specified that the male issue of Malka Jahan should take a greater share than the famale. From this, and from the general tenor of the documents, the inference was that he regarded all her descendants as entitled to such shares as would be apportioned to them by the rules of the Muhammadan Law relating to grants or appropriations, and not to the shares into which, by the rules of inheritance, estates were divided. These interests were not inherited, but settled upon those entitled. The Judicial Commissioner had erroneously construed the words 'her issue" to mean the "heirs of her body," and had erred in deciding that the King intended to designate his wife's heirs by tacit reference to the provisions of the Muhamadan Law of inheritance. At the same time, the Judicial Commissioner had been right in holding that the defendant Wazir Begum was not entitled to any share; so far the decision was correct. The grant was specified to be "*naslan bad naslan*," and "*batu bad batu*," thus excluding the great-grandchild of Malka Jahan, who belonged to a subsequent generation and not to the generation in which came the plaintiffs. The second generation could not come in until the first should have been exhausted. Reference was made to Baillie's Muhammadan Law, Book IX, of *Wakf* or Appropriation, Vol. I, pp. 559, 571, and to Vol. II, pp. 211, 212, 217; Tagore Law Lectures, 1884, by Syed Ameer Ali, ss. ix and x, pp. 217, 397, 398, 399, 400.

Sir *Horace Davey Q. C.*, and Mr. *J. D. Mayne*, for Wazir Begum, the appellant in the second appeal, argued that the corpus of the fund never having belonged to Malka Jahan, by force of the documents in question, it did not form part of her estate at her death. Consequently, the question, who should take at her death, could not be determined by reference to the law of inheritance, but must be determined by the true construction of the words of the instrument creating the interest in the fund, and by inference allotting the proportionate shares. The King in his letter of 1842 abstained from using the term "heirs," using, instead of that expression, the words "issue" and "offspring" ("*aulad*" in the original.) This was owing to his desire, and showed his desire, to execlude from the construction of the settlement made by him all consideration of what the Muhammadan Law of Inheritance would apportion, and to exclude the principle of division by which the nearer heir would exclude the more remote descendants. According to the King's desire, all the offspring were to participate equally. This would bring in the great-grandchild, as well as the grandchildren; and the former on the reasonable version of the Treaty of 1838 and the letter of 1842, must be held to be entitled equally with the latter. Reference was made to Baillie's Muhammadan Law, Vol. II, Chap. "*Wakf*," pp. 211, 212, 217, 218, 219, 221.

Mr. *J. Rigby, Q.C.*, and Mr. *R. V. Doyne*, for Sahib Mirza and Imdad Ali Khan, respondents in both appeals, contended that the Court below was right in holding that the world "issue," used in regard to the right of succession to the interest of the fund in question, was equivalent to the words "heirs of the body," and that the relative right of such heirs to share that interest was governed by the ordinary law, that being the Muhamedan Imamiya Law of Inheritance, under which the parties lived. It was clear that the intention of the King (and it was upon his intention that the appellants also relied) was that the right to receive the interest in question should descend to her heirs according to the Muhammadan Law. That was, in this case, the law prevailing among Shiahs. As regards the passages which had been cited from Baillie's work at pp. 217, 218 and 219 of Vol. II, it was submitted that they meant no more than this, *viz.*, that where a Muhammadan founder of an endowment, or settlor, expressed in his *waktnama* a clear intention to benefit certain designated persons or classes, the latter would take, although the ordinary law of inheritance would not, of itself, have brought them in. There was nothing to be found in the books, nor was there any principle or rule in the Muhammadan Law, to prevent a Court's acting on the resonable presumption that where a Muhammadan grantor used a general expression to indicate the order of succession which he wished to be observed, he intended that such expression should be interpreted by reference to the ordinary law governing the family. There is no ground for supposing that it was the intention of the King Muhammad Ali Shah to subject the interest created by him to any rule of succession other than that given by the ordinary law. To allow the correctness of the appellants' contention would be to let in the equal rights of the children, thirteen in number, of the appellants Sultan Mariam and Amir Jahan, and of the respondents. In reference to the appeal of Wazir Begum, it would be contrary to the only probable intention of the King, that she should be declared entitled to a share equal that of a male, and there could be little doubt that he had entire regard to the Muhammadan Law as regulating the question of heirship.

Mr. *T. H. Cowie, Q.C.*, replied on behalf of the appellants, Mariam and Amir Jahan.

Mr. *J. D. Mayne* replied for Wazir.

On a subsequent day (14th May) their Lordships' judgment was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

The facts of this case, as well as the origin and nature of the suit, are fully set forth by the Judicial Commissioner. It is sufficient for the present purpose to state that in the latter part of the year 1841 Muhammad Ali Shah, the then King of Oudh, was, under circumstances to which it is not now necessary to advert, induced by the late Sir John (then Colonel) Low, the Political Resident at Lucknow, to subscribe the sum of twelve lakhs of rupees to the 5 per cent. Government Loan which was then open. The money was paid into the Resident's Treasury, and brought to the credit of the Government of India.

On the 21st January 1842 a letter from the King, dated 21st Zikad 1257 Hejira (corresponding with the 4th January 1842, and addressed to the Governor-General, was forwarded by the Resident to the Secretary to the Government of India. The letter was, after the usual compliments, in the following terms:—

"Being fully convinced that your Lordship has always entertained a sincere friendship for me, I without any ceremony mention to your Lordship that at the time when the guarantee of the 3rd Ramzan 1254 Hejira (corresponding with the 22nd November 1838), regarding the pension of the ladies of my royal family, children, and other relations was concluded, the trifling sum of Rs. 400 per month was assigned to Malka Jahan Hamidai Sultan Fakhruzzamani Nawab Tajunnissa Begum. Owing to the smallness and insufficiency of the amount invested, as I have always entertained a particular regard for her, and in every way endeavoured to promote her honour and comfort, I now entertain the hope from your Lordship's kindness that, instead of issuing a promissory note in the name of Malka Jahan for the sum of Rs. 12,00,000, which was totally lodged by me in the Residency Treasury, your Lordship will receive that money into the Company's Treasury as a separate loan, for which he and the future Residents will pay 5 per cent. per annum interest, or Rs. 5,000 monthly, as long as the present public 5 per cent. loan shall exist, and that, when the loan shall have been paid off, Colonel Low and the Residents for the time being will, after taking receipt in the same manner as prescribed for the allowance mentioned in the said deed, pay to her and to her issue, generation after generation and womb after womb, the interest at the rate of 5 per cent. per annum, *i.e.*, Rs. 5,000 a month, so long as 5 per cent. interest may be allowed, and afterwards such reduced interest as may be paid from time to time by the British Government. My sole object in making this request is to prevent the risk that might otherwise occur of Nawab Malka Jahan or her offspring being persuaded, at some future period, by evil advisers, to sell the note and squander the money. The accomplishment of this object will be highly gratifying to me, and will demonstrate to the public your Lordship's friendship and regard for me; this will prevent any new guarantee being entered into, but will merely be the payment of a larger sum in interest instead of a small one."

The Governor-General, by letter sent through the Resident and addressed to the King, assented to his request, stating that he was pleased and gratified beyond limit in concurring with the hearty desire and wishes of the King in regard to the fixing of the stipend of Malka Jahan. From that time until the time of her death, on the 9th of July 1881, the stipend was paid to her in accordance with the terms of the arrangement between the Government of India and the King. Malka Jahan at the time of her death left two grandsons, the respondents in both these appeals, two granddaughters, Sultan Mariam Begum and Nawab Amir Jahan Begum, the appellants in one of the appeals, and a great-granddaughter, Nawab Wazir Begum, the daughter of a deceased grandson, the appellant in the other appeal, her surviving; such deceased grandson being

a son of Mirza Humayum Bukht, a son of Malka Jahan, who died in his mother's lifetime.

The question in these appeals is what is the proper construction of the King's letter of 1842, read, as it ought to be, in conjunction with the deed of the 22nd November 1838, referred to therein and to be found in the second volume of Aitchison's Treaties and Engagements, edition 1876, p. 144.

By the latter of these documents it was the intention of the King to provide pensions or stipends for the ladies of his royal family, children and other relations, including, amongst others, Malka Jahan and her son Mirza Humayum Bukht, the grandfather of the appellant Nawab Wazir Begum, and father of the other appellants and of the respondents.

By the 3rd Article it was stipulated that the pensions should be paid to the several pensioners specified therein and to their heirs in perpetuity on their receipts under their seals; and by the 4th Article, that if any of the pensioners should die without issue, his or her pension should revert to the King of Oudh.

By Article 6, it was provided that the said pensioners and after them their issue who on their decease should succeed to their respective pensions should always experience the special favour and kindness of the British Government. It should be observed that in that article the favour and protection of the Government is bespoken not for all the issue, but merely for the issue who should succeed to the pensions. In the deed of 1838, the words "heirs" and "issue" are used as convertible or equivalent terms, so that in that document the word "heirs" must mean heirs who are issue, and "issue" must mean issue who are heirs.

Their Lordships are of opinion that it was the intention of the King that, in the event of the death of any of the pensioners leaving issue, his or her heirs, according to the Muhammadan Law of Inheritance, should receive payment of the pension in the proportions regulated by such law of inheritance.

Their Lordships concur with the Judicial Commissioner in the opinion that the King intended in 1842 to provide an additional pension for Malka Jahan of the same nature as that which he had provided for her inthe year 1838, and that, after her death, provided she should leave issue, it should be paid to such of her issue as should be her heirs according to the rules of the Muhammadan Law of Inheritance. There is nothing in the King's letter of 1842 to lead to the inference that he intended, by the increase of the pension of Malka Jahan, to benefit any other persons than those who were to be benefited upon her death by the pension of 1838. It seems unreasonable to suppose that he intended that the several pensions of Malka Jahan and of her son, which were created by the deed of 1838, should, if they should die leaving issue, be paid to their respective heirs according to the Muhammadan Law of Inheritance, and that the pension of Malka Jahan, created in 1842, should be paid to her issue so as to allow a granddaughter of her son to take an equal share with his sons and daughters, ignoring altogether the policy of the Muhammadan Law of Descent. Some effect ought to be given to the last words of the King's letter of 1842, wherein he says: "This" (meaning the assent of the Governor-General to his request, or to use the King's own words, 'the accomplishment of his object') "will prevent the necessity of any new guarantee being entered into, but will merely be the payment of a larger sum in interest instead of a small one."

The guarantee of the Government in the deed of 1838 was to pay the interest to the pensioners and their heirs if they should die leaving issue, and consequently a new guarantee would have been necessary if the intention was that the interest of the new loan should be paid to the issue of Malka Jahan, whether heirs or not. This appears to be almost conclusive that the word "issue" in the letter of 1842 was used in the sense of heirs of the body, and that such of the issue of Malka Jahan as would be her

heirs according to the Muhammadan rule of descent ought alone to receive payment of the pension in the proportions assigned to them by that law.

It should be remarked that, although a settlement in the terms of the King's letter of 1842 creating pensions in perpetuity could not, under the Muhammadan Law, be validly made by a private individual, the arrangement of 1842 takes effect as a contract of treaty between two sovereign powers.

For the above reasons, their Lordships will humbly advise Her Majesty that the decree of the Judicial Commissioner, except so far as it relates to costs, ought to be affirmed. Considering, however, that the lower Courts differed in opinion, and that the ambiguity in the words used by the King in his letter of 1842 has led to the litigation, their Lordships will humbly advise Her Majesty to vary the decree of Judicial Commissioner as to costs, and to order that the costs of all the parties in the lower Courts be paid out of the pension which is the subject-matter of the suit.

Their Lordships order that the costs of the appellants and of the respondents of the appeals to Her Majesty in Council be paid out of the same fund.

Decree affirmed except as to costs.

Solicitors for Nawab Sultan Mariam Begum and Nawab Amir Jahan Begum, defendants-appellants: Messrs. *T. L. Wilson & Co.*

Solicitor for Nawab Wazir Begum, defendant-appellant: Mr. *William Battle.*

Solicitors for Nawab Saheb Mirza and Imdad Ali Khan, plaintiffs-respondents: Messrs. *Wrentmore & Swinhoe.*

15th 16th May and 29th June 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

HEMMUNI SINGH AND OTHERS * ... } *Plaintiffs,*

and

CAUTY AND ANOTHER ... *Defendants.*

On Appeal from the High Court in Bengal.

Land Registration Act (Bengal Act VII of 1876), s. 7—Delimitation of land of adjoining proprietors—Correction of entry in register.

On a claim for the correction of the entry of the names of proprietors in the general register of revenue-paying lands in a district kept in accordance with Bengal Act VII of 1876, the limits of the area of the estate had not been defined, further than by boundaries mentioned in the plaint, which were disputed by the defendants, who were the owners of land adjoining, and who had obtained from the revenue authorities an order for the entry now alleged to be incorrect. The properties were both parts of an ascertained number of bighas, forming a chuckla

The High Court, while affirming the decision of the Court below in the plaintiffs' favour, ordered a local enquiry with a view to the accurate delimitation of their estate. This, with the subsequent decree, resulted in the area being defined therein by reference to a map made and marked by an Amin. This was not a just division; for, while it divided the chuckla so as to give the defendants their full share, it went beyond it, to make up the full area of the plaintiffs' share. Their Lordships therefore made a new order, calculated to secure the division of the whole chuckla in due proportions for the purposes of the entry in the register.

APPEAL from a decree (8th March 1882) of the High Court, varying a decree (1st July 1880) of the Subordinate Judge of Bhagalpur.

The present appeal was preferred from a decree which directed a local investigation as to boundaries, for the purpose of

* 17 I. L. R. Calc., 304.

ascertaining the correct entry to be made, in accordance with s. 7 of Bengal Act VII of 1876 (the Land Registration Act, 1876), in reference to an estate, as to which the names of the plaintiffs were entered in the column of proprietors.

The suit out of which this appeal arose was brought to set aside the order of the the revenue authorities in the Bhagalpur district, that the names of the defendants should be entered as owners, each of a one-third share of a whole area, or chuckla, comprising a little more than 1,040 bighas, known as Pathurghati of Phagu Sirdar, and lying within or forming a dependency of a mauza called Latouna. This had formerly been part of a taluq named Thalba which belonged to a joint family estate owned in the year 1859 by five brothers. On a partition among the brothers, the chuckla Pathurghati was nominally allotted thus: *viz.*, rather more than 503 bighas to one brother named Nundkishore, and the residue, 536 bighas and a few cottahs, to another brother named Haruckman.

The present suit had reference to the proper registration of the plaintiff's names as proprietors of these 503 bighas, part of Pathurghati, involving their making-off and description. The property in the 503 bighas remained in Nundkishore's possession till his death in 1872, descending to his heirs the present plaintiffs. The residue, 536 bighas, came to the defendants as purchasers from Haruckman; and their application made in 1878 to have their names registered under Bengal Act VII of 1876 as proprietors, each of a one-third share of the whole of mauza Latouna and of chuckla Pathurghati, comprising all the 1,040 bighas (instead of only the 536 bighas, which had fallen to the share of Haruckman), occasioned this suit. An order of the Collector, dated 29th March 1879, reversing that of the Deputy Collector, and confirmed on appeal by the Commissioner, directed entry of all that the defendants had applied for which included entry of two-thirds of Pathurghati in their names.

The Subordinate Judge decreed that the names of the plaintiffs be entered in the register, in respect of that portion of Pathurghati of which portion the boundaries were given in the plaint; the names of the defendants being removed; the orders of the revenue officers being set aside as to the entry in favour of the defendants.

The High Court (Prinsep and O'Kinealy, JJ.) in the main affirmed this decree; but found it necessary to direct the District Judge to issue an order to an Amin to make a local inquiry, and a map of the land to which the entry when made would relate. This was done. The Judges then in continuance (3rd April 1883) gave the following decision:—

"It was our intention not merely to find in favour of the plaintiffs, but to restrict the claim so that they might have only the 503 bighas odd, to which they became entitled in consequence of the partition between Nundkishore and Haruckman Singh. We certainly never intended to deprive the defendant of the 536 bighas odd to which under that partition he was also entitled.

"The local inquiry has now been held, and the Amin has submitted a map showing the area claimed by the parties, as well as the boundaries of Pathurghati fixed by the survey of 1847, that is to say about eleven years before the partition took place. Within these boundaries the Amin has found an area of 1,040 bighas which was the area dealt with by the partition. The case therefore is practically a mere boundary dispute. The only difficulty arises from the fact that the boundary between the two properties of the parties runs almost entirely through jungle land having no defined features.

"The main objection which has been taken before us tothe correctness of the Amin's proceedings relates to the northern boundary. Now it does not appear that any such objection was taken while these proceedings were being held, or at any previous stage of this case. It would seem rather as if the correctness of that delineation was accepted by the parties, since it generally accords with the boundaries which they pointed out. There is no reason to suppose that ,as regards the eastern and western boundaries of the entire tola Pathurghati of Phagu Sirdar, any error has been committed; and the correctness of the entire demarcation is in some way corroborated by the fact that the area corresponds with that dealt with by the partition.

"It seems to us therefore that we should be doing justice between the parties in the present case, if we were to give the defendant the full amount of the 536 bighas to which under the

partition he is entitled, leaving the remainder to the plaintiffs."

The judgment then gave a more detailed description of what the entry was to be by reference to the map; and a decree followed to the same effect.

The plaintiffs appealed to Her Majesty in Council, as to the question of the correctness of the entry of the boundaries, as decreed by the High Court.

Mr. *R. V. Doyne*, for the appellant, argued that, as the plaintiffs sought, not to obtain possession by decree, but to have their title cleared from the doubts that would be cast upon it by the mistaken entry under the erroneous orders of the Collector and of the Commissioner, it was not incumbent on the plaintiffs to have the division ascertained and delineated. All that was necessary for the plaintiffs was that the orders should be set aside, and that the parties should be restored to their former position. If anything more was required, the boundaries alleged in the plaint were capable of being laid down. The decree of the High Court would have the effect of apparently transferring to the defendants lands which, as to part, had been in the possession of the plaintiffs and of Nundkishore since 1859; and that decree prescribed an unjust division for the purposes of the register.

Mr, *C. W. Arathoon*, for the respondents, supported the decree of the High Court.

Mr. *R. V. Doyne* replied.

Their Lordships took time to consider their judgment, which was afterwards (on 29th June) delivered by

THE RIGHT HON. SIR RICHARD COUCH :—

The appellants were the plaintiffs in the suit, and the plaint stated that upon a partition between the members of a joint Hindu family of property, of which a chuckla known as Pathurghati formed part, and the entire 16 annas of which chuckla was 1,040 bighas 1 cottah 2 dhoors, 503 bighas 7 cottahs 12 dhoors 12 rains of jungle land fell to the share of Babu Nundishore Singh, the father of the first and grandfather of the second and third plaintiffs, and the remaining 536 bighas 13 cottahs 9 dhoors 8 rains of jungle-land of the chuckla went to the share of Babu Haruckmun Singh, from whom the defendants derive their title. That upon petitions of the plaintiffs and defendants for registration of names under Bengal Act VII of 1876, an order for registration of names of the plaintiffs in respect of the 503 bighas, &c., was made by the Deputy Collector; but on appeal the Collector reversed that order, and directed the names of the first and second defendants to be recorded in regard to two-thirds of the entire chuckla, and this order was confirmed by the Commissioner, and in accordance with it the name of the second defendant was also registered in respect of one-third. The plaint prayed for an order for registration of the plaintiffs' names in respect of the 503 bighas, &c., out of the 1,040 bighas &c., and for the registration of the defendants' names only in respect of the remaining 536 bighas, &c., and for other relief giving boundaries of the 503 bighas. The written statements of the defendants said that the boundaries given in the plaint did not comprise 503 bighas of land; that the entire area of chuckla Pathurghati was not 1,040 bighas, and the boundaris given by the plaintiffs were wrong. The Subordinate Judge of Bhagalpur made a decree that the names of the plaintiffs should be registered in respect of that portion of the lands which is called Pathurghati Phagu Sirdar, the boundary of which has been given in the plaint, and that the names of the defendants in respect of that share should be expunged, and that portion of the order of the Mutation Department which is prejudicial to the interests of the plaintiffs should be set aside.

Upon an appeal to the High Court, that Court considered that the partition was made as stated; but the real difficulty in the case consisted in the indefinite character of the boundaries given in the plaint upon which the plaintiffs' case had

been decreed; that those boundaries, so far as they understood them, were natural boundaries, but from the extensive area of the land in dispute, it was not improbable that these natural boundaries indicated only a small portion of the boundary lines. They therefore thought it necessary that the boundaries given in the plaint should be ascertained and clearly indicated in a map before a final order was made. The District Judge was accordingly requested to direct a competent Amin to prepare a map, after proper inquiry, showing the boundary as stated in the plaint, and having ascertained these boundaries, the Amin should proceed to measure the area falling within them, and should then submit his report for the orders of the High Court. The District Judge accordingly, by an order dated the 10th of June 1882, commanded a Civil Court Amin to make the local investigation and the map thus required.

The Amin made his report, dated 12th August 1882. In that he states that the servants of the plaintiffs and defendants had pointed out the land which they said was in the possession of their masters, and it was measured; but the lands as pointed out when added together, did not tally with the amount of land specified in the partition, and was deficient by 256 bighas 2 cottahs 14 dhoors. He then says that in order to ascertain why the amount of land had decreased, as well as to know the boundary limit of chuckla Pathurgahati, summoned several persons; but they only stated that the lands appertaining to mouza Babhungaon, named in the plaint as on the west of the 503 bighas claimed, were on the western limit of chuckla Pathurghati. After this he called for a survey map made in 1847, which had been filed on behalf of the plaintiffs, and using this and taking a point on the east side where Pathurghati joined to two mouzas, Doparkha, and Burakurwa, which was pointed out and admitted by the agents of both parties and the servant of the proprietor of those mouzas, he fixed the boundary of Babhungaon farther to the west than the point which had been pointed out to him by the agents of the plaintiffs as on the western limits of Pathurghati, so as to include the 256 bighas which were deficient. This was done in the absence of any representatives of the proprietor of Babhungaon. The Amin appears to have thought he was bound to fix the boundaries of Pathurghati so as to give an area which exactly tallied with that in the partition. But it was not his duty to do this, and the defendants had denied that the entire area of the chuckla was 1,040 bighas.

The case came again before the High Court on the 3rd April 1883, the respondents (the plaintiffs) having filed objections, in which they said that as the partition did not take place with reference to the survey map, the Amin was wrong in calling for the survey map, and in finding on the strength of it that the chuckla extended more on the west, contrary to the allegations of both parties. But the Court adopted the boundaries found by the Amin, and decided to give to the defendants the full amount of 536 bighas to which they said they were under the partition entitled, leaving the remainder to the plaintiffs; and also that the defendants were to have the portion which lies to the extreme east, and they were to obtain the services of some competent person to delineate on the map submitted to the Court by the Amin the boundaries between the 536 bighas and the lands belonging to the plaintiffs. This was done, and the case with the map of the surveyor again came before the Court on the 6th June 1883, when it was objected on behalf of the plaintiffs that the balance remaining in their possession was considerably less than 503 bighas; but the Court said they had then no concern with that matter, it was considered before the decree was settled, and ordered that the map should form part of the decree, and that out of the lands in suit the plaintiffs should receive any land outside the boundary shown by line marked by the surveyor, and the other boundaries described in the order

of 3rd April, and the defendants should get 536 bighas lying within those boundaries. The result is that the defendants would obtain possession of 536 bighas, and the plaintiffs might have to engage in a suit with the proprietors of Babhungaon before they could obtain possession of the whole of the 503 bighas. This is not a just division, and their Lordships are of opinion that in this suit the boundaries of the land to be divided should be taken to be those pointed out by the servants of the parties, and that the proper decree will be that the land within those boundaries, and which are within the line marked green on the copy of the map of the Amin to be annexed to the order of Her Majesty in Council, shall be divided, by a competent surveyor, by a line beginning on the northern boundary at a point in a straight line with the north-west corner of the tank, and going thence to the southern boundary as nearly in a direct line as will conveniently divide the whole area in the proportion of 503 to 536, and that the plaintiffs shall obtain possession of the land lying on the western and the defendants of the land lying on the eastern side of such line, and that the suit should be remitted to the High Court that the line shall be so marked, and the decree of the High Court be varied accordingly. Their Lordships will thus humbly advise Her Majesty. The parties will bear their own costs of this appeal.

Decree varied.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents. Messrs. *Barrow & Rogers.*

17th 21st and 23rd May and 6th July 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

MUHAMMAD MUMTAZ AHMAD AND OTHERS * } *Plaintiffs*

and

ZUBAIDA JAN AND OTHERS *Defendants.*

On Appeal from the High Court for the North-Western Provinces.

Claim to possession of property under deed of sale—Consideration—Muhammadan law—"Mushaa"—Effect of possession following upon gift to render it valid.

The law relating to the invalidity of gifts of "mushaa," *i.e.*, the prohibition of the gift of an undivided part in property capable of partition ought to be confined within the strictest rules; and the authorities on the Muhammadan law show that possession taken under a gift, even although that gift might with reference to "mushaa" be invalid without it, transfers effectively the property given, according to the doctrines of both the Shia and the Sunni schools. Possession once taken under a gift is not invalidated, as regards its effect in supporting the gift, by any subsequent change of possession.

The subject of the gift was shares in revenue-paying villages, with land, homes and moveables. Of the greater portion of this property, the donor, a mother giving them to her daughter, had only so far possession that she was in receipt of the rents and profits. In the deed of gift she declared (thereby making an admission whereby her heir and all claiming through him were bound) that she had made the donee, her daughter, possessor of all the properties; and she directed that the gift should be carried into effect by the daughter's husband, who was manager of estates on behalf of both mother and daughter before them.

Held, in a suit for the possession of the property on a sale by the heir of the donor, brought by the vendees against him, and joining as defendants the heirs of the daughter, then deceased, that sufficient possession had been taken

* 16 Cowell's, Ind. Ap 205; 11 All., 460.

on behalf of the daughter to render the gift effectual, and to defeat the claim as against her heirs.

APPEAL from a decree (22nd June 1885), of the High Court, reversing a decree (1st May 1884) of the Subordinate Judge, of Mainpuri, and dismissing the appellant's suit.

The first of the two questions in the suit out of which this appeal arose, was as to the payment of the consideration upon a deed of sale, dated 16th December 1882, in favour of the plaintiffs, who claimed possession upon it. The other, forming the second issue, related to the validity of a deed of gift, purporting to have been executed on 12th February 1879, by a Muhammadan widow in favour of her daughter, now represented by the first six defendants, this gift disposing of the property the subject of the sale; and, if valid, effectually preventing any such subsequent transfer, by the vendor, who made title as heir to the widow. By this sale deed, which was registered, the vendor, Muhammad Usman, in consideration of Rs. 10,000, purported to transfer to two of the plaintiffs, and to another person, (through whom a third plaintiff claimed), three-fourths of his interest in the property left by his sister, Himayat Fatma, who died in January, 1882, he being her sole heir. The property was described as in greater part "zamindari villages together with all the appurtenances, perpetual maáfi lands, and resumed maáfi, milkiats and groves situate in pargana Mahrera, the estate of Himayat Fatma Begum." The execution of this was admitted by Usman, who stated in his defence that when he was before the sub-registrar he received Rs. 2,5000; and acknowledged the previous receipt of Rs. 2,500; and his case was that, notwithstanding such acknowledgment, he had not, in fact, received the latter sum; having also, handed back the Rs. 2,500 after the registration.

The plaint also stated that the six other defendants, who were the heirs of the deceased daughter, Zahur, prevented the plaintiffs from getting possession, falsely setting up a deed of gift from Himayat to Zahur. These defendants, however, in their written statement maintained that the deed of gift was valid, and that under it Zahur had received possession of all the property claimed in the present suit. They further alleged that the plaintiffs' deed of sale had been obtained from Usman by collusion to deprive them of their rights, and without *bonâ fide* payment.

The Subordinate Judge found that the Rs 7,500 were not paid, and that it was not proved that Usman returned the Rs. 2,500 which he received before the sub-registrar. As to the deed of gift, he disbelieved the evidence as to its execution, and held that, even if executed, it would have been invalid on the ground of "mushaa." He found that no possession had been delivered under the gift. Proportioning the property comprised in the sale to the part of the consideration which he found to have been paid, he decreed in favour of the plaintiffs for possession of one-fourth.

The plaintiffs appealed to the High Court for the whole claim to be allowed on the grounds, first, that the whole consideration had been in fact paid; and, secondly, that, even on the view of part payment only having been made, they were entitled to the completion of the sale of the whole property by possession being given to them. The six defendants preferred a cross appeal, to the effect that their property was being conveyed away collusively, inasmuch as the deed of gift of 12th February, 1879, was valid, and had been followed by possession. They alleged that the payment of the Rs.2,500 by the plaintiffs had not been proved, nor, in fact, made. But their case was that they were entitled by the gift prior in date, which had been followed by delivery, and with which the doctrine of "mushaa" erroneously applied by the Subordinate Judge, had nothing to do.

The plaintiffs' appeal was dismissed by the High Court, (PETHERAM, C. J., and TYRRELL, J.). They refused to interfere with the conclusion of the Subordinate Judge.

The cross appeal of the six defendants was, however, decreed, and the suit was dismissed altogether, for reasons thus expressed in the judgment:—

"The plaint states that the plaintiffs bought this property by a deed, and paid Rs. 10,000 consideration. This is denied by the principal defendant, and upon this issue the case went to trial. It was the foundation of the whole case, and the Subordinate Judge decided that the deed was executed and the consideration was not paid. The plaintiffs' allegation was that they paid the entire consideration for the entire property, and their main proposition having failed, the Judge ought to have dismissed the suit as brought. But instead of doing this, he divided an indivisible consideration and an indivisible property and said that because the plaintiffs had paid a part of the consideration, they were entitled to a part of the property. This was making a new contract for the parties, which the Subordinate Judge had no power to do. We decide the case upon this ground only, and we decide nothing as to the merits. The appeal must be allowed on the ground that the first Court has granted a relief which is not in accordance with the plaintiffs' claim, and that the plaintiffs have failed to prove the main allegation upon which their prayer for relief was based. We make no order as to costs in this case. In first appeal No. 93 of 1884, the appeal is dismissed with costs."

Mr. *J. Graham*, Q. C., and Mr. *R. V. Doyne*, for the appellants, argued that the decrees of the High Court should be reversed and that the whole claim of the plaintiffs should be decreed; or that they should receive such proportionate relief as had been decreed to them by the first Court.

It was submitted that in regard to the Indian Registration Act, III of 1877, ss 58 and 59, an admission of payment endorsed in accordance with s. 58, such as had been made in this case, was *primâ facie* evidence against the executant; and, without evidence to the contrary, conclusive. This, and other facts, threw the burden of disproving payment on to Usman and the other defendants, who had not sustained it. On the other hand it was sufficient to entitle the plaintiffs to a decree if the evidence, as to which the High Court had given its own opinion, should show that the Rs. 2,500 had been paid. The sale was complete under s. 54 of Act IV of 1882, whether the money was actually paid or not, if the agreement was for future payment. It was the right to the possession that was now in question, and the contention was that the transfer of a right of possession of the property would be none the less a transfer because the transferring vendor happened to be out of possession. They referred to Macnaghten's Principles of Muhammadan Law, Chap. III, Sale, paras. 12 and 18, Precedents of Sale, Case IV.

Mr. *J. H. A. Branson*, for the six respondents claiming under the deed of gift to Zahur, contended that the dismissal of the suit was right, if not precisely on the grounds stated in the judgment of the High Court.

The concurrent findings of the Courts below were that the Rs. 7,500, were not paid, and even if the Rs. 2,500, contrary to the weight of the evidence, were to be taken as paid, the plaintiffs had failed to show themselves entitled to possession. Instead of performing, or being ready and willing to perform, their part of the contract, the plaintiffs were found alleging that they had made a greater payment than they had made, if not alleging a payment when they had made none.

He referred to *Kalee Pershad Tewari* v *Raja Sahib Perhlad Sein*(1), *Rani Bhobosunderi Dassia* v *Issarchunder Dutt*(2), *Kali Das Mullick* v. *Kanhaya Lal Pundit*(3).

There was another, and it was submitted a complete, ground for the dismissal

(1) Reported with, and as part of, the case of *Raja Shahib Perhlad Sein* v. *Baboo Budhoo Sing*, 12 M. I. A., 306, at p. 311; also 2 B. L. R., P.C., 111.
(2) 18 W. R., 140.
(3) L. R., 11 I. A., 218; I. L. R., 11 Calc 121.

of the suit, as against the six defendants, *viz*, that at the death of Himayat the estate which Usman purported to sell had been already transferred to others The deed of gift of 12th February 1879, was valid, all the reasons assigned by the Subordinate Judge, for its being invalid and inoperative, being inadequate. It was an error in the judgment of the first Court to assert that possession had not followed that deed of gift. He referred to the proceedings taken to obtain mutation of names, and the other evidence on the question of possession by Zahur; and argued that, in the case of a gift from a parent to a child, proof of the transfer of the possession was not required to establish it. He referred to *Mussamat Ameer-un-nissa Khatoon* v. *Musammat Abed-un-nissa Khatoon*(1), in which case it was said that the general principle of Muhummadan law, that a gift is invalid where there is a want of acceptance and seisin by the donee, is subject to the exception that where there is on the part of a father or other guardian a *bonâ fide* intention to make a gift, the law will be satisfied without change of possession. Here, however, the evidence showed that Zahur had, through her manager, her husband, Ahmad Husain, obtained possession. That being so, the gift to her, which she lived long enough to receive as a valid gift, was effective; and rendered Usman's subsequent deed of sale inoperative.

Mr. *J. Graham*, Q C., replied, contending that the deed of gift of 1879 had not been completed by delivery of possession to Zahur.

On a subsequent day, 6th July, their Lordships' judgment was delivered by

THE RIGHT HON. SIR BARNES PEACOCK.

The appellants, who were plaintiffs in the suit, claim as purchasers of three-fourths of a share in an estate to which they alleged that Muhummad Usman had succeeded by descent from Himayat Fatma. The first two appellants claimed as direct purchasers from Usman, and the third as a sub-purchaser.

The estate originally belonged to Chaudhri Hafiz Husain, who died in 1865 without leaving male issue. After his

(1) 23 W. R., (P. C., Civ. Rul.) 208. As to "mushaa" the following is part of the judgment in case cited:—"A legal objection to the validity of these gifts was made in the High Court on the ground that the gift of mushaa, or an undivided part in property capable of partition, was, by Muhammadan law invalid. That a rule of this kind does exist in Muhammadan law, with regard to some subjects of gift, is plain. The Hedaya gives the two reasons on which it is founded: first, that complete seisin being a necessary condition in cases of gift, and this being impracticable with respect to an indefinite part of a divisible thing, the condition cannot be performed; and, secondly, because it would throw a burden on the donor he had not engaged for, *viz.* to make a division (see Book XXX, c I Vol. 3, p. 293). Instances are given by text writers of undivided things which cannot be given, such as fruit unplucked from the tree and crops unsevered from the land. It is obvious that with regard to things of this nature separate possession cannot be given in their undivided state, and confusion might thus be created between donor and donee which the law will not allow.

"In the present case the subjects of the gift are definite shares in certain zamindaris, the nature of the right in them being defined and are gulated by the public acts of the British Government. The High Court, after stating that 'the shares were for revenue purposes distinct estates, each having a separate number in the Collector's books, and each being liable to the Government only for its own separately assessed revenue,' and further, that the proprietor collected a definite share of the rents from the ryots and had a right to this definite share and no more, held that the rule of the Muhammadan law did not apply to property of this description.

"In their Lordships' opinion this view of the High Court is correct. The principle of the rule, and the reasons on which it is founded, do not, in their judgment, apply to property of the peculiar description of these definite shares in zemindaris, which are in their nature separate estates, with separate and defined rents. It was insisted by Mr. *Leith*, that the land itself being undivided and the owners of the shares entitled to require partition of it, the property remained 'mushaa.' But although this right may exist, the shares in zemindaris appear to their Lordships to be from the special legislation relating to them, in themselves, and before any partition of the land, definite estates, capable of distinct enjoyment by reception of the separate and defined rents belonging to them, and therefore not falling within the principle and reason of the law relating to 'mushaa'."

death his widow, Himayat Fatma, and his daughter, Zahur Fatma, by an award made with their mutual consent, obtained proprietary possession of the property in equal shares, and Chaudhri Ahmad Husain, husband of Zahur Fatma, was entrusted with the management.

The plaintiffs in their plaint (para. 4) alleged that upon the death of Himayat Fatma in the beginning of 1882, Muhammad Usman became her heir, and that according to the distribution of shares under the Muhammadan law Usman got 229 out of 390 sihams, and the heirs of Zahur, who died in December, 1879, in her mother's lifetime, got 161 sihams; that out of his right Usman sold three-fourths, amounting to 171¾ sihams, to the plaintiffs, Mumtaz Ahmad and Firasat Husain and Sahib Ali Khan, for Rs. 10,000 on the 16th December, 1882, and received the consideration money and got the deed registered; and that on the 3rd May, 1883, Sahib Ali Khan sold his interest to the appellant, Sheikh Irshad Husain under a sale deed. They charged that the daughters, the grandson, and the son-in-law of Ahmad Husain had entered into a collusion with Usman, and interfered with their possession, and prayed that they might be put into possession of the claimed property, being 171¾ out of 390 sihams of the property detailed in the plaint, by proving the sale deeds of the 16th December, 1882, and 3rd May, 1883, and setting aside the proceedings of the Revenue Court. They alleged that their cause of action accrued on the 4th January, 1882, the date of the death of Himayat Fatma, and they valued their claim at Rs. 10,000, the amount of consideration.

Usman was made a *pro formâ* defendant.

The case of the first six defendants-respondents was that the sale deed by Usman had been obtained by fraud without the payment or receipt of the consideration money only for the purpose of carrying on litigation, and further that Usman had no right to the property, inasmuch as Himayat Fatma had executed a deed of gift of her share to her daughter, Zahur Fatma, under which the latter had obtained possession.

Usman in his written statement said: "The Plaintiffs obtained the sale deed from the defendant by fraud. They got him to acknowledge before the sub-registrar the receipt of Rs. 7,500 without paying the same to him, and the Rs. 2,500 which they had paid to him was taken back by them after registration on the pretence that they would use it in meeting the costs of suit," and in para. 5 he stated that "Sahib Ali Khan, who is brother of defendant's wife, has, for fear of losing the good opinion of the brotherhood, sold his share for Rs. 100 to Irshad Husain."

The important issues of fact were—

1st.—Was the consideration for the sale by Usman paid, and was the sum of Rs. 2,500 paid at the time of registration taken back or not?

2nd.—Did the deed of gift in favour of Zahur Fatma become null and void, and was possession held in accordance therewith?

4th.—Did Usman inherit the estate of Fatma, or had she no right left to her at the time of her death?

The Subordinate Judge of Mainpuri before whom the case was tried in the first instance found upon the first issue that the Rs. 70,00 were not paid, but that the Rs. 2,500 paid at the time of registration were not taken back. Upon the second issue, he found that the deed of gift in favour of Zahur Fatma was a fictitious document and was null and void. He said in the first place the gift was made in respect of an undivided property. The detail of the properties given at the foot of the plaint shows that some of them are joint. Such a gift is invalid under the Muhammadan law. Secondly, according to Muhammadan law the delivery of actual possession is necessary. But in the present case the donor was in possession of all the properties, and the donee died before she could obtain possession of them. He then gave his reasons for con-

sidering that Himayat Fatma continued in possession.

The result was that the Subordinate Judge considering that only one-fourth part of the alleged consideration for the sale by Usman had been paid, gave a decree for the plaintiffs for one-fourth of the property claimed in the plaint.

From that decision the plaintiffs appealed to the High Court, for, amongst others, the following reasons :—

1st.—Because the finding of the lower Court that Rs. 7,500 out of the consideration was not paid by the plaintiffs was against the weight of the evidence.

4th.—Because it being shown that the deed of sale was delivered to the plaintiffs, and that a portion of the consideration had been paid by the appellants, the whole claim ought to have been decreed.

The first six defendants appealed to the High Court, for, amongst others, the following reasons :—

1st.—Because the lower Court has erred in holding that the deed of gift, dated the 12th February, 1879, was, not valid, under the Muhammadan law, by reason of "mushaa."

2nd—Because the Subordinate Judge's finding that the gift in question was not followed by delivery of possession in favour of the donee, is against the weight of evidence, which proves that the gift was duly carried out on behalf of the donor while the donee was alive, and that the gift took full effect with the consent and free will of Himayat Fatma, the donor.

3rd.—Because it is established by sufficient evidence that the donor, on the demise of the donee, in confirmation of the gift, caused Ahmad Husain, the husband of the donee, to be placed in possession of the whole of the property previously conveyed by gift to Musammat Zahur Fatma, the deceased donee.

4th.—Because the finding of the lower Court against the validity of mutation of names, subsequently effected in favour of the husband of the deceased donee, is not correct; while the remarks made by the Subordinate Judge, as to the absence of the formalities of a proper transfer, are not well founded.

6th.—Because the payment of Rs. 2,500 being a portion of the consideration money of the sale deed set up by the respondents is not proved by the evidence on the record, and the finding of the Court below to the contrary is not correct.

Upon the appeal of the plaintiffs the High Court held that the plaintiffs' statement that the Rs. 7,500 were paid to Usman was false, and that the defendants' statement that the Rs. 2,500 were returned was also false. They gave their reasons for disbelieving the payment of the Rs. 7,500, but they did not examine the evidence as to the return of the Rs. 2,500, notwithstanding the defendants' sixth ground of appeal, in which they said that the payment of the Rs. 2,500 was not proved by the evidence on the record; nor did they give any reason for the conclusion at which they arrived that the defendants' statement as to the return of that amount was false. Even as to the non-payment of the Rs. 7,500, they very much modify their opinion in a subsequent part of the judgment of the Chief Justice, wherein he says: "It appears to me that we cannot in this Court say that the Subordinate Judge who tried the question of fact decided it wrongly. It is not necessary for us to say whether, supposing the case to have come before us in the first instance we should have arrived at the same conclusion; it is sufficient to say that we do not feel called upon to interfere with the decision he has passed." Mr. Justice Tyrell concurred with the Chief Justice, and the appeal was dismissed with costs. Here then was a

decision which, unless reversed by Her Majesty in Council, would be conclusive, in any future proceeding between the parties to the suit, including Usman and the purchasers, as to the non-payment of the Rs. 7,500, and the non-return of the Rs. 2,500. Their Lordships are now called upon to reverse the decision, and they are obliged to deal with the question, at least as to the non-return of the Rs. 2,500, without having the benefit of the reasons of the High Court with reference to it This is unsatisfactory, and at variance, with the rule of Her Majesty in Councils which requires the reasons of the Judges to be transmitted to the Judicial Committee.

The judgment of the High Court upon the appeal by the first six defendants is still more unsatisfactory. The second issue was the most important one as regards them, for the denial of the validity of the deed of gift of the 12th February, 1879, from Himayat to her daughter, and of possession being taken in accordance therewith, went to the very root of their title. That issue was found against them as regards both law and facts by the the Subordinate Judge. Their first four grounds of appeal to the High Court were directed to the findings of the first Court upon the second issue, and they were fairly entitled to an expression of the High Court's opinion with reference to those four grounds of appeal. Yet the High Court, in their judgment upon that appeal, have left the findings of the first Court upon the second issue wholly unnoticed, and, without awarding to the defendants the costs of their appeal, have dismissed the suit upon a mere subsidiary point not taken by the defendants in their grounds of appeal, *viz.*, the plaintiffs' failure to establish their right to stand in the place of Usman by reason of the non-payment of the Rs. 7,500. To use the words of the Chief Justice, the High Court decided the case upon that ground only, and decided nothing as to the merits, notwithstanding the opinion expressed by the Chief Justice that future litigation is likely to arise between the parties, a misfortune much more likely to be promoted than averted by abstaining from deciding the case upon the merits. Their Lordships therefore consider it to be their duty to determine the issue as to the defendants' title, as well as upon that which raises the subsidiary point as to the plaintiffs' right to stand in the place of Usman. They see no reason for the fear entertained by the Chief Justice, that if the High Court had decided the case upon the merits, and given judgment upon all the points raised by the grounds of appeal, complications could have ensued which would make it uncertain what their decision was, and create difficulties in connection with the point of *res judicata*.

Their Lordships will now proceed to express their opinion upon the four principal issues raised in the case.

First, as to the non-payment of the Rs. 7,500, they concur entirely with the Subordinate Judge. It is very improbable that the purchasers would have paid Rs. 7,500 to Usman without taking any receipt or acknowledgment from him beyond the mere statement in the sale deed that the Rs. 10,000 had been paid, especially as the deed itself would not have been admissible in evidence of the fact before registration. The evidence of the witnesses who were called to prove that the money was at the place named and there counted and paid to Usman was contradictory and very unsatisfactory. Even admitting that Rs. 7,500 were carried to the place named by the witnesses and there counted and ostensibly made over to Usman, a story which their Lordships do not believe, there is no reliable evidence as to where or from whom the money was collected, whence it was brought, or whither and by whom it was carried away after the alleged payment of it to Usman. Whatever weight the admission made by Usman before the sub-registrar as to the receipt of the Rs. 7,500 might have had against himself, it was of no weight as against the other defendants. Neither of the plaintiffs ventured to give evidence, nor did Usman appear as a witness. It might have been some corroboration of the fact of the purchase by the

plaintiffs for Rs. 10,000 if it had been proved that Rs. 4,000 were *bona fide* paid by the plaintiff, Irshad Hussain, to Sahib Ali Khan for the one-fourth share of the property which the latter had purchased from Usman. But there was nothing of the sort. No proof was given of any payment made by Irshad Hussain except the payment of Rs 100 in the presence of the Sub-Registrar, notwithstanding the written statement made by Usman that only Rs. 100 were paid. The admission in the deed of sale to Irshad Hussain of the receipt of the whole of the alleged purchase money of Rs. 4,000 is subject to the same remarks as those already made as to the admission by Usman of the receipt of the Rs. 7,500 and Rs 2,500.

As to the non-return of the Rs 2,500, their Lordships cannot concur with the Subordinate Judge. He gives no sufficient reason for disbelieving the evidence of Fazl-ul-Rahman. All he says upon that subject is, "He" (meaning Usman) "has examined only one witness, Fazl-ul-Rahman, but what reliance can be placed on him and how can it be believed that the defendant took the money at the time of registration, and afterwards returned it?" It is not very clear that the money, although the Sub-Registrar was led to believe that Usman had received it in his presence, ever actually passed out of the control of those who brought it. Usman might, no doubt, have led the Sub-Registrar to suppose that the Rs. 2,500 which are said to have been there counted were placed under his control, notwithstanding a secret arrangement that the money should remain under the control of, and be carried away by, those who brought it. This is not very incredible when Usman's acknowledgment as to the receipt of the Rs. 7,500 is disbelieved. No explanation is given why Rs. 2,500, and Rs. 2,500 only, of the Rs. 10,000 stated in the deed as the consideration should be actually paid when Usman made a false statement as to the Rs. 7,500.

Fazl-ul-Rahman, whom their Lordships see no reason to disbelieve, says:—"I know Muhammad Usman and Mamtaz Ahmad. Muhammad Usman did not get the consideration money of the sale deed from Mumtaz Ahmad and others, in whose favour he executed it. I know this because I went with Sahib Ali Khan, my uncle, at the time of registration. When I went to the tahsil I saw Badulla, the servant of Sahib Ali Khan, and Nanhey Khan, the servant of Ali Ahmad, carrying the money in bags. I heard that there were Rs. 2,500. Mumtaz Ahmad and Sahib Ali Khan went inside in presence of the Registrar. I heard the sound of the money being counted. After registration Muhammad Usman, Sahib Ali Khan and Mumtaz Ahmad came away. The money was with the same persons who carried it to the tahsil. These persons first took the money to the tahsil treasurer, and asked him to receive it on account of revenue due from Sahib Ali Khan and Ali Ahmad. I was present at at that time. The treasurer said that the treasury was closed that day, and the money could not be received. These persons then went with the money to the house of Firasat Husain, and Sahib Ali Khan and I came to the house of Muhammad Haji, where we had put up. The servant of Firasat Husain came at 10 o'clock on the following day, and asked to have the money deposited in the tahsil. Sahib Ali Khan and I both came to the house of Firasat Husain, and stayed there for a short time. Sahib Ali Khan, Mumtaz Ahmad and I then went to the tahsil, the money being carried by the same persons. Some was received on account of revenue due from Sahib Ali Khan, and some on account of revenue due from Ali Ahmad. Mumtaz Ahmad is the brother of Ali Ahmad"

As to the second issue. The Subordinate Judge has found that the deed of gift of the 12th February, 1879, was a fictitious document and was null and void. It is not very clear whether he meant by the word fictitious that the deed was executed without the knowledge or consent of Himayat Fatma. That question is scarcely raised by the issue "did the deed of gift become null and void, and was possession held in accordance therewith?" The finding of the Subordinate Judge

on the third issue seems to assume that the deed was executed. Be this as it may, however, their Lordships see no reason to distrust the report of the commissioner who was deputed by the Sub-Registrar to examine the old lady, and to whom she admitted the execution. That report was dated the 22nd of February, 1879, it was believed by the Sub-Registrar, and upon the strength of it the deed was registered on that day.

The Subordinate Judge held that the deed was void as being a gift of undivided property. He adds, that some of the properties are joint, and that such a gift is invalid under the Muhammadan law. Upon this point their Lordships would have been glad to have the opinion of the High Court. In their opinion the gift and possession taken under it transferred the property of Himayat to her daughter.

The opinion of the Subordinate Judge who was a Muhammadan, must be taken in connection with his finding that the donee died before she could obtain possession; but, for the reasons given hereafter, their Lordships consider that that finding was erroneous.

The doctrine relating to gifts of mushaa was considered by this Committee in the case of *Ameeroonnissa* v. *Abedoonnissa* (1), and by the High Court in Calcutta, in *Mullick Abdool Guffoor* v. *Muleka* (2). The facts of those cases differ from the present, but they throw light upon the doctrine.

It is unnecessary for their Lordships to express an opinion as to whether the gift in question was invalid or not, for it appears that, even if invalid, possession given and taken under it transferred the property.

The authorities relating to gifts of mushaa have been collected and commented upon with great ability by Syed Ameer Ali in his Tagore Lectures of 1884. Their Lordships do not refer to those lectures as an authority, but the authorities referred to show that possession taken under an invalid gift of mushaa transfers the property according to the doctrines of both the Shia and Sunni schools, see pages 79 and 85. The doctrine relating to the invalidity of gifts of mushaa is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules

In the course of his judgment the Subordinate Judge cursorily remarks that Himayat was an old lady, and was not in the proper enjoyment of her senses.

There is nothing in the evidence to show that the latter portion of that assertion was well founded, nor was there any issue upon the subject, nor anything in the report of the commissioner who examined her as to the execution of the deed, or in the statements of the relations who identified her, to raise an inference that she did not understand the nature and effect of the deed. There was nothing in the deed of a complicated nature or which required the exercise of any great mental powers to comprehend the meaning of it. The disposition was a probable one. The old lady and her daughter and granddaughters were living together; both mother and daughter were ill, and had been suffering from an epidemic. Usman, the mother's brother, was one of her heirs, and the daughter on the death of the mother would not have inherited any portion of the property, nor could the mother have devised the property to her by will. The property was small. Nothing could be more natural than that the mother should desire that in the event of her death her daughter and granddaughters, if they should survive her, should continue in the same moderate degree of comfort which they had enjoyed in her lifetime.

The lady had merely proprietary, not actual, possession of the greater portion of the property, that is to say, she was merely in receipt of the rents and profits. In the deed of gift she declared (an admission by which Usman as her heir and all persons claiming through him were bound) that she had made the donee possessor of all properties given by the deed; that she had abandoned all connection with them; and that the donee was to

(1) 23 W. R., 208.
(2) I. L. R., 10 Calc., 1112.

have complete control of every kind in respect thereof. Ahmad Husain, the daughter's husband, was the general manager of both mother and daughter, and would doubtless take care that the deed of gift should be carried into effect. Their Lordships have no doubt that sufficient possession was taken on behalf of the daughter to render the gift effectual. If possession were once taken and the deed of gift took effect, no subsequent change of possession would invalidate it.

On the 24th April, 1879, Himayat Fatma by special power of attorney appointed Sheikh Himayat Ali as her general agent to present and verify a petition for mutation of names, and on the 28th a petition was accordingly presented on her behalf by Himayat Ali, by which, after reciting the deed of gift and that Zahur Fatma had been put into proprietary possession of the property, she prayed that after expunging her name from the Collectorate papers the name of Zahur Fatma, the daughter, might be entered therein. The usual proceedings were adopted, and on the 5th June, 1879, a parwana was issued by the Assistant Collector to the tahsildar, by which he was requested amongst other things to have the petition proclaimed and to cause an enquiry as to possession to be made This was done, and on the 27th July the village patwari reported that Himayat Fatma had made a deed of gift of her own rights to her daughter, Zahur, and that the latter had obtained possession of the same in the place of Himayat Fatma, her mother. On the 28th July the tahsildar reported that he had caused the notification to be proclaimed, and that it was evident from the report of the patwari that Zahur Fatma had obtained possession of the property specified in the gift in the place of Himayat Fatma.

Notwithstanding the proclamation, neither Usman nor any other person raised any objection to the mutation, and accordingly on the 4th February, 1880, an order for the mutation of names was granted.

Zahur Fatma died on the 3rd of December, 1879, and Himayat Fatma, her mother, on the 4th January, 1882. The order for mutation was consequently after the death of Zahur. Mutation of names in the Collector's office was not actually necessary to complete the transfer of possession under the deed of gift. But the order for mutation is important as showing that no objection was made to the mutation, and that the report of the patwari made during the lifetime of Zahur as to the execution of the deed of gift and of the transfer of possession under it which had been adopted by the tahsildar was also adopted and acted upon by the Deputy Collector.

Their Lordships have no doubt that upon the evidence, and especially in the absence of any objection by Usman in the lifetime of Zahur, the Subordinate Judge ought to have found the second issue in favour of the defendants, and their Lordships do so now.

The reasons of the Subordinate Judge in support of his finding that the donee died before she obtained possession are weak and unavailing. First, he relies upon five decrees in suits brought in the name of Himayat Fatma for rent which accrued after the date of the deed of gift, and also upon one payment of revenue made in her name on the 26th November, 1879, but the suits were commenced and the revenue paid before the mutation of names in the Collector's office at a time when actions for rent and payment of revenue would in all probability be brought and made in the name of the person entered as the proprietor in the Collector's book. A similar remark applies to the order of the Assistant Collector in January, 1880, in which he speaks of Himayat Fatma as the person in possession, This order, it should be remarked, was made after the reports of the patwari and of the tahsildar that Zahur was in possession, but before they had been adopted by the Assistant Collector and the order for mutation made. Then the Subordinate Judge makes a point of Himayat's continuing to occupy one of the pakka houses intended for females included in the deed of gift, as if the daughter after she had obtained possession under the

deed of gift would, in order to complete her title, have turned her mother out of the premises altogether, and have refused to allow her to continue to occupy the house in which she had previously lived at a time when one moiety belonged to herself and the other to her daughter. Such an argument is as futile as the following one, wherein he says: "The revenue receipt is filed as No. 128, and the order as No. 136. with the record. At the first page of the deed of gift, the last pucka house intended for females is entered as occupied by the donor, who having made a gift of it, continued to occupy it herself. How can such a gift be valid? A very strong reason to believe the gift to be false is that, if Zahur Fatma had become the absolute owner and acquired possession under the gift, two things must needs have happened after her death, namely, in the first place, her husband, Ahmad Husain, would not have taken any proceeding tending to set aside the gift, because his object to acquire the property had been obtained. Some of the property would devolve on him and some on his daughters, and a sixth share only would go to the mother. So he would have contented himself to take steps to acquire only that one-sixth share, and would not have troubled himself about the rest. But he did not do so. He took steps to acquire the whole property."

As though a fraudulent attempt on the part of Ahmad Husain to acquire the whole property for himself instead of only a portion of it was a strong argument in the face of all the other evidence to prove that the deed of gift was false and had no existence at all. It is unnecessary to refer to the other arguments of the Subordinate Judge in support of his finding on the second issue. They are utterly valueless.

That Ahmad Husain was not the honest man that the Subordinate Judge treats him to have been, who would have contented himself, to take steps to acquire the sixth share which went to the mother, and would not have troubled himself about the rest, is shown by the plaintiffs' (appellants') own case, for it is there said, "Ahmad Husain, alleging a parol gift without date, from Himayat Fatma to himself, applied seven days after his wife's death, *i e.*, on the 10th December, 1879, for the transfer of possession in a number of villages from Himayat to him in accordance with that alleged gift, and at the same time he applied, in fraud of his own daughters, for the transfer to him, as heir of his deceased wife, of her share, and obtained various collusive and false reports from kanungos and other native local officers, and an order, dated the 19th November, 1880, for the registration of his own name in respect of the entire estates of Himayat and of Zahur. It is sufficient to say here, of those proceedings, that the first Court has found, and there is now, as is submitted, no question remaining, that the claims of Ahmad Husain to the properties now in suit were unfounded and "improper."

The appellants rely on Ahmad Husain's having, from Himayat's death to the time of his own death, remained in possession under an order of the 10th November, 1880, for mutation of names, and on the first four defendants, his daughters, having, upon his death, applied for mutation of names to themselves as his heirs; but this argument does not assist the plaintiffs' case, for the order of the 19th November was obtained with the assent of the daughters of Zahur, and subject to the following proviso. In their petition of the 4th February, 1880, speaking of their father, Chaudhuri Ahmad Husain, they say, "Husaini Jan and Hajira Jan having filed a petition in the tahsil of Etah for the entry of their names instead of that of their mother, Zahur Fatma, and having included therein our names also, we submit that we and the objectors are five own sisters, and are the heirs and proprietors of the property of our deceased mother, and with our consent our father, Ahmad Husain, continues, as usual, in possession of the villages, and he too is an heir of the deceased, with right of inheritance to her property. The said Chaudhri and we are joint, and possession by him is our possession. We therefore

have no objection to his name being, during his life, entered instead of ours; but with this proviso that such arrangement be now made that our shares be saved from other claimants, and that we do not thereby ever lose our rights; and he must, during his lifetime, provide for us properly. We accordingly submit that, with the above proviso, the name of Chaudhri Ahmad Husain be entered instead of ours."

Upon the whole their Lordships will humbly advise Her Majesty to reverse the decree of the Subordinate Judge and both the decrees of the High Court, to order the plaintiffs to pay to all the defendants, except the representatives of Muhammad Usman, who is dead, their costs in the Courts below, that a finding be entered for the defendants on the first issue that the amount of the consideration was not paid, and that the Rs. 2,500 were taken back; and upon the second issue, that the deed of gift in favour of Zahur Fatma was executed with the authority of Himayat Fatma, that possession was taken under it, and held in accordance therewith, and that the possession taken under the deed transferred the property; and that upon those findings a decree be given for the defendants, and that it is unnecessary to record any finding upon the other issues.

The appellants must pay the costs of the appeal to Her Majesty in Council.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Barrow and Rogers.*

Solicitors for the first six respondents: Messrs. *Watkins and Lattey.*

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479 & 291

23rd, 24th May and 29th June 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

PERTAP CHUNDER GHOSE*... *Plaintiff,*

and

MOHENDRANATH PURKAIT ... *Defendant.*

On Appeal from the High Court in Bengal.

Contract—Effect of misrepresentation by a party as to part of the subject-matter of a contract—Registration Act (III of 1877), s. 17, cls. (b) and (h)—Civil Procedure Code, 1882, ss. 584 and 585.

Where one party induces another to contract on the faith of representations made to him any one of which is untrue, the whole contract is in a Court of Equity considered as having been obtained fraudulently.

Where a tenant had executed a kabulyat containing a stipulation which the landlord had told him would not be enforced, the tenant could not be held to have assented to it, and the kabulyat was not the real agreement between the parties. Where by an ikrarnama tenants conjointly promised that they would sign, and have registered, kabulyats for rents at rates mentioned: *Held*, that the document did not come under cl. *(b)* of s. 17 of the Registration Act III of 1877, as operating to create or declare an interest, but came under cl. as a document merely creatting a right to obtain another document, which would when executed create or declare an interest.

The limitation to the power of the Appellate Court in hearing a second appeal under ss 584 and 585 of the Code of Civil Procedure, 1882, must be attended to, and the appellant cannot, be allowed to question the finding of the first Appellate Court on a question of fact.

APPEAL from the two decrees (27th January 1887) of the High Court, reversing two decrees (30th November 1886) of the District Judge of the 24-Pergunnahs.

This appeal raised the question of the appellant's right to obtain a decree for arrears of rent at an enhanced rate against the defendants as tenants of two *jóts* or

* 16 Cowell's Ind. Ap. 233; 17 Calc., 291.

cultivating tenures in village Sunker. pore, in the 24-Pergunuahs, within the appellant's zemindari of Porui.

One of these, consisting of 140 bighas, bearing a rent of Rs. 299, stood in the name of Godadhur, son of Ruttun Purkait. The other, consisting of 3 bighas 15 cottahs at a rent of Rs-8, stood in the name of his brother Abhoychurn, both of whom died before this suit was brought.

The plaintiff, who had purchased the zemindari rights in Porui in 1877 at a sale for arrears of Government revenue, had for about three years received the old rents from the respondents family. Afterwards he obtained an ikrarnamah dated 14th Baisakh 1287 (25th April, 1880), from some of the raiyats of Sunkorpore, including Abhoychurn, which purported to be an agreement, signed by the latter and sixteen others to pay rent at the rate of Rs. 2-12 per bigha, and also to include in their kabuliyats 7½ seers of paddy for each bigha, the effect being enhancement from Rs. 307-4 to Rs. 520-13.

Afterwards, on 21st June 1881, Abhoychurn having died in April of that year, Rukkhit Chundor Purkait, his nephew, son of Godadhur, also deceased, signed the kabuliyat on which the present suit was brought. He was a defendant in his own right and as guardian of the minor children of Abhoychurn. Afterwards by order of Court, their mother Bhagubutti Dasi was appointed guardian of the latter under Act XL of 1858. She then in her written statement denied the authority of Rukkhit to bind the minors by signing the kabuliyat. Rukkhit himself also raised the objection that his two younger brothers, sons of Godadhur, were interested, but had not been sued, and the defence insisted that the lands were ancestral *maurasi* tenures of the family.

The issues raised the questions whether Rakkhit had signed the kabuliyat with knowledge of its terms and effect, and whether the minor defendants were bound by it.

The judgment of the Subordinate Judge was that the plaintiff's suit on the kabuliyat failed, but that he was entitled to have effect given to the ikrar signed by Abhoychurn, who was when he signed it "admittedly *kurta* of the family and father of the minors." The Subordinate Judge decreed Rs. 1,272 instead of Rs. 1,640 which was demanded on the strength of the kabuliyat.

Appeals were filed in the Court of the District Judge, both by the minor defendants and by the plaintiff.

The District Judge concurred with the Subordinate Judge in holding that the kabuliyat had been executed by Rakkhit Chunder with a knowledge of the amount of rent required, and held that, though "some of the stipulations in the kabuliyat were very hard and even flagrantly unjust," there was no reason to suppose that Rukkhit was not a free agent, or was imposed upon when he signed, and that he was therefore bound by the kabuliyat.- His execution being, in the Judge's opinion, within the scope of his authority on behalf of the minors, they for whose benefit it also was were bound by it.

There were second appeals from all parties to the High Court under s. 514, Civil Procedure Code, the plaintiff urging that the ikrarnama which had been excluded from the evidence for want of registration should have been received.

A Division Bench (PRINSEP and BEVERLEY, JJ.) reversed the decrees of the lower Courts and dismissed the suit.

The Judges were of opinion that the kabuliyat could not be enforced. They observed:—

"It is impossible in a document of this description to state what terms the parties agreed should be enforced, and what they understood should merely be nominal. We cannot, therefore, concur in the finding of the District Judge that the agreement to pay an enhanced rent absolutely and unconditionally was ever accepted by Rukkhit. In taking a kabuliyat on the understanding deposed to by his Naib, and in attempting to enforce that agreement, the landlord has acted fraudulently. The parties therefore not being of one mind as to what was agreed upon, we think that the terms of the document cannot be enforced. It must not be supposed, however, that from our

not calling attention to other portions of the District Judge's judgment we accept his finding as to undue influence or misrepresentation in this case. From the facts found it is clear that on many points he is wrong, while on others we are not satisfied that the case has been properly tried."

They then went into the question of how far the respondent Rukkhit was competent to bind his brothers and the sons of Abhoy, and after noticing the fact that the brothers of the respondent Rukkhit applied to be allowed to appear as defendants and defend the case, and that such application was refused upon the appellant's objection, they came to the conclusion that Rukkhit had no power in that behalf, and they set aside the judgments of both the lower Courts, and dismissed the appellant's suit with costs in all Courts.

Mr. *J. H. A. Branson* and Mr. *G. Cave* (with whom was Sir *H. Davey Q.C.*), for the appellant, contended that, as regards the kabuliyat, there were concurrent findings of the Subordinate Judge and of the District Judge that it was executed by Rukkhit with sufficient knowledge of its stipulations. The High Court had no authority to establish any other conclusion; nor was it justified in finding that the appellant had acted fraudulently on taking it; that he had exercised any undue influence, or made any misrepresentation in taking it; or that the parties, purporting to contract were not of one mind. The ikrar, at all events, ought to have been taken into consideration. It did not require registration. Reference was made to ss. 584 and 385 of the Code of Civil Procedure, 1882, and to s. 17, cls *(b)* and *(h)* of the Registration Act III of 1877.

Mr. *R. V. Doyne*, for the respondent, argued that the judgment of the High Court was correct, the kabuliyat not being binding for the reasons given in the judgment. It was not binding on the minor defendants, for whom Rukkhit Chunder had no authority to act, and to whose interests it was prejudicial. The suit moreover could not proceed in regard to the interests of the other sons of Abhoychurn, who had not been made parties.

Mr. *J. H. A. Branson* replied.

Afterwards (on June 29th) their Lordships' judgment was delivered by

THE RIGHT HON. SIR RICHARD COUCH:—

This suit was brought by the appellant, and the plaint stated that, on the 21st June 1881, the first defendant, Rukkhit Chunder Purkait, for himself and as guardian of three minor defendants (two of whom are the first and second respondents) executed a registered kabuliyat, by which he rented 177 bighas 5 cottahs and 15 chittacks of land of the plaintiff, engaging to pay an annual rental of Rs. 487-9 and 1-10-12 kahans of paddy worth Rs. 33-4 total Rs. 520-13, and was in occupation of the above tenure; and that, exclusive of payments, there was due for rent and interest on overdue instalments, and for road and public works cesses, and interest thereon, a total of Rs. 1,640-11-1, and prayed for a decree for that amount and interest during the pendency of the suit. Rukkhit Chunder, in his written statement, said that he agreed to execute a kabuliyat, and a draft was made out and read to him, and when it was subsequently engrossed on a stamp, the plaintiff said it was just the same as the draft, and the defendant, in reliance on that statement, signed the ducument, but the draft and the engrossment were different. The minor defendants, by their mother and guardian, said they had no knowledge of the kabuliyat, and that Rukkhit had no power to execute a kabuliyat on their behalf. The Second Subordinate Judge of the 24-Pergunnahs, who tried the case, negatived the allegation that any deception was practised in getting the signature to the kabuliyat, but he held that all the terms of it were not binding on Rukkhit, "the bargain being very unconscionable and consideration very inadequate," and that Rukkhit, whether guardian or manager, had no power to bind the other members of the family, as the contract was not for their benefit. He, however, admitted in evidence an ikrar or agreement executed on the 25th April 1880 by Abhoychurn, the father of the minors and uncle of Rukkhit, who died in April or May 1881,

and who was the *kurta* or manager of the family, and by other tenants, by which he said they agreed to pay Rs. 2-12 per bigha. And he made a decree for rent according to the ikrar of 144 bighas 9 cottahs 7 chittacks and 15 gundahs, considering that the defendants were not proved to be bound by the area mentioned in the plaint.

From this decree there were appeals by both parties, which were heard before the Additional Judge of the 24-Pergunnahs. In his judgment, after saying that he agreed with the Subordinate Judge in the finding that Rukkhit signed the kabuliyat, he says, to quote his own words: "But he (the Judge) considers that the terms of the kabuliyat are so extortionate and hard that he finds it difficult to believe that the defendant executed the kabuliyat with full knowledge of its terms, or after fully realizing the effect of the terms, or at all events that some extraneous motive or influence was used, such as a promise that all the terms would not be enforced. Now as to this I have to remark that the only question before us is did the defendant knowingly execute the agreement as to the amount of rent? There are many stipulations in the kabuliyat, and some of them are very hard and even flagrantly unjust, but we have nothing to do with them just now. All we want to know is, did defendant know what he was about when he agreed to pay the rent stated in the kabuliyat? It may be, and it appears from the Naib's evidence that there are some stipulations in the kabuliyat which were not intended to be acted upon, but they need not be considered until plaintiff attempts to enforce them." The kabuliyat after the agreement to pay the rent contains these words: "If you (the plaintiff) or your heirs require the land, you and they will take *khas* possession of it. I (the tenant) and my heirs shall never have occupancy right to the said lands;" and towards the end of a clause that if the rent is unpaid the tenants shall at the pleasure of the plaintiff and of his heirs be ejected from the land; and it shall be his and his heirs' *khas* property. The Subordinate Judge said it had been proved to his satisfaction by printed dakhilas that the defendants paid rent at a uniform rate for upwards of twenty years, and were, therefore, in a position to plead the presumption arising therefrom in an enhancement suit. The evidence of the Naib, which the District Judge appears to have believed, is that the tenants objected to the condition that *khas* possession might be taken at will, and therefore they were told that that condition had been inserted because then the tenants would remain under the influence (of the zemindar), and that it was not that the plaintiff would actually eject the tenants; and that, with reference to the condition that *khas* possession would be taken if rent were not paid by the end of the year, it was said that this was a penalty clause, and that the law was to that effect, and the plaintiff made those statements. It was admitted by the Counsel for the plaintiff that the statement of the effect of the law was a misrepresentation. Although the District Judge does not expressly find that there was a misrepresentation, their Lordships think that this is the effect of his judgment. He says: "Granting that they (the tenants) were under a mistake as to their position, and that plaintiff represented his power as an auction purchaser as greater than it really was, this would not amount to such misrepresentation as would vitiate the contract." In this he was in error. Where one party induces the other to contract on the faith of representations made to him any one of which is untrue, the whole contract is, in a Court of Equity, considered as having been obtained fraudulently. If such a representation had not been made, the tenants might have refused to sign the kabuliyat. Further, if there is any stipulation in the kabuliyat which the plaintiff told the tenants would not be enforced, they cannot be held to have assented to it, and the kabuliyat is not the real agreement between the parties, and the plaintiff cannot sue upon it.

The Subordinate Judge, it has been seen, founded his decree upon the ikrar. The District Judge held that this document was inadmssible for want of registration, as operating to create or declare

an interest, and coming under cl. *(b)* of s. 17 of the Registration Act III of 1877. Their Lordships are of opinion that it does not come under that clause, but under cl *(h)*, as a document, merely creating a right to obtain another document, which will when executed create or declare an interest. Its terms are that the tenants conjointly promise that they will sign and have registered kabuliyats in respect of rents at the rates mentioned for the old lands which they have and for the excess land if any be found on measurement It clearly was not the kabuliyat described in the plaint, and the evidence of the plaintiff himself showed that it was not intended to be the final agreement. It could not be sued upon as an agreement to pay the rent claimed, which the Subordinate Judge held it to be.

The District Judge, taking the view that the only question was whether Rukkhit agreed to pay the rent stated in the kabuliyat, and finding that he had power to contract on behalf of the minors, dismissed the defendant's appeal, and in the plaintiff's appeal made a decree for the plaintiff for the amount of his claim with interest. From this the defendants appealed to the High Court, the plaintiff also appealing on the ground that the ikrar ought not to have been held to be inadmissible. That Court set aside the judgments of both the lower Courts, and dismissed the plaintiff's suit with costs in all Courts, and did not in the judgment take notice of the question of the admissibility of the ikrar. Their Lordships have doubted whether the Judges of the High Court in hearing the appeals had regard to the provision in the Code of Civil Procedure (Act XIV of 1882), s. 584, as to appeals from appellate decrees, and thought they were at liberty to consider the propriety of the findings of the District Judge upon questions of fact. Certainly there are some passages in their judgment, particularly in the latter part, if not in the former, which suggest this Their Lord-hips must observe that the limitations to the power of the Court by ss. 584 and 585, in a second appeal, ought to be attended to, and the appellant ought not to be allowed to question the finding of the first Appellate Court upon a matter of fact.

For the reasons which have been stated, their Lordships are of opinion that the plaintiff's suit should be dismissed, and that the decrees of the High Court are the proper ones. They will, therefore, humbly advise Her Majesty to affirm those decrees and dismiss the appeal. The appellant will pay the costs of it.

Appeal dismissed,

Solicitors for appellant: Messrs. *Watkins & Lattey.*

Solicitors for respondents: Messrs. *T. L. Wilson & Co.*

30th May and 20th July 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

SUNDAR* ... *Plaintiff,*

and

PARBATI ... *Defendant.*

On Appeal from the High Court for the Noth-Western Provinces.

Possessory title—Possession of and partition between co-widows of estate left by their deceased husband—Attempted adoption of sister's son by a Brahman.

Possession of the estate left by their deceased husband was taken by two widows of a deceased Hindu, who, being childless, had, before his death adopted a son, to whom, also, by will, he bequeathed his estate. The adopted son died soon after the testator.

Held, that the widows had a possessory title or interest in the estate, notwithstanding that a preferable title might exist in others through the deceased legatee: also, the estate, being jointly held by them, was partible, and that either widow might maintain a suit for partition.

* 16 Cowell's Ind. Ap., 186 ; 12 All. 51.

The child whom the testator had purported to adopt was his sister's son. If it had been necessary to determine the point, their Lordships would, probably, have had little difficulty in accepting the opinion of the High Court that a Brahman cannot lawfully adopt his sister's son.

APPEAL from two decrees (12th June, 1885) of the High Court (1), reversing a decree (27th February, 1884) of the Subordinate Judge of Saharanpur, and dismissing the appellant's suit.

The principal matter now disputed was as to the right to possession and partition, between the plaintiff and defendant, of two widows of Baldeo Sahai, a Bohra Brahman proprietor of Muzaffarnagar, in the Saharanpur district. Baldeo, having, no child by either wife, adopted, in 1875, his sister's son, Premsukh, to whom he also bequeathed his estate. Baldeo died in 1878, the widows taking the management of his property and maintaining the minor adopted son, who died in the following year, 1879.

The widows' names were entered as joint proprietors of the village lands which had been Baldeo's, by orders of the revenue authorities of 3rd, 5th and 21st April, 1880.

On 15th May, 1883, Sunder, the junior widow, sued the elder, Parbati, for a decree for partition, and complete possession, of a half share in houses and land in Muzaffarnagar, for half of the income of certain shops in the town, for an equal share of the value of an elephant, and of other moveable property. The elder widow denied the plaintiff's right to separate possession, alleging that she herself, as the elder, was entitled to be manager of the whole estate, partition not being allowed.

The Subordinate Judge fixed issues as to the adoption, and as to the will: also as to the rights of the widows. He then found that Baldeo Sahai, being doubtful as to the sufficiency of the adoption of his nephew Premsukh, had made him his successor by will. This legatee died a minor, while the widows were in possession, managing the property, and their rights were not affected, whatever might be the claims of third parties, through the deceased, in consequence of the will in his favour. He decreed the claim, directing partition.

Appeals from both parties were heard by a Division Bench, (PETHERAM, C. J., and BRODHURST, J.) and the judgment is reported in I. L. R., 8 All. 1. The plaintiff's suit was dismissed without costs: the ground of the decision being that the widows could not maintain a suit founded on their possessory right to the property, not having obtained any possession in their own right as widows of Baldeo Sahai.

On this appeal,

Mr. *W. A. Raikes*, for the appellant, argued that the widow who claimed, being in possession, or joint possession, had, as a matter of right, a good title against all persons except the heirs of Premsukh, who had not come in to assert their title, and who, for aught that appeared, might not exist. She could maintain a suit for possession, when wrongly deprived of it, and her claim for separate possession, and for partition, as against the respondent, was equally valid. He referred to *Asher* v. *Whitlock* (1), *Pemraj Bhavanirám* v. *Narain Shivaram Khisti* (2) *Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar* (3). It was true that in the judgment of the Court below, the plaintiff's case was referred to as false, but this only implied "legally non-existent," as the context showed; and the facts had not been misrepresented. The contention was that the widow's right had a real existence, she having established that she had an actual interest, and sufficient possession as against the other widow. In the absence of any better title, proved against her, she had a valid claim.

The respondent did not appear.

(1) I. L. R., 8 All. 1.

(1) L. R., 1, Q. B. 1.
(2) I. L. R., 6 Bom., 215.
(3) I. L. R., 8 Bom., 371.

Their Lordships, having reserved judgment, it was afterwards delivered on 20th July by

THE RIGHT HON. LORD WATSON:—

In this case, the Subordinate Judge of Saharanpur and the High Court for the North-Western Provinces, though arriving at different results, did not differ as to the facts, which may be shortly stated.

The Appellant is the Junior and the Respondent the senior widow of Baldeo Sahai, a Hindu zemindar who died without issue in the year 1878. The deceased had formerly adopted a boy named Premsukh, who was his sister's son, and, possibly because he entertained doubts as to the validity of the adoption, he made a will on the 5th of July, 1875, by which, subject to provisions for the maintenance of his mother and of his widows, who are the parties to this suit, he bequeathed his whole estate of every description to Premsukh, "whom I have brought up and educated as my son from his infancy, and and have made my heir and successor."

Premsukh survived the testator, and died in minority and unmarried in December, 1879. On the death of Baldeo Sahai the two widows assumed the possession and management of his whole estate, moveable and immoveable, for behoof of his minor heir, and their names were put upon the register as being the mothers of Premsukh. After the death of Premsukh, as found by the Subordinate Judge, "they obtained possession of the zemindari estates and other immoveable and moveable properties, and they described themselves sometimes as the widows of Baldeo Sahai and sometimes as mothers of Premsukh." It is obvious that, if the adoption of Premsukh was not valid according to the principles of Hindu law, neither of the parties to this case could have any right of succession to him; and, on the assumption that he was legally adopted, it is equally clear that, the estates having passed to Premsukh under his adoptive father's will, they could not on his decease pass to the present litigants as widows of Baldeo Sahai.

No question is raised in this case with respect to the zemindari estates, which are registered in the joint names of the widows, the Respondent, as the senior, being lambardar. A dispute arose between them as to possession of the family residence, gold and silver ornaments, and other articles of value, which they submitted to arbitration, the result being that, on the 15th of July, 1880, the arbitrators issued an award, being in substance a decree of partition, in virtue of which each of the widows has since been in possession of her separate share of the subjects then in controversy. In consequence of fresh disagreements this suit was instituted by the appellant, in May, 1883, for partition and separate possession of house property, which does not form part of the zemindari, and also of certain moveable effects which were not included in the arbitration.

Of the issues framed by the Subordinate Judge, the only one which it is now necessary to consider is the sixth, which is in these terms.—"Has the plaintiff a right to have the property in dispute divided in equal shares as she claims?" The learned Judge answered that question in the affirmative, and gave the appellant a decree of partition, but his decision was reversed on appeal by the High Court for the North-Western Provinces, consisting of Petheram, C. J., and Brodhurst, J., who gave judgment dismissing the suit. The carefully framed and articulate decree of the Subordinate Judge does not appear to be in any respect erroneous, if the appellant has a right to insist upon partition being made.

The Subordinate Judge purposely abstained from expressing any opinion either as to the validity of the adoption of his sister's son by Baldeo Sahai, or as to the efficacy of his will to carry the estates to Premsukh, if not duly adopted, who in that case would not be an heir of the testator. He considered it unnecessary to determine either point until the estates are claimed by a kinsman of Premsukh's paternal line, or by a reversioner or collateral heir of Baldeo Sahai. He held that, in all questions *inter se*, both widows were estopped by their own previous acts and

admissions from alleging the invalidity of Premsukh's adoption; and, on that footing, their respective rights and interests being of precisely the same quality, he was of opinion that neither of them was in a position to resist a demand for partition. The Chief Justice, in whose judgment Brodhurst, J., substantially concurred, was of opinion that the adoption of his sister's son by Baldeo Sahai, who was admittedly a Brahman, was altogether invalid, the adoption of a child, whosemother he could not have lawfully married, being contrary to the text of the Mimansas, and also to a course of decisions in the Indian Courts. The Chief Justice then deals with the present appellant's alternative contention (which was the same with that submitted here) to the effect that, inasmuch as the widows "are in possession of the estate, they are competent to maintain a suit for the partition of the estate between themselves." He refers to the well known case of *Armory* v. *Delamirie*(1), where it was ruled that the finder of a jewel, though he does not acquire an absolute property or ownership, yet has such a property as will enable him to keep it against all but the rightful owner, and therefore to maintain trover; and also to the case of *Asher* v. *Whitlock*(2), in which it was held that a person in possession of land without other title has a devisable interest, and that the heir of his devisee can maintain ejectment against any person who has entered upon the land and cannot connect himself with some one having title or possession prior to the testator. The Chief Justice thus states the result of these authorities:—"Possession is a good title against all the world except the person who can shew a better title. By reason of his possession such person has an interest which can be sold or devised." But he thus proceeds to distinguish these cases from the present. "In this case" he says "there is nothing of the kind. Parties come and claim an estate to which they are not entitled. They set up a false claim. They have no estate in law which they could divide. To do so would be to recognise an illegal transaction, and we would be dividing an estate which has no legal existence."

If it were necessary to determine the point, their Lordships would probably have little difficulty in accepting the opinion of the High Court that a Hindu Brahmin cannot lawfully adopt his own sister's son. But apart from that question, and also from any question touching the legal effect of Baldeo Sahai's will, the fact of joint possession by the two widows of the estates which belonged to the testator, ever since the death of Premsukh in 1879, appears to them to be sufficient for disposing of this suit in favour of the appellant. Their Lordships are at a loss to understand, at all events to appreciate, the grounds upon which the Chief Justice endeavours to differentiate between the authorities which he cites, the import of which he correctly states, and the position of the parties to this action. Their possession was lawfully attained, in this sense, that it was not procured by force or fraud, but peaceably, no one interested opposing. In these circumstances, it does not admit of doubt that they are entitled to maintain their possession against all comers except the heirs of Premsukh or of Baldeo Sahai, one or other of whom (it is unnecessary to say which) is the only person who can plead a preferable title. But neither of these possible claimants is in the field, and the widows have therefore, each of them, an estate or interest in respect of her possession, which cannot be impaired by the circumstance that they may have ascribed their possession to one or more other titles which do not belong to them. It is impossible to hold that a joint estate is not also partible; and their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court ought to be reversed, and that of the Subordinate Judge restored. The respondent must pay the costs of this appeal.

Solicitors for appellant: Messrs *Barrow & Rogers.*

(1) Smith's L. C., 6th ed., 313.
(2) L. R., 1 Q. B. 1.

22nd June 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Lord Hobhouse, and the Right Hon. Sir Barnes Peacock.

MUNNALAL CHAODRI * } *One of the Defendants,*

and

GAJRAJ SINGH ... } *One of the Plaintiffs.*

On appeal from the Court of the Judicial Commissioner of the Central Provinces.

Decree—Construction of decree—Construction of order made by Settlement Officer awarding estate to a Hindu widow—Transfer by widow, Effect of.

The plaintiffs obtained a declaratory decree that they were the reversioners and heirs apparent, expectant on the future death of a widow who at the time of suit had survived two co-widows, and that they, the plaintiffs, would be entitled to inherit at her death the estate that had belonged to the deceased husband. All parties had proceeded, as far as to the present appeal, on the view that the surviving widow had the widow's estate only. But an order made in the course of the settlement operations in 1865 had conferred the estate of the deceased on the three widows as well as on his mother, in equal shares of one-fourth each.

Held, that there was nothing in this order to show an intention to give to the mother and widows anything more than an interest, such as that which a Hindu widow takes; and that the inheritance would devolve in due course of law, an alienation which the widow had made operating only for her life-time.

APPEAL from a decree (16th July 1886) of the Judicial Commissioner of the Central Provinces, dismissing an appeal from a decree (2nd January 1886) of the Commissioner of the Jabalpur Division, affirming a decree (7th September 1885) of the Deputy Commissioner of Mandla.

The suit out of which this appeal arose was brought by the respondent Thakur Gajraj Singh, together with his brother as co-plaintiff, on the 26th March 1885, claiming to have set aside a sale of the proprietary right in seventeen villages forming a taluka named Bamhni, in the tehsil and zilla Mandla. This sale, on 9th October 1882, had been executed by Mussammat Ganga, widow of a deceased Brahmin proprietor, Ratan Singh, to whom the taluka belonged, for the consideration of Rs. 8,000. The general question now was, whether in this suit, brought by the reversionary heirs, brothers of her late husband, against the widow and the purchaser, a decree had rightly limited the interest purchased to the widow's life.

The widow who sold was the survivor of three widows of Ratan Singh, who died on 23rd October 1883, leaving a mother, besides the three widows. On the 16th February 1864, the Settlement Officer, Mubarik Ali Khan, Superintendent, made the order as follows: "It is ordered that proprietary rights of mouza Bamhni Khas be conferred in equal shares of four-annas each on Mussammats Khema, Nanhi and Ganga, widows, and Mussammat Durga, mother of Ratan Singh; that a rubkar be issued to the Tehsildar, Mandla, for information; that the papers be sent to the office; and that orders be issued for the information of the proprietors."

Mussammat Ganga, the first defendant, admitted the plaintiffs' reversionary right; but the purchaser, Munnalal Chaodri, the second defendant, denied it, besides alleging that the sale was for the widow's necessary expenditure. Issues on both these latter points were found against him in the first Court, which decreed for the plaintiffs a decree which the Commissioner affirmed on appeal. A second appeal, to the Judicial Commissioner, was also dismissed.

The defendant Munnalal Chaodri on the 17th January 1887, applied for leave to appeal to Her Majesty in Council under s. 596, Civil Procedure Code. The value of the right of property involved was more than Rs. 10,000. In addition to the grounds of appeal, consisting of a re-statement of the matters alleged in his defence, the defendant then, for the first time, relied upon the effect of the order made

* 16 Cowell's, Ind. Ap. 205; 17 Calc., 246.

by the Settlement Officer on 16th February 1864, awarding equal shares of four-annas each to the three widows and the mother.

The Judicial Commissioner gave the following reasons for granting the certificate, which he did on the 12th April 1887 :—

"No doubt these questions are raised now for the first time, but there is nothing in s. 596 of Code of Civil Procedure to show that the substantial question of law, which the appeal must involve, is to be a question which has been raised and considered in the Courts in this country. The question must be involved in the appeal, that is to say, it must be relevant, and not merely a speculative question raised for the mere purpose of making the appeal admissible. It may be doubted whether the question, as to a co-widow's right to succeed, is relevant, because, in the present case, if it were decided that the next male reversioner should succeed, it would be necessary to decide the further question whether this finding of law would affect the rights of the plaintiffs, and to decide this further question certain issues of fact would have to be determined.

"The other ground of appeal is, I think, a substantial question of law ; only one witness's evidence was objected to, but possibly it might be held, if that evidence is inadmissible, that the finding of the Courts on the question of the respondent's relationship to the husband of the widows is unsustainable.

"The last three grounds of appeal were not pressed in this Court when the second appeal was heard, but I do not think this would bar the appellant from putting them forward as material questions of law.

"On the whole then, though with some hesitation, I consider that the appeal does involve a substantial question of law.

"The value of the property sued for is above the required amount, and I therefore grant the certificate asked for."

Mr. *F. W. Dillon* for the appellant.—In addition to the question of the evidence, upon which the lower Courts decided, there were two points: *First*, that as regards three-fourths of the property claimed, the decrees of the lower Courts, which were of a declaratory nature, could not stand, inasmuch as the respondent, if entitled to one at all, was entitled to claim consequential relief; in other words, to claim possession of the estate (s. 42 of Act I of 1877). *Secondly*, that as regards one-half of the property claimed, that portion which consisted of the shares of Mussammats, Durga and Nanhi, who died more than twelve years before the date of this suit, the respondent's claim was barred by time. The widows of Ratan Singh, not having acquired the estate from him, but as the result of an award from the Government in the Revenue Department, held, with the mother of Ratan Singh, a separate four-anna share each in the estate. Where such an award defined the shares, it would be inconsistent with the provisions of s. 87 of the Act XVIII of 1881 [the Central Provinces Land Revenue Act (1)] to allow one of those persons to claim under the Hindu Law a right which would conflict with the award. The sections contemplated that proprietary rights could, during the process of settlement in the area under it, only be awarded by the Executive, and that the Judicial Courts could not award them, except in so far as s. 88 might permit. It followed that the claim of the respondent, as that of the male heir next after the deceased, should have been at one time, for possession, not merely declaration of title, of all but the one-fourth share held therein by Mussammat Ganga, the sole survivor of the four grantees. Now, however, his claim would be barred as regards the two four-anna shares which had belonged to Durga and Nanhi. The appellant had acquired by purchase a title from Ganga based on her adverse possession of these two shares, besides her own, for a period of twelve years. Upon those grounds, if not upon the defence originally urged, it was submitted that the appeal should be allowed.

(1) Section 87 is as follows: "When a Settlement Officer or Settlement Court has, at any settlement made before this Act comes into force, made an award of proprietary rights in any land, all claims which, after consideration by such Officer or Court, may have been expressly decided by him or it to be invalid, or inferior to the claims of the persons in whose favour the award was made, shall be barred both as against the Government and as against the persons last-mentioned ; and no suit shall lie for the enforcement of such claims in any Civil Court.

"The award at any such settlement of proprietary rights in land to a widow shall be deemed to confer on her those rights only, which, in accordance with the personal law to which she is subject, she would enjoy in land inherited by her from her husband."

The respondent did not appear.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD HOBHOUSE.—

This appeal is raised on three grounds. The *first* is this: that the plaintiffs, who sue as the heirs of Ratan Singh, are not his heirs, or at least that the evidence, which proved that they are his heirs, ought not to have been admitted. Their Lordships consider that no objection has been shown to the admissibility of the evidence, and the matter, therefore, is concluded by the finding of the Commissioner, from whom no appeal upon facts lay to the Judicial Commissioner, whose decree is now under appeal.

The *second* ground is that legal necessity for the sale to the appellant ought to have been inferred by the Judge, the sale being by a person purporting to have a widow's estate. Their Lordships are of opinion that that also is concluded by the judgment of the Commissoner. They cannot hold, as a matter of law, that the things on which it is alleged that the money raised by the sale was spent constituted a legal necessity for the sale; and indeed it appears to them that the judgments of the Court below have gone upon the principle of examining the items which are alleged to have been spent on matters of necessity, and finding they have no connection with the sale. That therefore is a matter of fact which is concluded by the judgment of the Commissioner.

The *third* point is raised for the first time in these proceedings on the third appeal, and the fourth hearing of the cause All the parties have proceeded hitherto on the view that the widow of Ratan Singh, who effected the sale, had the widow's estate only; and therefore that, although the sale was perfectly good for her lifetime, it was not good for any period beyond her life, unless legal necessity for the sale could be shown. Acting upon that view, the Courts below have given the plaintiffs a declaratory decree that they are the reversioners and heirs apparent expectant on the widow's death. But it is now said that this widow, Ganga, had something different from the widow's estate; that the effect of an order of the Settlement Officer in the month of July 1865 was not to give the three widows, who then were living, the widow's estate, but it was an order effecting a partition of the family, and giving one-fourth in absolute proprietorship to each of the three widows, and the remaining share to the mother of the deceased Ratan Singh. There may be words in this order about which there is some ambiguity, but reading the order as a whole their Lordships cannot doubt that the Settlement Officer took Ratan Singh as being the Proprietor of the estate, and took the estate as having passed to his heirs upon his death. Why he attributed a fourth to the mother of Ratan Singh does not appear, but no doubt she was entitled to maintenance; and it may have been that the state of things before him at that time led him to believe that it would be a proper way of dealing with the estate to give each of the four who had claims upon it the enjoyment of one-fourth of the estate. That may be so; but their Lordships cannot find upon the face of this order any intention to give to the mother and widows between them anything more than an interest in the widow's estate.

The consequence is that Ganga, having survived the rest, takes the whole of the widows' estate in the whole of the property, and the inheritance is left to devolve as it may devolve by course of law. The present heirs apparent are the plaintiffs, and therefore they are entitled to decree.

The result is that the appeal must be dismissed. There will be no costs, as the respondent has not put in an appearance.

Appeal dismissed.

Solicitors for appellant: Messrs. *T. L. Wilson & Co.*

16th and 17th July 1889.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Lord Watson, the Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

PUTHIA KOVILAKATH KRISHNAN RAJA AVERGAL } **Defendant,*

and

PUTHIA KOVILAKATH SRI-DEVI AND OTHERS } *Plaintiffs.*

On Appeal from the High Court at Madras.

Concurrence of Lower Courts in findings upon questions of fact—Agreement for division of family property in equal shares—Malabar custom.

Two Courts in concurrence found that there had been an agreement between two parties, interested in a family fund, that it should be divided into equal fourth parts among the four branches of the family, but that an unequal division, made under a decree, had resulted from unfair dealing. To contest, upon this appeal, those findings of fact, nothing was stated to make it appear to the Committee that, if they went through the whole of the evidence, they would differ from the Courts below on anything but questions of pure fact. Accordingly, their Lordships were of opinion that the case fell within the rule which makes appellate tribunals reluctant to interfere, and in most cases makes them refuse to interfere, with concurrent findings of the Courts below.

APPEAL from a decree (23rd March 1885) of the High Court, affirming a decree (3rd April 1884) of the Subordinate Judge of South Malabar.

The suit out of which this appeal arose was brought by the respondents against the appellant for Rs. 37,633, with interest, calculated from the 19th January 1881, as money received by the defendant on that date on behalf of the plaintiffs, having been paid by the Official Trustee as part of a one-fourth share of joint property to which the plaintiffs were entitled. They alleged that the defendant having received the whole of their share had paid over only part, improperly retaining the balance now claimed.

The defence was that according to an agreement for partition contained in a razinama filed in a suit in which a decree was made by the High Court, the plaintiffs were entitled to no more than the sum which they had received. The plaintiffs and defendant were members of a family of zamorins, or rajas, at Calicut, comprising three "kovilakams," or houses, and the parties belonged to the first of these called the Puthia Kovilakam. They were governed by the Marumakatayam law of inheritance, under which descent is traced in the female line, a person's heirs being the children of his sisters. Each kovilakam, or house, had its separate estate, and the senior female representative of each, known as the Valia Thamburatti of such kovilakam, was entitled to the management of the property belonging to it. There were also five stations, or places of dignity, known as stanoms, to which separate property was attached, and these belonged to the senior male members of the kovilakams in succession as explained in *Vira Rayen* v. *Valia Rani of Pudia Kovilakam* (1). The fund, of which the partition led to the present litigation, consisting of jewels, and money of the value of Rs. 4,77,996, constituted the bulk of the joint estate of the Puthia Kovilakam, and was derived from a zamorin, who died in 1845. The mother of the first and second of these respondents, and grandmother of the third, was the Valia Thamburatti of the Puthia house, and manager. She, being anxious for the safety of the fund, made it over for safe keeping to the Collector of South Malabar, and then at his request to the Official Trustee at Madras.

The first branch, dissatisfied at this, in September 1879, sued the Official Trustee and the Valia Thamburatti, claiming to have the right of that branch to one moiety of the fund declared, as being the descendants of one of the two sisters,

* I. L. R., 12 Mad., 512.

(1) I. L. R., 3 Mad., 141.

whom they declared to have been the donees in 1845.

The Valia Thamburatti in her defence denied their right to interfere with her management. But while matters so stood, a compromise was entered into among the four branches of the family at Calicut. By this it was agreed that the fund in question should be divided into four equal parts, each branch taking one, and to carry this out, an authority to a vakil at Madras was signed at Calicut, to have four persons (parties afterwards to the present suit) made defendants to the then pending suit, and to have it disposed of and partition made. The result was that there was executed at Madras the razinama, which the present suit alleged to be fraudulent, by reason of its arranging, without due consent, and contrary to the subsisting understanding, that the moiety of the fund should be unequally divided between the two of the parties, one of whom represented, without due authority, the present respondents. On the 5th May 1880 the razinama was filed, and a decree made by consent; the present appellant receiving the moiety of the fund now in question from the Official Trustee on the 19th January 1881.

In the present suit the issues raised between the parties were as to the validity of the razinama, and the decree founded thereon, and also as to the limitation.

The Courts below concurred in finding that the agreement in question was for the equal division into four parts, and that the razinama of 1880 was in violation of that agreement, and the result of fraud; so th t the decree which followed it was not binding on the respondents. The Courts below also concurred in holding that the plaintiff's suit was not barred by limitation, whether it were regarded as a suit to recover money received to their use, and improperly retained, or for relief on the ground of fraud, inasmuch as the suit was brought within three years of the fraud in question becoming known to these respondents.

Mr. *J. D. Mayne*, for the appellant, argued that there were grounds for doubting the correctness of the finding of the Courts below. (Their Lordships referred to *Venkateswara Iyan* v. *Shekhari Varma* (1), where they interfered with concurrent dicisions, but pointed out that in that case the question raised was one dependent on the admissibility of subordinate facts and the construction of documents). He took, *seriatim*, the grounds mentioned in the Original Court for its decision, and contended that on important points the Court was in error. (Their Lordships also referred to *Pauliem Valloo Chetty* v. *Pauliem Sooryah Chetty* (2), where concurrent judgments on fact were allowed to be disputed, but they distinguished the present case). The whole evidence showed that the plaintiffs left their interests in the hands of the Valia Thamburatti, the legal manager of their estate, and there was nothing establishing fraud in the razinama of 1880 (3.)

Mr. *T. H. Cowie, Q. C.*, and Mr. *R. V. Doyne*, for the respondents, were not called upon. Their Lordships' judgment was delivered by

THE RIGHT HON. LORD HOBHOUSE.—

Their Lordships consider that this case is concluded by the findings of the Courts in India. So far as regards the merits of the case, two questions are raised: first, whether there was an agreement between the parties interested in the fund which is the matter in dispute, that it should be divided into equal fourth parts among the four branches of the family; and, secondly, whether the unequal division, which actually took place and which was affirmed by the decree of the Court, was due to underhand or foul play. On the first point the Subordinate Judge finds that there was an agreement for equal division, and he finds that on the ground of oral evidence

(1) L. R., 8 I. A., 143; I. L. R., 3 Mad., 385.
(2) L. R., 4 I. A., 109; I. L. R., 1 Mad., 252.
(3) The cases reported in Moore's I. A., in which the concurrence of two Courts upon fact has been adverted to, are given in a list under the title "Practice," in the Digest of the Moore's I. A., Ca. made by the late H. J. Tarrant, Esq, in 1874, see pp. 242, 250, 251 and 258.

which he believed. It is quite true that in assigning reasons for preferring that evidence to evidence given the contrary way, he relies upon some documents which are contemporary, or nearly contemporary, with the transaction, showing that letters were written or instructions given by other branches of the family in terms which point to the division of the property in equal fourths, and one of which refers to similar documents written on behalf of all the branches of the family. Then it is stated by the defendant that there were letters and papers containing instructions which warranted the actual transaction that was carried out, and the actual division of the money, but none of those letters or papers are forthcoming, and the mention of them and their disappearance does not benefit the case of the defendant. Those are the reasons assigned by the Subordinate Judge for preferring the evidence which affirms an agreement for equal division into fourths. Whatever his reasons are, the question remains one of pure fact. The two Courts have found the same way on that question of fact. Nothing is stated to make their Lordships conclude that if they went through the whole of the evidence, and differed from the Courts below, they would differ from them on anything but questions of pure fact. Therefore the case clearly falls within that wholesome rule which makes appellate tribunals reluctant to interfere, and in most cases makes them refuse to interfere, with concurrent findings of the Courts below. Their Lordships think they would be making a departure from that principle if they were to allow this evidence to be canvassed for the purpose of reversing the decision.

The same thing may be said with respect to the second question of dishonesty or foul play. It all resolves itself into a question of credit due to the witnesses, and their Lordships have the same reluctance to interfere with the findings of the Court on that question. So far as to the merits of the case.

Then a defence is raised on the ground of bar by lapse of time; and it is said that the case falls within article 95 of Act XV of 1877. That article provides that a suit to set aside a decree obtained by fraud, or for other relief on the ground of fraud, must be brought within three years from the time when the fraud becomes known to the party wronged. Whether the case does fall within that article or not is a question in controversy, but, their Lordships will treat it for the sake of this judgment as falling within that article, that being the ground which is most favourable to the appellant's case. Then the question arises, when did the fraud become known to the plaintiffs in this suit? That again is a question of pure fact. Both Courts have found that there is no evidence that the fraud became known before the month of December 1880. It is doubtful whether it became known so early, but that is sufficient. The plaintiffs swear, and are believed when they swear, that they did not know of the fraud within the statutory time; and as they have given as much evidence of a negative as people can be expected to give, it was for the defendant to come forward and show something which might carry the knowledge home to them. He has not done it. That issue is found against him, and upon those findings their Lordships think that the Court was right in holding that, even if the case falls within article 95, the plea of limitation is not proved.

The result is that the appeal fails, and should be dismissed with costs, and their Lordships will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitors for the appellant—*Lawford, Waterhouse and Lawford.*

Solicitors for the respondent—*Burton, Yeates, Hart, and Burton.*

17th and 18th July 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

HAIDAR ALI KHAN* ... *Plaintiff,*

and

NAWAB ALI KHAN AND (BY REVIVOR) NAUSHAD ALI KHAN ... *Defendants.*

On appeal from the Court of the Judicial Commissioner of Oudh.

Oudh Estates Act (1 of 1869), s. 3—Effect of sanad to confer proprietary right on a talukdar, not being a trustee—Claim to under-proprietary right against talukdar distinguished, and not concluded by a decree for the former right in his favour.

Unless a talukdar, who holds such a sanad as is referred to in the Oudh Estates Act I of 1869, has agreed in some way, or has otherwise become legally bound, to hold the estate comprised in the sanad, or some part of it, in trust for another person, the principle on which *Sookraj Koowar* v. *Government* (1) and *Hardeo Baksh* v. *Jowhir Singh* (2) were decided is not applicable to make the talukdar hold subject to a charge for the benefit of such other person.

The talukdar in whom no such trust is vested is entitled to the proprietary right in the lands forming the talukdari estate comprised in the sanad.

A claim against the talukdar for the proprietary right included lands in which the claimant alleged himself to have purchased under-proprietary rights which were not claimed. A decree, maintaining the talukdar's proprietary right, was made without prejudice to a claim for the under-proprietary rights.

APPEAL from a decree (10th June 1885) of the Judicial Commissioner of Oudh, affirming a decree (14th March 1884) of the District Judge of Lucknow.

The suit out of which this appeal arose was brought by the plaintiff to obtain proprietary possession of villages in the Bara Banki district, of which the greater part was comprised in a talukdari sanad, dated 1st October 1860, granted by the government to the plaintiff's brother, father of the defendant, who succeeded as talukdar in 1875. Part of the claim also was for villages in which the plaintiff alleged that he had purchased the under-proprietary rights. And the principal question raised by this appeal was as to the correctness of the concurrent judgments of the Courts below, which maintained the sole proprietary right of the defendant as talukdar, in virtue of the sanad confirmed as it had been by the effect of s. 3 of the Oudh Estates Act I of 1869. A further question related to the under-proprietary rights.

The plaintiff was the third son of Lutf Ali Khan, who died more than fifty years before this suit, leaving four other sons. The second son, Mardan Ali, deceased on the 16th August 1875, was father of the original defendant on this record, Nawab Ali, who died after this appeal had been filed. A certificate (16th October 1888) certifying his death, and the relationship of Naushad Ali, his minor son, was sent by the Judicial Commissioner to the Registrar, and by their Lordships' order of revivor (19th February 1889) Naushad Ali was brought on to the record, being represented by the Court of Wards through the Deputy Commissioner of Bara Banki.

Nawab Ali executed the kabuliyat on the 25th November 1858, and on the 25th October 1860 he received a sanad granted by the Chief Commissioner in the form then granted to the Oudh talukdars (1). This recited that, by the Proclamation of 15th March 1858, all proprietary rights in the soil of Oudh (with the exception of land lying in especial localities) were confiscated and vested in the British Government, which was empowered to make transfers at its will. Wherefore the Chief Commissioner, acting under autho-

* 16 Cowell's Ind. Ap. 183 ; 17 Calc., 311.

(1) 14 Moore's I. A., 112 ; 2 P. C. J, 507.

(2) L. R., 6 I. A., 161 ; 4 P. C. J., 10.

(1) A similar sanad is set forth at length in *Thakur Shere Bahadur Singh* v. *Thakurain Dariao Singh* (1. L. R., 3 Calc., 649).

rity vested in him by the Governor-General in Council, thereby granted and conferred on Nawab Ali Khan the entire proprietary right in, and possession over, the estate of Maila Raeganj in Daryabad, *viz.*, the villages entered in the kabuliyat executed by him, and to his heirs in perpetuity, subject to paying the annual revenue which might be fixed from time to time and to other terms specified.

Nawab Ali Khan had previously, on 12th July 1860, made application that "the integrity of his estate," conferred on him in proprietary right by the British Government heritable from generation to generation, should be maintained in accordance with the practice obtaining in a raj or gaddi without its being allowed to be divided into shares. And the sanad contained the following clause:—"One of the terms of this sanad is this, that if the original proprietor or any of his successors die intestate, his whole estate shall devolve on his male issue, *viz.*, the sons and nephews, &c., in the order of succession in accordance with the system of raj or gaddi." Comprised in the sanad were eight villages in perganna Bado Sarai and six in Daryabad. Nawab Ali Khan was then about eighteen years of age, and his father and uncles were all living. The taluk was afterwards included in list 2 of the lists prepared in accordance with the Oudh Estates Act I of 1869, s. 8.

The estates claimed were shown by four schedules appended to the plaint and marked A, B, C and D.

Schedule A comprised the ancestral property in three villages, of which the first, Maila Raeganj, gave its name to the taluk.

Schedule B comprised certain villages, or divisions of villages, which were acquired while the defendant was a minor and were included in the sanad. These the plaintiff alleged to have been acquired in the first instance by himself.

Schedule C comprised certain under-proprietary rights in small holdings which were said to have been acquired by the plaintiff himself, after the grant of the sanad, at dates varying from December 1874 to April 1876, from under-proprietors and village zemindars within the taluk.

Schedule D comprised sir land lying in different villages within the taluk, and alleged to belong to the plaintiff, as other sir land had belonged to Sahib Ali, the eldest of Lutf Ali's sons, and to Tassadduck Rasul, brother of the defendant, and to Inayet Ali, the third son of Lutf Ali.

The plaintiff's claim was based on statements in the plaint to this effect, *viz.*, that with the exception of the late Raja Farzand Ali, who being talukdar of Jehangirabad, did not care for assistance from the ancestral estate, all the other sons of Lutf Ali, including Mardan Ali, the defendant's father, were allowed sir land as detailed in schedule D; and that the plaintiff had full control over all the remaining estate, which was in his proprietary possession, according to the clauses 1, 3 and 12 in the wajib-ul-arz of village Maila Raeganj. This possession continued during the lives of the Raja and of Mardan Ali, the defendant remaining satisfied with his forty-three bighas of sir land mentioned in schedule D, but that after the deaths of his father and his uncle, Raja Farzand Ali, which latter took place on the 30th November 1880, the defendant sought to disturb the plaintiff's previous long possession, and applied on the 8th of January 1881 to the Magistrate, who maintained the plaintiff's possession under s. 530 of the Code of the Criminal Procedure; that the Magistrate's order was set aside for certain irregularities by the Judicial Commissioner on the 9th June 1881; and that the defendant ousted the plaintiff from not only his possession of the lands of the taluk (*i e.*, from the lands of schedules A and B), including, with a small exception, the plaintiff's sir lands within the taluk, but also from his under-proprietary rights acquired by him by purchase in the lands of schedule C.

The plaintiff claimed (1) that a decree for possession of the entire area of th ancestral property entered in schedule A of the plaint be made, excepting the sir

land forty-three bighas held by the sons of Mardan Ali on payment of revenue; and that it be declared that the rent-free sir land entered in schedule D was, according to old usage, a compensation for the malikana or percentage due on account of superior right to the defendant as kabuliyatdar; (2) that a decree for proprietary possesion of the entire area of the acquired property entered in schedule B be made in favour of the plaintiff; in whose favour also (3) a decree for full proprietary right in the estates and interests entered in schedule C should be made.

The grounds of defence appear from the issues, which were, *first*, whether the suit was barred either by the sanad or by the Oudh Estates Act I of 1869, and how the claim was affected by the Oudh Sub-settlement Act XXVI of 1866; *secondly*, as to the land comprised in schedule A, whether or not the plaintiff was entitled to it in right of inheritance; *thirdly*, whether he was entitled to the land in B and C, by reason of his having acquired it; *fourthly*, whether he was in possession till June 1881; and *fifthly*, "was defendant's name entered in the Government papers as owner, by consent of plaintiff, as *ism farzi?*"

At the hearing the plaintiff relied on clauses in the wajib-ul-arz of Maila Raeganj, the principal village in the taluk, as containing admissions of his beneficial interest. The District Judge found against him on the fifth issue; also expressing in the judgment an opinion that the wajib-ul-arz, as well as the correspondence and the evidence generally, contained nothing to show that by agreement or by his conduct the talukdar had constituted himself a trustee as to any part of the estate claimed.

On the plaintiff's appeal the following judgment was given by the Additional Judicial Commissioner, Mr. T. B. Tracy:—

"In appeal, Mr. Thomas contends that, at the regular settlement in 1870, the titular talukdar admitted in the village administration paper, or wajib-ul-arz, the possession and proprietary right of Sheikh Haidar Ali. Further, that the evidence on the record proved Haidar Ali's possession of the estate, and that there was nothing to show that Haidar Ali or his son Mansab Ali were merely agents for the talukdar.

"For the defendant his pleader contended that the real owner of the estate was Mardan Ali, the father of the defendant, who caused his son to be recorded as proprietor. It was further pointed out that, under s. 10, Act I of 1869, the defendant as sanad-holder had acquired an indefeasible title to the estate; that the suit was to recover possession of the taluka and not to establish that the defendant held it or any part of it in trust for the plaintiff; that the preparation of the wajib-ul-arz by the defendant was a clear indication of proprietary right; and that in this very paper, the plaintiff, as uncle of the talukdar, was recorded as holding some sir land for his maintenance.

"To this it was replied that the suit was not for the cancellation of the defendant's talukdari sanad, but for a return to the *status quo ante*, that is, for the restoration to possession of the plaintiff as rightful owner of the estate; that in accordance with numerous judgments of the Privy Council the suit was not barred.

"It appears to me that the present suit is distinguishable from *Ramanund Kunwar* v. *Raghonath Kunwar* (1), and the other cases referred to in the judgment therein. In these suits the title of the talukdar as legal owner of the estate was admitted, but it was sought to establish that he had, by express agreement or by his conduct, constituted himself a trustee for others as to the whole or part of the beneficial interest in the land the subject of the sanad. The present suit is practically and substantially for a declaration that no estate had in fact been conferred by Government on the talukdar, and that the entire transaction was a mere fiction. I do not think that the confiscation, restoration and subsequent

(1) 8 Calc., 769; L. R., 9 I. A., 41; 4 P. C. J., 316.

grant of the estate can be viewed in this light. It must, I think, be held that the sanad gave the defendant the absolutely legal title to the estate against adverse claimants.

"It remains to be decided whether the defendant has subsequently, either by express agreement or by his conduct, constituted himself trustee for the plaintiff.

"The District Judge has found that the wajib-ul-arz, as prepared at the settlement of 1870, 'must be taken to be a correct and a genuine record of the rights of the parties, but neither in that document nor elsewhere can I find any evidence of any agreement that in the record of rights, one name should be substituted for another as a fictitious transaction by way of trust. I can nowhere find that defendant has invariably admitted plaintiff's possession as proprietor over the estate.' In this finding I concur. The passages in paras. 1, 3, and 12 of the wajib-ul-arz on which the plaintiff relies are manifestly insufficient. The passage in para. 1 is as follows:—'During the possession of the present talukdar other pattis acquired by Haidar Ali, uncle of the talukdar, by virtue of transfer were included.' Paragraph 3 begins as follows:—Haidar Ali, the talukdar's uncle, has the power of proprietor in respect of arranging for cultivation, collection of rent and abatement and enhancement thereof, and for reclaiming waste land. Paragraph 12 merely declares that, as a member of the talukdar family, Haider Ali holds some *sir* for his maintenance in accordance with the usual custom. There is nothing in all this inconsistent with the finding of the District Judge that as a fact, Sheikh Mardan Ali, and after him his son, the defendant, managed the estate through Mansab Ali, the son of Haidar Ali, who is the prime mover in the present case, his father, the ostensible plaintiff, being an old man on the verge of imbecility.

"As to the wajib-ul-arz, I find that it contains no admission by the defendant that this title is fictitous, and that his uncle was the rightful owner of the estate. Apart from this, if, as the plaintiff alleges, he was all along in proprietary possesion of the estate and the defendant was merely titular talukdar, what becomes of his claim to be the *cestue que trust* of the latter?

"There is no good evidence that the plaintiff was ever in possession of the estate as proprietor, either before or after annexation. There is, on the other hand, ample evidence on the record that the estate was managed on behalf of Sheikh Mardan Ali and his son Nawab Ali by Mansab Ali. This is abundantly proved by the numerous letters which the Judge has found to have been written by Mansab Ali to his uncle Mardan Ali, making reports as to the management and asking for orders. The plaintiff has, in my judgment, failed to prove his case, which is from the outset improbable. It does not appear why he should have a better title to the estate than his elder brother Mardan Ali. In the next place, supposing him to have acquired possession under native rule to the exclusion of his elder brother, what motive could he have had for making his nephew the *ism farzi* proprietor in preference to one of his own sons? Why did he not assert his claim when the summary settlements were made with Nawab Ali Khan, or when the estate was conferred on him by Government?

"The oral evidence as to the possession of the estate before 1881 is conflicting. I am, however, of opinion that, taking one part of the case with the other, the weight of evidence goes to prove that Haidar Ali and his son Mansab Ali managed the estate on behalf of the talukdar. As members of the family they were allowed extensive powers, and were not called to a very strict account in respect of their collections. Nawab Ali Khan was an absentee, and appears to have lived for the most part with his uncle, the late Raja Farzand Ali Khan, the wealthy Talukdar of Jehangirabad. I do not think that any weight can be given to the evidence in this case of Tassadduck Rasul (Nawab Ali Khan's brother and the present Talukdar of Jehangirabad). The brothers are at enmity in consequences of the bequest by Raja Farzand Ali Khan of his estate to Tassadduck Rasul. The finding of the

District Judge, though professing merely to decide the fifth issue, practically decides that Haidar Ali did not enjoy proprietary possession till 20th June 1881 (4th issue).

"I find that the plaintiff-appellant has failed to make good his claim to any part of the property in suit, and I accordingly dismiss the appeal with costs."

On the plaintiff's appeal,

Mr. *R. V. Doyne* for the appellant.—The settlement made in 1260 Fasli, corresponding to 1853 A. D., in the name of Nawab Ali Khan, then aged only nine or ten years, was no recognition of his exclusive right but only the result of family arrangement. Actually at that time the son had no right, as his father, Mardan Ali, was then alive. The nephew's name was recorded as the ostensible proprietor, the uncle remaining in possession. The just inference was that the name was used by an arrangement common in troubled times. The question then arose, what were the rights of the relations of a talukdar, their rights not being expressed, in a sanad granted to the latter alone? It was submitted that this appellant's right to the proprietary interest in the lands forming the taluk of Raeganj, which he was admitted by the wajib-ul-arz of 1870 to have then possessed (lands of which the appellant retained possession till ousted by Nawab Ali Khan in June 1881), should have been declared. His rights were not those of a karinda or manager. It was not that the plaintiff alleged the sanad to be fictitious. What was meant was that the boy's name was used "*benami*," to which the expression "*ism farzi*" corresponded; and what was alleged was that the existence of the plaintiffs interest in and title to the family estate having been established, the defendant should have been held to be in the position of a trustee. He could be held to be in that position on the principle recognized in *Hardeo Baksh* v. *Jowahir Singh* (1), *Sookraj Koowar* v. *Government* (2), and *The Widow of Sunkersahai* v. *Raja Kishn Pershad* (3). The plaintiff at all events should have been declared entitled to possession of his portion of the sir lands comprised in the taluk; and no case had been suggested for excluding the plaintiff from the under-proprietary rights detailed in schedule C of the plaint. Reference was made to *Gouri Shunker* v. *The Maharaja of Bulrampore* (4), *Shere Bahadur Singh* v. *Daraioa Kuar* (5), *Ramanund Kuar* v. *Raghunath Kuar* (6).

Mr. *T. H. Cowie, Q.C.*, and Mr. *J. H. A. Branson*, for the respondent, argued that the claim of the plaintiff, being against the sanad of 25th October 1860, could not be sustained. Neither the wajib-ul-arz, nor any other evidence in the suit, established the title of the plaintiff as proprietor, and he had failed to prove his case There was no ground for the recognition of a trust; and neither by the defendant's acts nor conduct, nor by express nor by implied agreement, had he rendered himself a trustee.

Mr *R. V. Doyne* replied.

(1) L. R. 4 I. A., 178; I. L. R., 3 Calc., 522; L. R., 6 I. A., 161.—As the Indian Law Reports contain no report at the final judgment in *Hardeo Baksh* v. *Jowhir Singh*, in which the first judgment (9th June 1877) is reported (I. L. R., 3 Calc., 522), the result is here stated. On the remand, the Commissioner of Sitapur found as a fact that, during the period between Lord Canning's proclamation of confiscation in 1858 and the commencement of the disputes between the parties, there had been a joint interest in, and a common management of, the talukdari estates by the parties. Upon this the final judgment (1st March 1879) was that such an interest could not have existed unless the talukdar had consented that the property should be held as the joint estate of the family; and that there were grounds for presuming that it was the intention of the talukdar that the villages included in the summary settlement with him, and sanad granted to him, should be held by him in trust for the joint family as joint family estate, subject to the law of the Mitakshara; and the appeal being allowed, it was declared that he so held the villages in suit.—See *Pirthi Pal* v. *Jowahir Singh* (I. L. R., 14 Calc., 493, at p. 495).

(2) 14 Moore's I. A., 112; 2 P. C. J. 507.

(3) L. R., 4 I. A., 198; L.R., I. A., Sup. Vol. 220; 3 P. C. J., 289.

(4) I. L. R., 4 Calc., 839.

(5) I. L. R., 3 Calc., 645.

(6) 8 Calc., 769; L. R., 9 I. A., 41; 4 P. C. J., 316.

Their Lordships' judgment was delivered by—

THE RIGHT HON. SIR BARNES PEACOCK.—

Their Lordships are of opinion that the decree of the Judicial Commissioner ought to be affirmed.

There is nothing in this case to show that the defendant, by any agreement or by any arrangement or other means, became clothed with any trust as regards the lands included in the sanad. The case, therefore, does not fall within the decisions of *Sookraj Koomar* v. *Government* (1), or the case of *Hardeo Baksh* (2). The defendant is therefore entitled, as proprietor, to the lands included in the sanad.

A question has been raised with regard to the lands included in schedule C. As to those the plaintiff has claimed a proprietary right. If he had claimed a sub-proprietary right, the defendant might have given evidence to shew that he was not entitled to any such right. Their Lordships, however, think that, in affirming the decree, it ought to be without prejudice to any claim which the plaintiff may have to under-proprietary rights in respect of the property included in schedule C.

Their Lordships will humbly advise Her Majesty to this effect, and that the appeal should be dismissed.

The appellant must pay the costs of it.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Barrow & Rogers.*

Solicitors for the respondent: Messrs. *Watkins & Lattey.*

(1) 14 Moore's I. A., 112; 2 P. C. J., 112.
(2) L. R., 6 I. A., 161; 4 P. C. J., 10.

18th and 20th July 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

MUNGNIRAM MARWARI AND ANOTHER } *Defendants,*

and

GURSAHAI NAND ... *Plaintiff,*

LIAKUT HOSSEIN ... *Defendant,*

and

GURSAHAI NAND ... *Plaintiff.*

On appeal from the High Court in Bengal.

Act XL of 1858, s. 3—Order granting certificate to act as gurdian of minor —Obtaining a certificate—Majority Act (IX of 1875.)

When a Court, to which application has been made under s. 3 of Act XL of 1858 for a certificate, has adjudged the applicant entitled to have one, he then substantially obtains it; although it may not be drawn up or issued at the time. Having obtained such an order, he has in substance complied with terms of the Act; in the same way as, when a plaintiff has judgment that he shall have a decree in his suit, it may be said that he has then obtained his decree. Therefore, where a minor had been represented in a suit by a person who had obtained an order for a certificate under s. 3, but had not had it issued to him, the absence of a certificate was held to be not such an irregularity as entitled the minor, on coming of age, to have the proceedings set aside on the ground that he had not been properly represented.

Two appeals from two decrees (22nd February 1886) (1) of the High Court, reversing two decrees (31st March 1884) of the Subordinate Judge of Bhagulpore.

The present respondent brought two suits severally against each of the present appellants, in respect of separate parts of an

* 16 Cowell's Ind. Ap., 195; 17 Calc., 347.
(1) *Sahai Nand* v. *Mungniram Marwari*, I. L. R., 12 Calc., 542.

estate which had been sold in execution of a decree obtained against the plaintiff, now respondent, during his minority. The plaintiff's ground of suit in each case was that in the suit so brought against him when a minor, which had resulted in the sale of the several portions of the estate now sought to be recovered, he had not been represented by a properly constituted guardian. He also alleged that the lands sold were debutter, or devoted to religious purposes, and were not liable to be attached in satisfaction of the decree against him.

The Subordinate Judge found that the suits had not been brought in due time, and dismissed both on the ground of limitation. On appeals preferred by the plaintiff to the High Court both decrees were affirmed by the first judgment of the Court. But afterwards reviews having been admitted, both the original decrees were reversed by another Division Bench.

Hence these appeals, in both of which the principal question was whether or not the proceedings, which resulted in the sale complained of, were wholly ineffectual, on the ground of the defendant in the primary suit having been a minor unrepresented by a properly-constituted guardian. The appeals were not conselidated by any order, but both raising the same point were heard together.

The lands, attached in execution of the decree in the primary suit, originally belonged to the Mohunts, whom Gursahai Nand, the plaintiff in this suit, had succeeded. This property was said to have been granted to them in the last century, as "Sheottur," meaning, according to the evidence, what is granted to Sunniyasi Fakirs.

On the 22nd February 1873, the plaintiff's predecessor Hurri Pershad, described as Mohunt and proprietor of Math Bela Sheottur, mortgaged Mouzas Bela and Bichawan, with other land, to the first appellant Mungniram Marwari, as security for a loan of Rs. 4,000, and afterwards in March 1875 created a further charge upon it, as security for a further loan of Rs. 500 from the same lender. On the 28th September 1875, Hurri Pershad, by an instrument of that date, appointed Gursahai Nand to be his successor as Mohunt,and to take all his properties includiug these two mouzas.

On the 24th November 1875, Gossain Jitlal Nand petitioned the District Courts, stating that Hurri Pershad had died, to grant him a certificate of guardianship of Gursahai, who was a minor, under Act XL of 1858. The order for a certificate was made on that date, but no certificate was ever issued.

On the 24th March 1876, Mungniram Marwari instituted a suit, called the primary suit in this appeal, to enforce his mortgages, describing Gursahai Nand as a minor, also as "heir and disciple of Hurri Pershad deceased under the guardianship of his uncle Jitlal Nand;" and on the latter summons was served; but he did not appear to defend.

On the 16th January 1877, an *ex parte* decree was made in favour of Mungniram, ordering the sale of the property mortgaged. Under this, at a judicial sale, Mungniram himself purchased Mouza Bela; and Syed Liakut Hossein, the defendant in the other suit, purchased Mouza Bichwa.

On the 18th August 1882, Gursahai brought the two suits out of which this appeal arose. In one he sued Mungniram Marwari in respect of Mouza Bela, and in the other he sued Syed Liakut Hossein in respect of Mouza Bichwa. The case made out by his plaints was that he, as heir and successor to Hurri Pershad, was entitled to hold the property in dispute as debutter, or property dedicated to sacred and charitable purposes; that it could not have been lawfully seized in execution of a decree against Hurri Pershad upon the bonds of 1873 and 1875; and that the decree of 16th January 1877, obtained against himself, was invalid and ineffectual, inasmuch as he was not properly represented by any guardian in that suit.

The defendants by their written statements denied that the property in dispute was debutter, and asserted that it was property which Hurri Pershad could have disposed of at pleasure, and which was

liable to be taken in execution for his debts. They alleged that the plaintiff was properly represented by Jitlal Nand as his guardian in the primary suit; also that he was twenty-five years of age, and not twenty-one as he stated, and that his suit, being in effect to set aside a decree made against him when a minor, was barred by limitation.

The suits having been dismissed by the Subordinate Judge upon this last ground of defence, and the plaintiff having appealed in both, the only point with which the High Court (Tottenham and Agnew, JJ.) dealt was whether the plaintiff had been properly represented in the primary suit. After quoting s. 3 of Act XL of 1858, they proceeded thus:—

"It has been frequently decided that a person who claims to have charge of property in trust for a minor, cannot act for him in a suit unless he has been appointed guardian *ad litem* under the provisions of the Civil Procedure Code, or holds a certificate under Act XL of 1858, except where the property is small and the person claiming to act is a relative, when the Court may grant permission. In all the cases to which we have referred, with the exception of *Aukhil Chunder* v. *Tripoora Soonduree* (1), and *Chunee Mul Johary* v. *Brojo Nath Roy Chowdhry* (2), the person who claimed to act had not taken any steps to obtain a certificate or to be appointed guardian *ad litem*. In the first of these cases, the fact that the formal order granting permission to a relative to act, had not been drawn up, was held not to be a sufficient ground for dismissing a suit on appeal, when the minor had obtained a decree in the lower Court. In the second case it has held, that the making of an order appointing a guardian under Act XL of 1858, and not the subsequent taking out of the certificate, is that by which a guardian of the person or property of a minor is appointed within the meaning of s. 3 of the Majority Act. There is not, so far as we are aware, any authority for holding that a person who has applied for a certificate of guardianship under Act XL of 1858, and who has been appointed guardian by the Court, can, as of right, sue or defend on behalf of the minor without taking out a certificate. But the absence of a certificate is not, we think, such an irregularity as to entitle the minor, on coming of age, to have the proceedings set aside on the ground that he was not properly represented. The appointment of a guardian is a matter of procedure, *Puyikuth Ithayi Umah* v. *Khairhirapokil Mamod* (3), and if in reality the minor was represented with the approval of the Court throughout the proceedings by a fit and proper person, it would be a great hardship to allow a defect in procedure of a purely formal character to vitiate the whole of the proceedings, possibly after many years had elapsed. In this case we think that the circumstances are such as to preclude the defendant from obtaining relief on the ground that he was not properly represented, because Jitlal had not taken out the formal certificate of guardianship, to which he was entitled by the order of Court. It appears that before the order for the certificate was made, Jitlal had acted for the plaintiff as his guardian. He applied to the proper Court for a certificate, and his application was only granted after opposition, and he acted for the plaintiff not only in Mungniram's suit, but in suits by other creditors, and in proceedings taken by certain chelas to establish title to the office of Mohunt. The plaintiff, after he attained majority, presented a petition in the Court of the Subordinate Judge, in which he stated that Jitlal had obtained a certificate of guardianship under Act XL of 1858, and had been managing his estate, and, on the 6th of July 1881, he was examined as a witness, and stated that Jitlal had been his guardian and used to do all his business. It is too late now for the plaintiff to come forward and ask for relief upon the ground that Jitlal was not his guardian. He has ratified Jitlal's acts in other respects, and must be bound by them in the present matter.

The Judges accordingly dismissed both appeals with costs.

This judgment was, on review, reversed by another Bench (Tottenham and Norris, JJ.) (1), who, seeing that a certificate under Act XL of 1858 was one of the documents mentioned in Schedule II of the Court Fees Act VII of 1870, held that such a certificate "cannot actually come into existence until the person, who has the permission of the Court to obtain it, deposites the requisite amount of stamp duty." Without the certificate Jitlal Nand, in their opinion, had no authority to appear in the proceedings. They set aside the judgment of the Subordinate Judge in both suits; whereupon the plaintiff appealed to Her Majesty in Council.

On these appeals,

Mr. *R. V. Doyne*, for the appellant Mungniram, argued that the respondent,

(1) 22 W. R., 525. (2) I. L. R., 8 Calc., 967. (3) I. L. R., 3 Mad., 248.

(1) *Sahai Nand* v. *Mungniram Marwari*, I. L.R., 12 Calc. 542.

the defendant in the primary suit, had been properly represented by Jitlal Nand as his guardian, and that the proceedings in that suit had rendered effectual the sale in execution of decree. Mouza Bela having been sold at that sale to the appellant, he had become the *bonâ fide* purchaser. If the respondent was a minor when the primary suit was brought, Jitlal Nand was his guardian, having obtained a judgment and order of the District Court that the certificate under Act XL of 1858, s. 3, should issue to him. Although Jitlal Nand had not obtained the formal certificate, that was not now ground for invalidating the decree obtained against Gursahai Nand, as represented by the former his guardian, on the 16th January 1877, ordering the sale of the property. Also, there had been a correct finding by the Subordinate Judge that Gurshai was more than 18 years old at the death of Hurri Pershad, which occurred in 1875, so that the present suits, which were in effect to set aside a decree made against him during minority, were not brought in due time, not having been brought till August 1882. Although by the Majority Act, IX of 1875, a minor, of whom a guardian had been appointed, attained his majority at the age of twenty-one years, and not before, the suits were barred under s. 7 of Act XV of 1877, the Limitation Act, and the 12th and 13th Articles of Schedule II. The first judgment of the High Court, correct throughout, had found that the respondent, after attaining full age, had accepted and ratified the acts of Jitlal done in the capacity of guardian.

Reference was made to *Stephen* v. *Stephen*(1), *Chunee Mul Johary* v. *Brojonath Roy Chowdhry*(2) *Hari Saran Moitra* v. *Bhubaneswari Debi*(3.)

Mr. *C. W. Arathoon*, for the appellant Syed Liakut Hossein, argued, that the the first judgment of the High Court, affirming that of the Subordinate Judge, was correct. The minor had been properly represented in the suit against him in 1877. It was also too late for him to have the sale set aside on the ground that Jitlal Nand was not his guardian. The judgment of the High Court upon the review was erroneous, for the mere fact that the certificate which had been duly ordered had not been taken out, did not leave Jitlal Nand without authority to represent the minor. He referred to *Girishchunder Chowdry* v. *Abdul Selim* (4)approving the ruling in *Chunee Mul Johary* v. *Brojonath Roy Chowdry*(2.)

Mr. *J. D. Mayne* and Mr. *W. H. Rattigan*, for the respondent, argued that he not having been represented by a duly authorized guardian in the primary suit, the decree of 16th January 1877 and the sale in execution of it were inoperative against him.

[SIR B. PEACOCK inquired if the certificate was anything more than the statement or record of what the Judge had already ordered.]

The certificate had not been issued, and no form of it was on the record; but it was submitted that the actual production of a document was necessary. There was no necessity for the respondent to sue to set the decree of 1877 aside. He was entitled to treat it as if it had not been made, not having been duly represented by a guardian to whom a certificate under Act XL of 1858 had been issued.

Reference was made to Civil Procedure Code, s. 443; Act XL of 1858, s. 3; The Bombay Minors Act XX of 1864; Act VII of 1870, Schedule I, Art. 10. [SIR B. PEACOCK observed that the Court Fees Act of 1870, having been later in date, could not be of any use in construing Act XL of 1858.]

Though the order granting a certificate might be sufficient to constitute a guardian for other purposes, yet he could not sue or be sued, with effect binding upon the minor, without having had a formal

(1) I. L. R., 8 Calc., 714; on appeal, I. L. R., 9 Calc., 901.
(2) I. L. R., 8 Calc., 967.
(3) I. L. R., 16 Calc., 40; L. R., 15 I. A., 195.
(4) I. L. R., 14 Calc., 55.

certificate issued to him. *Stephen* v. *Stephen* (1) was not applicable.

Doorgapersad v. *Keshopersad Singh* (2) *Doorga Churn Shaha* v. *Nilmoney, Dass* (3), *Vishnu Keshav* v. *Ramchundra Bhaskar* (4), *Vasudev Vashnu* v. *Narayan Jaganath* (5), *Jatha Naik* v. *Venktapa* (6), *Mrinamoyi Debia* v. *Jogodishuri Debia* (7), *Gregory* v. *Molesworth* (8), *Hoghton* v. *Feddey* (9) were referred to.

Mr. *R. V. Doyne* replied.

Their Lordships' judgment was delivered on July 20th by

THE RIGHT HON. SIR RICHARD COUCH.—

In this case the plaintiff, the present Mohunt of a Muth called Bela Sheottur, seeks to obtain possession of certain properties, and for a declaration that the decree and auction sale under which the defendants in the two suits became the purchasers of the properties are not binding upon him, as he was a minor, and was not properly represented in the suit in which the decree was obtained. He is the successor in the Mohuntship of one Hurri Pershad Nand, who, in the years 1873 and 1875, borrowed money of the defendant in one of the suits, Mungniram Marwari, and executed mortgages of the properties which are now claimed by the plaintiff. Hurri Pershad, on the 28th September 1875, appointed the plaintiff to be his successor (the terms of the appointment will be referred to), and died on the following day. On the 24th of November 1872 Jitlal Nand, the brother of Hurri Pershad, applied to the District Judge of Bhagulpore for a certificate of guardianship of the person and property of the plaintiff under Act XL of 1858, and on the 19th of February 1876 the application was allowed, after opposition on the part of one Somar Nand. The terms of the application and of the allowance are these: The application stated that Hurri Pershad had in his life-time given the guddi of Mohuntship to Mohunt Gursahai Nand, the present plaintiff, his youngest disciple, of about 13 years of age; and, after stating the vesting in possession of the Muth and other properties, it said that it was necessary, in order to take care of the person of the minor and to look after all the cases and manage the properties, that the petitioner, that is, Jitlal Nand, should obtain a certificate under Act XL of 1858; and it prayed for a certificate. The order of the District Judge, after stating the application, and that it had been objected to by a disciple, a chela, who claimed to have succeeded Hurri Pershad, and that the certificate of guardianship would be only as regards the personal property of the minor, "whatever that property may be at present," said "Order; application allowed."

On the 7th November 1876 Mungniram, the defendant in one of the suits, instituted a suit on his mortgage bonds against the plaintiff, and in the plaint he described the present plaintiff as "minor, disciple and heir of Mohunt Hurri Pershad Nand, deceased, under the guardianship of his uncle Jitlal Nand." In this suit a summons was served on Jitlal Nand personally, but he did not appear, and made no defence to the suit; and, on the 16th January 1877, Mungniram obtained an *ex parte* decree declaring his lien upon the mortgaged property and directing it be sold. In execution of that decree Mungniram caused the property to be attached, and it was put up for sale by auction; and Mungniram became the purchaser of Bela Sheottur, part of the property taken in execution, and the defendant in the other suit, Liakut Hossein, purchased Mouza Bichwa, the other part.

On the 18th August 1882, the plaintiff instituted the present suits, alleging that he attained his majority in January 1880. The first question to be considered

(1) I. L. R., 8 Calc., 714: on appeal. I. L. R., 9 Calc. 901.
(2) L. R., 9 I. A., 27; I. L. R., 8 Calc., 656.
(3) I. L. R., 10 Calc., 134.
(4) I. L. R., 11 Bom., 131.
(5) 9 Bom. H. C., 289.
(6) I. L. R., 5 Bom., 14.
(7) I. L. R., 5 Calc., 450.
(8) 3 Atkyns, 626.
(9) L. R., 18 Eq., 573.

is whether he was properly represented in the suit by Mungniram by his guardian Jitlal; and that depends on the construction of Act XL of 1858. That Act in the third section says:—"Every person who shall claim a right to have charge of property in trust for a minor under a will or deed, or by reason of nearness of kin, or otherwise, may apply to the Civil Court for a certificate of administration; and no person shall be entitled to institute or defend any suit connected with the estate of which he claims the charge until he shall have obtained such certificate." The question is, what is the meaning of the words "until he shall have obtained such certificate?" Although the order was made allowing the application for the certificate, no formal certificate appears to have ever been prepared by the officer of the Court, and issued to Jitlal Nand. The Subordinate Judge found that although Jitlal Nand did not take out the certificate, he was the constituted guardian of the plaintiff, but that he did not properly look after the interests of the plaintiff, and did not defend the suit. On that account he held that the decree in the suit was not binding upon the plaintiff, but he thought that the suit was barred by the law of limitation, and decided the case upon that ground.

Then it came by appeal to the High Court. That Court, after noticing some cases which had been quoted, said: "There is not, so far as we are aware, any authority for holding that a person who has applied for a certificate of guardianship under Act XL of 1858, and who has been appointed guardian by the Court, can, as of right, sue or defend on behalf of the minor without taking out a certificate;" and they went on to state what is material as showing the nature of the case, that Jitlal Nand had acted for the plaintiff, not only in this suit by Mungniram, but that he acted in suits by other creditors, and in proceedings taken by certain of the chelas to establish title to the office of the Mohunt and further, that after the plaintiff attained his majority, he presented a petition to the Court of the Subordinate Judge, in which he stated that Jitlal had obtained a certificate of guardianship under the Act, "and had been managing his estate; and on the 6th of July 1881 he (the plaintiff) was examined as a witness, and stated that Jitlal had been his guardian, and used to do all his business." So that it appears that Jitlal had, at all events, although the certificate had not been issued, acted as the guardian of the plaintiff. The High Court then decided against the plaintiff, dismissing the appeal with costs. However, they entertained a petition for review, and, upon that petition, came to the conclusion that they had not put the right construction upon the Act. The ground of this conclusion appears to be that the Court Fees Act, which was passed in 1870, contains this provision: "Except in the Courts hereinbefore mentioned no document of any of the kinds specified as chargeable in the first or second schedule to this Act annexed shall be filed, exhibited, or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules;" and they considered, as they say, that the certificate could not actually come into existence "until the person, who has the permission of the Court to obtain it, deposits the requisite amount of stamp duty." They reversed their previous judgment, and held that the plaintiff ought to have a decree for possession and for mesne profits, on the ground that he had not been properly represented by Jitlal in the suit.

Now the words are "until he shall have obtained such certificate." The section provides that the person who claims a right to have charge of the property may apply to the Civil Court for a certificate. The Court is to exercise a discretion, or at least is to inquire whether the person making the application is entitled to have the certificate. Their Lordships are of opinion that when the Court makes that inquiry, and comes to a decision that the application should be allowed, that is doing all that is sub-

stantially necessary in the matter; and when the order is made that the applicant shall have his certificate, the applicant really then obtains his certificate. All is done at that time which is necessary to show that he is the person who should have the certificate. He then, by getting that order, substantially obtains the certificate, although the officer of the Court, whose duty it would be to draw up the certificate, and prepare it for the signature of the Judge, or the seal of the Court to be attached to it, may not do that for some time afterwards, on account of the course of business, or the party not applying to him for it. When a man obtains an order for a certificate he does in substance comply with the terms of this Act, in the same way as when a person has the judgment of the Court that he shall have a decree in his suit it may be said that he then obtains his decree. The decree, when it is drawn up afterwards, relates back to that time; and so would the certificate in this case relate back; and the terms of the Act that he shall have obtained such certificate are complied with.

The High Court give as a reason, as has been stated, that the Court Fees Act, which was passed twelve years after the Act of 1858, shows that obtaining the certificate is not complete until the fee is paid, and the certifiate is actually issued. The answer to this is that it must be seen what was the intention of the Legislature when the Act of 1858 was passed, and when there was apparently no such provision as this in existence requiring the Court-fee to be paid before the certificate was issued. If the meaning of the Act in 1858 was that the obtaining the certificate was complied with by obtaining the order, any subsequent provision in the Court Fees Act could not make any difference in the intention of the Legislature. Their Lordships have to see what the intention was, and what was meant by these words when the Act was passed in 1858. Therefore they have come to the conclusion that the Act was sufficiently complied with by Jitlal obtaining the order from the Judge, although the certificate was never actually afterwards drawn up. What means there might be under the Court Fees Act to oblige the person who had obtained such an order to take out the certificate it is not necessary now to consider. Probably, if there is not power now to oblige the fee to be paid, it would be for the Legislature to make a provision for it.

The plaintiff being thus properly represented in the suit, the other question which arises, and which has to be determined before considering any other matters or questions which arise in the case, is when did the plaintiff attain his majority? It is not disputed by his learned Counsel that the present suits are suits in the nature of one to set aside a decree, and that such a suit must be brought, according to the law of limitation, within one year from the making of the decree, if the party at that time is of full age; but if he is a minor, then within one year of his attaining majority. The plaint in this suit was filed on the 18th of August 1882, and the question is whether the plaintiff had attained his majority more than one year before that time. That depends upon the date of his birth; and the Subordinate Judge who had that question to try upon the second issue, finds this. He says: "With regard to the second issue the plaintiff states in the plaint that he was born in December 1861, and that he attained majority in January 1880, that is, when he completed his age of 18 years. On the other hand, the defendants contend that he was 25 when he brought the suits. The plaintiff was examined as a witness in another case on the 6th July 1881, when he had no idea of bringing these suits, and he then stated his age to be 24 years, and distinctly said that he was a minor up to 1879, that is, until he completed the age of 21. In the present case he has not ventured to come into the box and explain away his previous statement. He has sedulously kept himself out of Court, and though in the course of the trial the Court remarked that it would be satisfactory if the plaintiff

himself was examined, his legal advisers have not thought proper to examine him." The statement which is referred to is a deposition which he made on the 6th of July 1881 in some suit, the nature of which does not appear, and in that deposition there is this statement: "My name is Gursahai Nand, father's name Mohunt Hurri Pershad, age 24 years." Mr. Mayne has urged upon their Lordships that the heading of a deposition of this kind is not of much importance; that the statement of the age by a witness is taken down in such a way that little weight ought to be attached to it. The answer to that seems to be that if the plaintiff made this statement without considering what his age was, or made it in a loose and informal manner, he might have come forward as a witness, or been produced as a witness by his legal advisers and explained it. He might have shown how it was that he came to allow his age to be put down at 24 years, when, according to his present case, he was some three or four years younger at that time, and would be 19 or 20. The Subordinate Judge has properly attached considerable importance to that. He then goes on to say that he does not attach weight to the evidence which was given on the part of the plaintiff. Some of it, he says, and justly, is hearsay evidence, and he thinks that the evidence of the mother, and of the other persons who give any evidence on the subject, is not to be given credit to. The conclusion he came to was that the plaintiff was born in 1265 Fusli, and that he attained his majority when he completed 21 years of age, and more than a year before the suit was commenced. The difference between the 18 years and the 21 years has been adverted to in the course of the argument, and it has been said, and it may be with some justice, that the plaintiff may have supposed when he talked of majority that it was 18. This difference is explained by the operation of the Act of 1858; because when a minor is brought under the operation of that Act, which the plaintiff was by the certificate, the age of majority is altered from 18 to 21, and therefore it became necessary to show that the age of 21 years was attained.

Besides what the Subordinate Judge has referred to, some observations arise upon the evidence in this case with regard to the law of limitation. The hibanama throws some light upon the matter. That states: "I am Mohunt Gossain Hurri Pershad, inhabitant and proprietor of Mouza Muth Bela Sheottur, Pergunnah Bisthazari, lying within the jurisdiction of Station Sikundara Sub-Division Jamui, Zillah Monghyr. Whereas life is uncertain, and out of old disciples no one is intelligent and clever enough to discharge and manage the zemindari, village, and court affairs, and the affairs relating to my guddi of Mohuntship, for this reason I, of my own free will and accord in health of body and in a sound state of mind, have out of my disciples appointed a new disciple by name Gursahai Nand, who is competent to manage the zemindari, village, and court affairs, as the holder of the estate to be left, and the guddi of Mohuntship, and successor to my dignity and possession, in order that after my decease he shall take possession of my guddi of Mohuntship, and succeed to my dignity and possesion, the moveable and immovable properties, and household furniture detailed below." Therefore according to the plaintiff's case we have Hurri Pershad saying that no one is intelligent and clever enough out of his old disciples to discharge and manage the zemindari, and appointing a youth at that time only 13 years of age. It seems unlikely that Hurri Pershad, if the plaintiff was only of that age, would have used such language as this in the hibanama. He might do it if the plaintiff were just upon the point of attaining his majority of 18. Again, it is somewhat strange that Hurri Pershad, considering that he said not one of the old disciples was intelligent and clever enough to manage the zemindari, when he appointed a youth of 13, made no provision for the appointment of a guardian There is no suggestion that the plaintiff was a minor. The terms of this hibanama appear to their

Lordships not to be consistent with the case of the plaintiff, although they may be consistent with the case of the defendants, that at that time the plaintiff was very nearly attaining the age of 18, when he would be of full age if no certificate of administration had been obtained, which it would not be necessary then to apply for.

Another fact against the plaintiff's case is this: that an application was made for the return of documents, which was presented by a pleader; and in that application the plaintiff is made to state, or states: it is made through his pleader, and we may use the expression "made to state." "I have attained my majority since 1888, and have been personally transacting my own affairs." Upon that application, after a report was made to the Judge by the Record Keeper, an order was made that the documents should be returned on the petitioner having attained his majority. The pleader who was employed to present the petition was examined as a witness, and he appears to have done what was quite right: to have asked to see the petitioner, and saw him; he says that the plaintiff on that occasion told him that he had attained majority. It is suggested that the plaintiff had then in his mind the age of 18, but it is not to be supposed that the pleader, who, no doubt, was acquainted with the law, did not consider that the proper age to be attained was 21; and certainly a Judge, whose duty it was to see that the plaintiff was entitled to have back the documents, would have to consider whether it was true or not that he had attained his majority. That supports the conclusion to which the Subordinate Judge came when he decided the issue against the plaintiff, and there is certainly no reason for their Lordships thinking that this conclusion is wrong.

That being so, it is not necessary to consider the other question which was raised by Mr. Mayne, whether, as regards Mungniram, he being the plaintiff in the original suit, and being shown by the evidence to have known the whole state of the property, that it was "debutter" property, and that Hurri Pershad had no right to mortgage it, and knowing also that the suit which he brought to recover the money was undefended, and that Jitlal was grossly neglecting his duty in not defending it, and raising the question that the estate which had come to the plaintiff as the Mohunt, was not liable to satisfy Mungniram's debt, the decree obtained by Mungniram against the present plaintiff represented by Jitlal was not binding upon him by reason of the gross laches of Jitlal.

The result is that their Lordships will humbly advise Her Majesty that the decrees of the High Court made upon the review should be reversed, and both suits be dismissed with costs in the Subordinate Court and in the High Court, including the costs of the review. This conclusion was correctly arrived at by the Subordinate Judge and by the High Court upon the first hearing of the appeals, although not upon the same grounds as those upon which the judgment is now given. The appellants must respectively have their costs of these appeals.

Appeals allowed.

Solicitors for the appellant Mungniram Marwari: Messrs. *Barrow & Rogers.*

Solicitor for the appellant Liakut Hossein: Mr. *S. G. Stephens.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

23rd July and 1st August 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock and the Right Hon. Richard Couch.

KISSORIMOHUN ROY AND OTHERS* } *Defendants,*

and

HARSUKH DAS ... *Plaintiff.*

On appeal from the High Court in Bengal.

Attachment—Wrongful attachment—Claim to attached property—Civil Procedure Code, ss. 278, to 283, 483—Attachment before judgment—Liability of creditor who caused attachment of goods not belonging to the debtor—Damages after sale—Difference between English and Indian law on the subject.

Orders for attachment in security under s. 483 of the Civil Procedure Code being issued on the *ex parte* application of the creditor, who is bound to specify the property which he desires to have attached and its estimated value, it follows that the attachment is the direct act of the creditor, for which he is immediately responsible. Should the goods be proved not to belong to the debtor, the litigation and delay, and also any depreciation of the goods by an intermediate fall in the market, between attachment and sale, are the natural and necessary consequences of the creditors's unlawful act.

The plaintiff having taken, without success, the summary proceeding under s. 278, to get the release of goods attached under s. 487, in a suit to which he was not a party, afterwards, in a suit brought by him in accordance with s. 283, established his right of property in the goods:

Held, that (*a*), in order to entitle him to the full idemnity for the wrongful attachment he was not bound to allege and prove that the defendants had resisted his previous application under s. 278 maliciously, or without probable cause; and that (*b*), the goods having been sold under the court's order, the difference in market value of the goods at the time of their attachment (November 1883) and their price when they were sold (June 1884), the selling prices having fallen intermediately, must be added to the damages.

Held, also that, without bringing under review the judgment under s. 278, the effect of the judgment in the suit brought in accordance with s. 283 was to supersede the order under s. 278, and to render it inconclusive. The procedure on attachment not being the same in India as in England, where a judgment-creditor is not responsible for the consequences of a sale, under a judicial order, of goods taken in execution in satisfaction of his debt, that proposition does not hold good under the Indian procedure; and *Walker* v. *Olding* (1) is inapplicable to the latter.

APPEAL from a decree (18th March 1886) of the High Court (2) affirming a decree (28th April 1884) of the High Court in its Original Civil Jurisdiction.

The suit out of which this appeal arose was brought on 28th April 1884 by the respondent, Hursukh Das, in accordance with s. 283 Civil Procedure Code, to establish his right of property in, or a lien upon, 922 bales of jute which had been attached on 28th November 1883, before judgment, under s. 483, by the prsesent appellants, Kissorimohun Roy and his brothers, in a suit brought by them on 23rd November 1883, in the Court of the Subordinate Judge of the 24-Pergunnahs District, against Borodakant Dey and Umakant Dey, at that time dealers in jute. That suit was one to recover about Rs. 4,500 from the Deys in respect of transaction between them and the Roys who caused to be attached the above bales of jute in the screwing-godowns of Harsukh Das at Chitpore as the property of the Deys. A claim was preferred, under s. 278, by Hursukh Das, who was to screw the jute into bales, having had transactions with the Deys in the autumn of 1883, and having made a contract on 7th November 1883 with them, under which he was to have a lien on their jute for advances made by him, and for interest and other charges. Harsukh Das's claim was disallowed on the 15th April 1884 by the Subordinate Judge, under whose order, afterwards made for the benefit of all concerned, the jute was sold on 30th June 1884, realizing Rs. 12,053.

* 16 Cowell's Ind. ap. 183; 17 Calc., 436.

(1) I H. & C., 621; 9 Jur., N. S., 53; 32 L. J., Exch., 142; 7. L. J., N. S., 633.

(2) See *Kishori Mohun Rai* v. *Hursook Das*, I. L. R., 12 Calc., 696.

This was upon a decline in the market price.

On the dismissal of his claim, and before the sale, Harsukh Das brought this suit, claiming to have his right of property in the jute at the time of the attachment declared, and claiming that if the Courts should find that he was not in fact the proprietor as against the Roys, he should be declared to have a lien on the jute for his advances to the Deys, amounting to Rs. 42,025; also, if the jute should be sold, that he should have a decree for its value when attached, *viz.*, Rs. 23,355.

The Courts below concurred in conclusions opposed to those of the Subordinate Judge, and held that the plaintiff, at the time of the attachment in November 1883, was the actual owner, by purchase from the Deys, of 848 of the bales, and was therefore entitled to recover the full market value of those bales at the date of the attachment; and as to the residue of the bales, that the plaintiff had, under an agreement in writing with the Deys, the lien claimed by him. The result to these appellants was that the market value of the 848 bales having fallen largely between the 25th November 1883, when they were attached, and the 30th June 1814, when they were sold by order of theCourt of the Subordinate Judge, these appellants were declared liable to make good to the plaintiff that depreciation, amounting to Rs. 12,703-12. And they were also declared liable to pay the plaintiff the sum of Rs. 1,690-10 in respect of his lien. The total damages decreed were Rs. 25,584.

An appeal from the decree of Wilson, J., in the Original Jurisdiction, was heard by a Divisional Bench (Garth, C.J., and Cunningham, J.) The hearing of the case and the judgments on appeal are fully reported in I. L. R., 12 Calc., 697. The result was that the appeal was dismissed.

The Roys appealed to Her Majesty in Council, and on the 12th February 1889, before their appeal came on for hearing, an application was made on their behalf by Mr. *R. V. Doyne*, on affidavits setting forth that there had been a judgment in their favour by the Subordinate Judge on the claim made by Hursukh Das under s. 278, to their Lordships, Lord Watson, Lord Hobhouse, and Sir R. Couch, then present. The petition was to have that judgment, not then contained in the record of the appeal, added thereto. It was argued that the appellants were entitled to have this judgment made part of the record, and to refer to it, as showing that they had, in the opinion of the Subordinate Judge, acted in good faith throughout. The application was refused, on the ground that this judgment should not have affected the question raised in the subsequent independent suit permitted by s. 283.

Afterwards on the hearing of this appeal (July 23rd).

Mr. *R. B. Finlay, Q.C.*, and Mr. *R. V. Doyne*, for the appellants, argued that the Courts below had taken an incorrect view of the plaintiff's right to damages. It was not disputed that, as the Courts found, the property was not that of the Deys, but of Harsukh Das. But it was insisted for the appellants that, as they had acted *bonâ fide* in attaching the jute in 1883, believing it to be that of the defendants, as it had remained in custody of the Court, and as it had been sold by order of the Court, they were not liable for the amount of damages decreed by the Courts below. The attachment could not be regarded as having been made without reasonable cause, and the respondent was an assenting party to the order made by the Court for the subsequent sale, which took place to prevent loss by injury to the goods *in specie*. The respondent could not claim as damages the reduction in price, the result of the fall in the market. In a case like the present, the party attaching goods for security, even although he might have caused the attachment of goods not the property of his debtor, could only be held liable for such damages as had been occasioned by his acting without reasonable and probable cause; or by his having wilfully misled the Court into action, whereby the opposite party had been injured; or by

reason of his having acted with malice. The attachment was the act of the officer of the Court, and it would be contrary to the principle declared in the judgment in *Walker* v. *Olding*(1) that a person who merely conducted litigation in Court should be held liable for what he had done in good faith. Reference was made to *Walker* v. *Olding* (1). *The Quartz Hill Consolidated Gold-mining Company* v. *Eyre* (2), *Mitchell* v. *Mathura Das*(3).

Mr. *T. H. Cowie, Q.C.*, and Mr *J. H. A Branson*, for the respondent, contended that the appeal must be determined on the fact, found by both the Courts below, that the goods at the time of the attachment were the plaintiff's, rendering the attachment illegal. It was no part of their case that it was malicious, nor was it necessary for them to assert that there was an absence of probable cause, although no admission was made as to the latter, of which the Committee were not in a position to judge. The finding of the Courts below must be taken as to all the matters of fact, in which they had concurred, no ground having been shown by the appellants for impeaching that finding. The attachment was illegal, as depriving the plaintiff of his right; and the illegality was sufficiently brought home to the defendants by their having set the the Alipore Court in motion. At their own risk they had caused the attachment, and the order of the Court in directing the sale of the goods to save further loss, was an executive act, not a judicial proceeding; which act was the direct consequence of the defendant's mistake. The Civil Procedure enacted the law, which was not identical with English law on the subject, though, if, in *Walker* v *Olding* (1), the defendants had pointed out the particular goods to the sheriff's officer, the decision would probably have been different. Here the wrongful attachment was directly occasioned by the appellants, who were therefore responsible for all the direct consequences.

(1) 1 H. & C, 621; 9 Jur., N. S., 53; 32 L.J., Exch., 142.
(2) L. R., 11 Q. B. D., 674.
(3) L. R., 12 I.A., 150; I. L. R., 8 Al., 6.

Mr. *R. B. Finlay, Q.C.*, replied.

On a subsequent day (1st August) their Lordship's judgment was delivered by

THE RIGHT HON. LORD WATSON.—

The present appellants, in a suit brought by them before the Subordinate Judge of the 24-Pergunnahs, obtained a decree for a debt of Rs. 4,523 against two persons, who, in these proceedings, are called the Deys, on the 7th January 1884. During its dependence, the appellants made application, in terms of s. 483 of the Civil Procedure Code, for attachment in security of 1,900 bales of jute, more or less, then lying in the present respondent's premises at Chitpore, which they alleged to be the property of one of the Deys, the defendants in the suit. On the 28th November 1883 a perwana was issued, directing the Nazir of the Court "to proceed to the spot and make an inventory of the bales of jute actually attached, *the same will be identified by Hari Churn Sircar on plaintiff's behalf.*

The Nazir, in execution of the warrant, proceeded to the respondent's premises on the 28th November, and there attached a quantity of jute which was pointed out to him by the appellants as the property of Borodakant Dey, consisting of 848 bales, which the respondent alleged had been purchased by him from the Deys, and 74 bales over which he alleged that they had given him a lien for advances. The respondent then preferred a claim to the goods attached under s. 278 of the Code, which was disallowed, after inquiry, by the Subordinate Judge, on the 15th April 1884.

On the 28th April 1884 the respondent, as authorized by s. 283 of the Code, instituted the suit in which this appeal is taken before the High Court at Calcutta, in order to establish the rights which he claimed in the goods, and for damages in respect of their wrongful attachment. By decree dated the 28th December 1884, Wilson, J., declared that the respondent was sole and absolute pro-

prietor of the 848 bales, and had a valid and effectual lien upon the remainder for advances exceeding their value, and assessed damages at Rs. 24,584, being the market value of the jute at the time of the attachment. The Court of Appeal, on the 13th March 1886, affirmed the judgment of Wilson, J., with costs.

The decree of the Subordinate Judge, dismissing the respondent's claim, was not brought under review in these proceedings before the High Court; but the effect of the judgment of the High Court has been to supersede his decree and render it altogether inconclusive. The goods in question were sold in June or July 1884 by order of the Subordinate Judge, when, owing to the intermediate fall in the market, the price obtained for them was about half of what they were worth at the date of the attachment.

The validity of the respondent's claim to these 922 bales of jute depends upon the authenticity of the documents of title produced and relied on by him, which has been affirmed in this action by the concurrent findings of both Courts below. In the argument addressed to their Lordships the appellants did not impeach these findings; but they maintained that damages were assessed on an erroneous principle, and that the respondent was not entitled to recover more than the price which the jute realized when sold by order of the Subordinate Judge in the year 1884.

The appellants argued that to condemn them in payment of the market value of the jute on the 28th November 1883 was, in reality, to make them responsible for delay occasioned by litigation, and that the respondent could not recover the difference between that value and the depreciated price arising from such delay, unless he alleged and proved that they had litigated maliciously and without probable cause. That is a rule which obtains between the parties to a suit when the defendant suffers loss through its institution and dependence. It does not apply to proceedings taken by the injured party, after the wrong is done, in order to obtain redress. But, in this case, there has been no action and no proceedings instituted by the appellants against the respondent Harsukh Das. The summary proceeding under s. 278 was taken by the respondent for the purpose of getting the release of an attachment issued in a suit to which he was not a party; and it does not appear to their Lordships that, in order to entitle him to recover full indemnity for the wrongful attachment of his goods, the respondent is bound to allege and prove that the appellants resisted his application maliciously, and without probable cause.

The appellants mainly relied upon the English case of *Walker* v. *Olding* (1) which was cited as an authority for the proposition that a judgment-creditor is not responsible for the consequences of a sale, under a judicial order, of goods illegally taken in execution in satisfaction of his debt. *Walker* v. *Olding* (1) would have been an authority of importance had the law of execution been the same in India as in England, but there is in that respect no analogy between the two systems. In England the execution of a decree for money is entrusted to the Sheriff, an officer who is bound to use his own discretion, and is directly responsible to those interested for the illegal seizure of goods which do not belong to the judgment-debtor. In India warrants for attachment in security are issued on the *ex parte* application of the creditor, who is bound to specify the property which he desires to attach, and its estimated value. In the present case, by the terms of the perwana, no discretion was allowed to the officer of Court in regard to the selection of the goods which he attached; his only function was to secure under legal fence all bales of jute in the respondent's premises which were pointed out by the appellants. The illegal attachment of the respondent's jute on the 28th November 1883 was thus the direct act of the appellants, for which they became immediately responsible in law; and the litigation and delay, and consequent depreciation of the jute, being the natural

(1) 1 H. and C., 621; 9 Jur., N. S., 53; 32, L. J., Exch., 142.

and necessary consequences of their unlawful act, their Lordships are of opinion that the liability which they incurred has been rightly estimated at the value of the goods upon the day of the attachment.

Their Lordships will, therefore, humbly advise Her Majesty that the judgment appealed from ought to be affirmed. The appellants must pay the costs of this appeal.

Appeal Dismissed.

Solicitors for the appellants: Messrs. *Barrow & Rogers.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

25th, 26th, 27th and 30th July and 9th November 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

MAHOMED ASHANULLA CHOWDHRY * ... } *Plaintiff,*

and

AMARCHAND KUNDU AND OTHERS ... } *Defendants.*

On appeal from the High Court in Bengal.

Mahomedan Law—Endowment—An appropriation not within the principle of wakf—Property settled on members of grantor's family with a charge upon it for religious and charitable purposes—Effect of appropriation where the charge was not substantial one.

Although the making provision for the grantor's family out of property dedicated to religious or charitable purposes may be consistent with the property being constitued *wakf*, yet in order to render it *wakf* the property must have been substantially, and not merely colourably, dedicated to such purposes.

Although an instrument purporting to dedicate property as "*fisabilillah wakf*," and vesting it in members of the grantor's family in succession, "to carry on the affairs in connection with the *wakf*," might include provisions for the benefit of the grantor's family without its operation as a *wakf* being annulled, yet, on the other hand, it would not operate to establish *wakf*, as it did not devote a substantial part of the property to religious or charitable purposes.

Without determining how far provisions for the grantor's family might form part of a settlement for religious or charitable purposes, and yet not deprive it of its character as establishing *wakf*, the Committee approved the decision in *Muzhurool Huq* v. *Puhraj Ditarey Mohapattur* (1) to the effect that the mere charge upon the profits of the estates of certain items which must in the course of time have ceased, being for the benefit of one family, did not render an endowment invalid as a *wakf*.

In the present case, however, there being no authority for holding a gift to be good as a *wakf* without there being a substantial dedication of the property to charitable or religious uses at some time or other; and the uses prescribed involving only an outlay suitable for uch a family to make in charity, the gift was held not to be a substantial, or *bonâ fide*, dedication of the property as *wakf*. The use of this expression, and others, being only to cover arrangements for the benefit of the family and to make their property inalienable, the property was not constituted *wakf*, nor was it freed from liability to attachment in execution of a decree against one of the grantees.

APPEAL from a decree (11th May 1885) of the High Court, reversing a decree (26th July 1883) of the Subordinate Judge of zilla Chittagong.

The question now raised was whether a valid dedication had been effected by the plaintiff's father by an instrument which he executed on the 5th December 1864 of land in Chittagong, so as to constitute it *wakf*, or whether the instrument, though nominally dedicating property to religious and charitable purposes, established only a charge on the property in the hands of the members of the grantor's family, the property remaining liable to attachment in execution of a decree against one of them.

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* 17 Cowell's Ind. Ap., 28; 17 Calc., 498.

(1) 13 W. R., 235.

The suit, in which the present appellant sued as *mutwali* of *wakf*, or dedicated, property, was brought to obtain a declaration that four *taluqs* in the Chittagong district, which had been attached by Krishnadas Kundu in execution of a money decree against Shaikh Mahomed Rahimula Chowdhry, brother of the plaintiff, had been made *wakf* by their father, and were consequently not liable to be attached in execution. Rahimula had been joined with Krishnadas Kundu as defendant. Ahsanulla alleged that Ahmedulla Chowdhry, their father, who died in 1866, had executed the abovementioned deed of 5th December 1864, by which he purported to dedicate all his property, moveable and immoveable, in Chittagong district as "*fisabilillah wakf*," for defraying the expense of a *musjid* at his family dwelling-house, and of two *madrassas* at Chittagong, also of lodging strangers; and also had provided for the superintendence of this endowment by his two sons.

The principal clauses are set forth in their Lordships' judgment.

Krishnadas Kundu being now dead, he was represented by the respondents Amarchand Kundu and others.

Part of the property dealt with having been attached by Krishnadas in execution of a decree which he held against Rahimula, an application was made by Ahsanulla under section 278, Civil Procedure Code, for its release. This was refused on the 31st December 1881 by the Subordinate Judge, who, after considering the terms of the deed of 5th December 1864, and the absence of any directions fixing what share of the income of the property, then said to amount Rs. 17,000 annually, was to be appropriated to religious and charitable purposes; and after referring to the condition of the *musjid* and *madrassas*, made the following order:—"It appears to me as very probable from the aforesaid circumstances that the real object of the appropriator was neither religion nor charity, but the perpetuation of the properties in his family, so that his male descendants may enjoy their profits without alienating it to strangers. That the appropriator had such an intention in view may also be gathered from the provision in the 5th paragragh of the deed, by which he tried to restrict even the power of the so called *mutwalis* to sell or mortgage the allowances granted to them. I do not think a Mahomedan can lawfully make such a disposition of his property under the disguise of a *wakf*, and it appears to me that the disposition is invalid. The claim is dismissed accordingly with costs."

This suit was then, under section 283, Civil Procedure Code, instituted to have the above order set aside, and to have it declared that the property had been validly dedicated, and made *wakf*, so that it was not liable to attachment. The plaintiff alleged that he and his brother were only salaried servants, having no ownership in the property. The Subordinate Judge considered that the validity of the instrument of 5th December 1864 had been established, and that the property was *wakf* and inalienable. He made a decree in favour of the plaintiff to that effect.

On an appeal by the defendant to the High Court, a division bench (MACDONELL and MACPHERSON, JJ.) gave the following judgment:—

"The only question which we have to consider is, whether the *wakfnama*, upon which the plaintiff relies, makes the *taluqs*, which are the subject of this suit, valid *wakf* under the Mahomedan law. These are not the only properties affected by the deed, for the maker professed to appropriate his entire properties, moveable and immoveable, as *wakf*. The plaintiff has carefully withheld all evidence of the income of the properties so dealt with; but he admits that the annual profit derived from them was Rs. 12,000 or Rs. 13,000, though he says that it has become less since the inundation. We think that there is every reason to believe that it is much more than that sum.

"If the first clause of the deed stood alone there would be a valid dedication, for the properties are dedicated as *wakf* for defraying the expenses of the brick-built *musjid* at the dedicator's family dwelling-house, and of the two *madrassas* at his ancestral homestead and his lodging house in the town of Chittagong and for '*sadir warid*.' This would, as far as words go, sufficiently satisfy the requirements of Mahomedan law according to the strictest construction which has been put upon it by the courts in this country. But the

dedication is qualified by the words' in the manner provided in the paragraphs mentioned below.' These paragraphs, which are thirteen in number contain only one short allusion to the object of the endowment. This is to be found in the second paragraph where the *matwali* is directed to 'continue to perform the stated religious works according to custom.' The whole of the rest of the deed consists of minute provisions for the management of the property, the appointment of his three sons as *mutwali* and *naib-matwalis*, the succession to those offices which are to be filled by the sons of the *matwalis*, or, in their default, by 'sons born of the same family in nearest descent,' and for the maintenance and support of all other members of the family. The *mutwalis* are to get salaries of Rs. 100, 90 and 80 a month, respectively. If the sons of the *mutwalis* exceed three in number, the *mutwalis* can give to those who cannot get one of the three appointments any monthly allowance they like. Provision is also made for wives and daughters, and for birth marriage, and funeral expenses of both sons and daughters. Lastly, it is left to the *mutwalis* to increase their own salaries or those of other salaried persons, having regard to the income and expenditure of the *wakf* properties. The only provisions regarding a surplus are contained in paragraphs 2 and 4, which direct that the surplus after meeting all the expenses is to be kept in a safe place under the supervision and management of all the *mutwalis*, and that all properties acquired out of this surplus are to be part of the *wakf* properties.

"The effect, therefore, of the deed as a whole is, that, while it professes to dedicate as *wakf* properties bringing in a very large annual income, it leaves it to the members of the family, who are as *mutwalis* to retain the control and management, to spend as little as they like beyond what is customary on the objects of the endowment, and to take as much as they like for themselves and the members of the family for all time on account of salary as maintenance. There is nothing whatever in the deed to indicate that the dedicator contemplated any increased expenditure in maintaining the *musjid, madrassas* and *sadir warid*. The maintenance of the members of the family, however numerous, is well provided for; but the stated religious works are to be performed according to custom. It is quite clear that the customary mode of performing them would involve an expenditure which in no way approached the annual income, and that there would remain a large annual surplus, which would be entirely at the disposal of the *mutwalis*, and from which all the members of the family would have to be maintained.

"Although, therefore, the deed nominally dedicates the properties for purposes in them selves good and valid according to Mahomedan law, the dedication clause is subject to the subsequent provisions; and these, while giving the the smallest possible prominence to the objects of the endowment, and limiting, as we should construe the deed, the expenditure on them, would operate to create a perpetuity for the benefit of the members of the family, and at the same time place the properties beyond the reach of the law. That this was the object of the dedicator there can, we think, from the terms of the deed, be little doubt.

"On a proper construction of the whole deed it seems to us that though all the properties are nominally made *wakf* for proper and legitimate objects, there is a surplus which is to be enjoyed by the members of the family, and as to which there is no ultimate trust in favour of any pious or charitable purpose.

"It has been argued that a settlement of this nature is recognized by Mahomedan law, and that a person can make a *wakf* in favour of himself, his children and children's children, &c. The Subordinate Judge appears to have adopted this view, and has cited in support of it certain passages from Baillie's Mahomedan Law and the case of *Luchmiput Singh* v. *Amir Alum* (1), decided by Tottenham and Bose, JJ. It seems to us unnecessary to go into the point, because the settlement as made is not one of that character. If the properties had been made *wakf* in favour of the founder's children and children's children with an ultimate trust in favour of the poor and needy, we should undoubtedly have had to consider whether such settlement created a valid *wakf*. The decision of Norris and Tottenham, JJ., in *Hamidulla Khan* v. *Lutful Huq* (2) renders it extremely doubtful whether it would be valid. It was not considered so in that case. Here the dedication purports to be for religious and charitable purposes alone, and we have only to see whether this was the real intention of the donor and whether the deed as a whole supports such a dedication. It is clear that a person cannot do indirectly that which he cannot do directly. But putting this consideration aside, if the dedication in part fails as regards the avowed objects for which it was made, we are not, we think, bound to consider whether it will hold good as regards other objects for which there was no express dedication. It is clear that it was not the intention that in this case anything like the income should be spent on the objects designated, and I think the settlement should only hold good to the extent of the intention of the donor as regards the special objects in support of which the settlement was made.

"In the case referred to as decided by Tottenham and Bose, JJ., it was held that the objects of the *wakf* being religious and charitable, the dedication was complete, and that a subsequent direction that the manager should maintain the future male descendants of the maker of the *wakf*, did not necessarily alter its character. It was not decided whether such a direction could be lawfully carried out. That was a conclusion

(1) I. L. R., 9 Calc., 176.
(2) I. L. R., 6 Calc., 744.

arrived at on the construction of the particular deed propounded in that case, and we must suppose that there was found to be an intention to create a *bona fide wakf* of all the properties, though this was coupled with a condition which might or might not be enforceable. Here, we think, there was no such *bonâ fide* intention as regards all the properties, and we should only give effect to the intention so far as it existed

"We hold then that the deed, construed as a whole, did not create a valid and entire *wakf* of these properties, and that consequently the plaintiff is not entitled to get the properties released from attachment as *wakf*. It did, however, create a charge on the properties for the maintenance and support in the customary manner of the objects designated in the opening clause of the deed. We cannot, however, determine in this case what that charge is, in what proportion it should be borne by the different properties affected, or what part of the properties should be set aside to meet it, as this case relates to only a few of the properties subjected to the charge.

"The plaintiff's claim, so far as it seeks to get the properties declared to be *wakf*, and to get them released from attachment as such, must be dismissed, and in lieu of the decree of the Subordinate Judge, there will be a decree to the effect that the properties in suit are subject to the charge specified above, the extent of which has yet to be determined. The appellant will get his costs in both courts."

From this decision the plaintiff appealed.

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the appellant, argued that the instrument of 5th December 1864 had not been correctly construed with reference to the law of *wakf*, and had not received its due effect in the judgment of the High Court. An appropriation for religious or charitable purposes gave to the estate the quality of *wakf* of which it was not deprived merely by reason of the reservation of part for the maintenance of the donor's family. A *wakf* might lawfully contain provisions for the benefit of the grantor's family. Moreover, the law contemplated the payment of the *mutwali* or superintendent, and trustee. The appointment of some one to take charge of the property appropriated was essential, and he was entitled to participate in the benefit of the appropriation. They referred to—

Baillie's Digest of Mahomedan Law, Hanifeea, Chapter IX; Hamilton's Hedaya vol. II, of *Wakf*;

Macnaghten's Principles and Precedents, of Muhammadan Law, Endowments, case VIII.

Appropriations, in the nature of settlements of property upon descendants, had been treated as appropriations under the name of *wakf*, where there was the use of that term, and an ultimate trust for the poor. The legal effect of *wakf* was said to be an abatement of the appropriator's right of property; but it was consistent with a detaining of it in his ownership, without the power of alienation; and the poor were deemed to be an inextinguishable class of beneficiaries. The establishment of a *wakf* might be inferred from the general character of a grant; *Kulb Ali Hossein* v. *Syf Ali* (1) *Jan Bibee* v. *Abdoolah* (2), *Jiwan Das Sahoo* v. *Shaik Kubeer-ooddeen* (3). They also referred to Mr. Amir Ali's Tagore lectures for 1884, lecture IX, section II, and to lecture X.

Luchmiput Singh v. *Amir Alum* (4) showed that, notwithstanding provisions for debts and maintenance, a *wakf* was valid. And, although it was questioned in *Phate Saheb Bibi* v. *Damodur Premji* (5), whether a *wakf* could be created merely for the purpose of conferring a perpetual estate on a particular family, without any ultimate use to the poor, it was afterwards decided that, if the condition of an ultimate dedication to a pious and unfailing purpose had been satisfied, a *wakf* was not invalidated by an intermediate settlement on the founder's children, and their descendants, in *Fatma Bibi* v. *The Advocate-General of Bombay* (9). They also referred to *Mahomed Hamidulla Khan* v. *Lutful Huq* (7) and to *Abdul Ganne Kasam* v. *Hossein Mirza Rahimtulla* (8). Although there might be no trace in these cases that a man's mere gift to his own family was in

(1) Select Rep., 110.
(2) Fulton, 345.
(3) 2 Moore's I. A., 390.
(4) I. L. R., 9 Calc. 176.
(5) I. L. R., 3 Bom, 84.
(6) I. L. R., 6 Bom, 42.
(7) I. L. R., 6 Calc., 744.
(8) 10 Bom. H. C., 7.

itself a pious use, yet the ultimate trust for religious or charitable objects, or for the poor generally, was in itself a pious use. And there was a discretionary power to the *mutwali* to allow what might be suitable to maintain the family.

They also referred to *Doyal Chand Mullick* v. *Saiyud Keramut Ali* (1), *Amritlal Kalidas* v. *Shaik Hossein* (2), *Muzhurool Huq* v. *Puhraj Ditarey Mohapattur* (3), *Bischenchand Basawat* v. *Nadir Hossein* (4).

Under another system of law, the principle being apparently applicable to all, provisions inconsistent with the trust, which a will established for pious purposes, were rejected—see *Aushotosh Dutt* v. *Durgachurn Chatterjee* (5).

The decision of the High Court that the charge on the properties for the maintenance and support of the charitable objects, designated in the opening clause, had been created, and yet that the properties were not constituted *wakf*, was inconsistent with the course of decision of the courts.

Reference was also made to *Kuneez Fatima* v. *Saheba Jan* (6).

Mr. *T. H Cowie, Q.C.*, and Mr. *J. H. A. Branson*, for the respondents, argued that the deed of 1864 did not validly and effectually dedicate the property in question, so as to constitute it *wakf*. It appeared from the deed itself, as well as from the evidence as to the subsequent dealing with the property, that there had been nothing more than an attempt to create, under colour of a *wakf*, a perpetuity for the benefit of the family of Ahmedulla Chowdhry. The trusts declared were far from absorbing a substantial part of the properties. As to the document, it was insufficient that there should only be an insertion of the term *wakf*: there must be a clear intention shown to devote to religious or charitable purposes; and instead of this intention being shown, the question arose whether the primary object was of that character at all. The real purpose in view was to provide for the family, and only a small part of the estate was to be applied to the charity. They referred to the Tagore Lectures, 1884, p. 230, comparing an expression of opinion therein with what was said by West, J., in *Fatma Bibi* v. *The Advocate-General of Bombay* (7). They also cited *Khaja Hossein Ali* v. *Shahzada Hazara Begum* (8), *Futtoo Bibi* v. *Bhurrut Lal Bhukat* (9), Baillie's Digest, 557, Hedaya, II, 349. They distinguished the case in which the judgment was given by Kemp, J., *Muzhurool Huq* v. *Puhraj Ditarey Mohapattar* (10).

Mr. *R. V. Doyne* replied, referring to Macnaghten's Principles and Precedents, as giving all the true conditions of *wakf*, and contending that they were satisfied in this case.

Afterwards, on 9th November 1889, their Lordships' judgment was delivered by

THE RIGHT HON. LORD HOBHOUSE.

The plaintiff in this suit, who is also the appellant, is one of the sons of Sheik Ahmedulla Chowdhry; the second defendant is another son; the first defendant is a judgment-creditor of the second defendant, and in that character obtained an attachment against the property now in dispute. The plaintiff contends that the property is *wakf* and that he is the *mutwali* and that his brother has no interest therein which can be taken in execution. He accordingly made a claim in the execution proceedings which on the 31st December 1881 was rejected by the Court on the ground that no genuine *wakf* had been created.

The plaintiff then brought the present suit. In this plaint he states that the properties mentioned in schedule were owned by his father Ahmedulla; that Ahmedulla by a *wakfnama* of the 5th

(1) 16 W. R., 116.
(2) I. L. R., 11 Bom., 492.
(3) 13 W. R., 235.
(4) I. L. R., 15 Calc., 329; L. R., 15 I. A., 1.
(5) I. L. R., 5 Calc., 438.
(6) 8 W. R., 313.
(7) I. L. R., 6 Bom., 42.
(8) 12 W. R., 344.
(9) 10 W. R., 299.
(10) 13 W. R., 235.

December 1864 made a *wakf* of them, which ever since has continued in force; and that he and his brother are simply salaried servants, for the purpose of performing the work specified in the *wakf-nama*. He prays for a declaration that the specified properties are *wakf*, and that the order of the 31st December 1881 may be set aside.

The only substantial issue throughout the litigation has been whether the intention of the deed of 5th December 1864 was to turn the properties in question into *wakf* property. If it was, the plaintiff is entitled to succeed; and if not, he must fail. The Subordinate Judge decided in his favour. On appeal the High Court thought that the intention of the deed was not to create an entire *wakf* of the properties, but only to create a charge on them for the maintenance in the customary manner of objects designated in the opening clause of the deed. They reversed the decree of the Lower Court, dismissed the suit so far as it seeks to have the properties declared *wakf* and released from attachment, and declared "that the said properties are subject to the charge (the extent whereof has to be hereafter determined) specified in paragraph 1 of the *wakfnama* dated the 5th December 1864, that is to say, of defraying the expenses, in the customary manner, of the brick-built *musjid* of Jorip Mahomed Chowdhry in Paragulpore, and of two *madrasas* and *sadir warid* (travellers) as mentioned in the said clause."

From that decree the plaintiff appeals, and his appeal must be decided entirely by the construction put upon the deed.

At the outset of the deed the grantor adverts to his age and his coming death, and says—"I hereby appropriate and dedicate as '*fisabilillah wakf*,' in the manner provided in the paragraphs mentioned below,"—the properties now in question and other property there described,—"for defraying the expenses of the brick-built *musjid* of my grandfather Jorip Mahomed Chowdhry at my own family dwelling-house in the village of Paragulpore, and of the two *madrassas* at my own ancestral homestead, and my lodging house in the town of Chittagong and *sadir warid* (persons coming and going), and I pray to God that he may in his mercy accept and preserve the same for ever for being applied to those purposes."

The "paragraphs mentioned below" are 13 in number.

Paragraph 1 appoints the grantor's three sons to be *mutwalis* of the *wakf* properties in a gradation of rank, and it contains some very elaborate instructions respecting the management of the property.

Paragraph 2 runs as follows:—

"The *mutwali*, after payment of the proper expenses of the *mosaref* and the necessary costs of collections of the zamindari and the salaries of mokhtars and other servants and the expenses of litigation and the like, and all other charges which may be incurred on the occurence of any peril or emergency, out of all kinds of income and profits of the endowed properties according to the long standing practice, shall take from the residue his own monthly allowance, pay over the allowance due to the *naib-mutwali* and *naib-ul-maniab* and my daughters as specified in the schedule, and continue to perform the stated religious works according to custom. He shall, having regard to the provisions contained in the first paragraph, keep his eye to the legitimate objects of the *mosaref*, and not commit extravagance and waste or practise fraud in connection therewith. The balance that may be left after meeting the above-mentioned expenses shall be kept in a proper, that is to say, a safe place, under the supervision and management of all the three persons."

The schedule provides Rs. 100 per month for the first *mutwali*, Rs. 90 for the second, Rs. 80 for the third, and Rs. 30 for the daughters.

Paragraph 3 provides for the succession of *mutwalis* in case of retirement or death. It is very inartificially expressed, and in some contingencies might be difficult to apply. But for its bearing on the construction of the deed it is sufficient for

their Lordships to say that in their judgment it was meant by its framer to provide for a perpetual succession of some of the male members of his family as *mutwalis*, to be appointed either by existing *mutwalis*, or by a committee or by an officer of Government.

Paragraph 4 provides for the addition to the *wakf* of surpluses occuring under paragraph 2.

Paragraph 5 declares that the persons getting monthly allowances shall have no power to assign or charge them, and that creditors shall have no claim against them.

Paragraph 7 declares that if, "the *mutwalis*" have sons exceeding three in number, for those who are not *mutwalis* the *mutwalis* shall fix a monthly allowance. Those persons are to live on their own earnings in professions, trades, or service; but when any one becomes a *mutwali* he is to bring into the *wakf* all the property he has got.

Paragraph 8 provides that if "any one" dies leaving no sons, his wife and daughter shall receive allowances. It then continues—"It shall be competent to the *mutwalis*, having regard to the income and expenditure of the *wakf* properties, to proportionately increase or decrease these allowances as well as their own salaries, and those of other salaried persons, and no one shall be able to raise any objections to the same."

The other paragraphs have no material bearing on the present question.

The case has been very elaborately argued at the bar, and numerous textbooks and decisions have been cited: on the plaintiff's side to show that a *wakf* may lawfully embrace provisions for the family of the grantor; and on the defendant's side to show that there can be no *wakf* unless the whole property is substantially and primarily dedicated to charitable uses.

Their Lordships do not attempt in this case to lay down any precise definition of what will constitute a valid *wakf*, or to determine how far provisions for the grantor's family may be engrafted on such a settlement without destroying its character as a charitable gift. They are not called upon by the facts of this case to decide whether a gift of property to charitable uses which is only to take effect after the failure of all the grantor's descendants is an illusory gift, a point on which there have been conflicting decisions in India.

On the one hand their Lordships think there is good ground for holding that provisions for the family out of the grantor's property may be consistent with the gift of it as *wakf*. On this point they agree with and adopt the views of the Calcutta High Court stated by Mr. Justice Kemp in one of the cited cases *Muzhurool Huq* v. *Pubraj Ditarey Mohapattur*(1). After stating the conclusion of the Court that the primary objects for which the lands were endowed were to support a mosque and to defray the expenses of worship and charities connected therewith, and that the benefits given to the grantor's family came after those primary objects, that learned Judge says:—"We are of opinion that the mere charge upon the profits of the estate of certain items which must in the course of time necessarily cease, being confined to one family, and which after they lapse will leave the whole property intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Mahomedan law."

On the other hand, they have not been referred to, nor can they find, any authority showing that, according to Mahomedan law, a gift is good as a *wakf* unless there is a substantial dedication of the property to charitable uses at some period of time or other. Mr. Arathoon indeed contended that a family settlement of itself imports an ultimate gift to the poor, founding himself on a passage in the Tagore Lectures delivered in 1884 by a learned Mahomedan lawyer (see p. 230). But no authority has been adduced for that proposition. The observations of Mr. Justice West, which are relied on by the learned lecturer, do not go that length;

(1) 13 W. R. 235.

and they are themselves of an extra-judicial character, as the case in which they were uttered did not raise the question. Their Lordships therefore look to see whether the property in question is in substance given to charitable uses.

The leading clause of the deed contains no charitable gift except "in the manner provided by the paragraphs mentioned below," and we must search those paragraphs to find the real nature of the gift. Now as regards the grantor's moveable property, he was advised that there would be legal difficulty if he did not then define the objects on which it was to be spent. So he expressly mentions that it is to be spent in pious and virtuous works, and it is not necessary to decide whether the terms which he uses constitute a separate absolute gift to such purposes, or are controlled by the other paragraphs. As regards the immoveables, he uses different language; and the only direction creating a trust for the objects mentioned in the opening sentence is that which is contained in the second paragraph. That trust is (after payment of '*mosaref*,' expenses, and salaries) "to perform the stated religious works according to custom."

There is a great deal in the deed which is designed for the aggrandisement of the family property and for keeping it perpetually in the hands of the family. The provisions for accumulation in paragraph 4; the attempt to save salaries from alienations and from creditors in paragraph 5, the provisions for appointment of male issue as *mutwalis* in paragraph 3, coupled with the allowances to other male issue, and to wives and daughters of such issue in paragraph 7 and 8, all indefinite in point of duration, and, as their Lordships think, intended to be commensurate with the existence of the family; the direction in paragraph 7 that new *mutwalis* should bring all their private acquisitions into settlement;—all these things point to the same end, the increase of property available for the family. In paragraph 8 the grantor allows, increases of salaries and allowances to members of the family, so that, as the property increases, the family may grow richer. There is not a word said about increasing the amount spent on charitable uses beyond the expenditure which was according to custom. There Lordships cannot find that the deed imposes any obligation on the grantor's male issue, or on any other person into whose hands the property may come, to apply it to charitable uses except to the extent to which he had himself been accustomed to perform them.

If indeed it were shown that the customary uses were of such magnitude as to exhaust the income, or to absorb the bulk of it, such a circumstance would have its weight in ascertaining the intention of the grantor. But the Court, in the execution proceedings, considered that the charitable outlays which he contemplated were of small amount compared with the property. The Subordinate Judge in this suit does not deal with the matter. The High Court says that the plaintiff has carefully withheld evidence as to value, and believes that it was much more than he represented. For all that appears there is no reason to suppose that the charitable uses would absorb more than a devout and wealthy Mahomedan gentleman might find it becoming to spend in that way.

Under these circumstances, their Lordships agree with the High Court that the gift in question is not a *bonâ fide* dedication of the property, and that the use of the expressions "*fisabilillah wakf*," and similar terms in the outset of the deed, is only a veil to cover arrangements for the aggrandisement of the family and to make their property inalienable.

The result is that in their judgment this appeal should be dismissed with costs, and they will humbly advise Her Majesty to that effect.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents: Messrs. *Watkins & Lattey.*

31st July 1889.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Lord Watson, the Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

SETH JAIDAYAL ... *Defendant*,

and

RAMSAHAE AND OTHERS ... *Plaintiffs*.

On appeal from the Court of the Judicial Commissioner of Oudh.

Contract—Contract which had become impossible to perform—Further and other relief—Damages—Contract Act (IX of 1872), s. 56—Novation.

Money having been advanced, a contract was made to secure repayment of it by a usufructuary mortgage, with possession to be given to the lender, of land, which however had then already been attached under a decree, and had been taken under the Collector's management under s. 326 of the Code of Civil Procedure. To perform the contract by delivery of possession of the land having thus become impossible, it was *held* that the lender of the money was entitled to compensation, the damages being the amount of the advance, together with interest from the date when, had performance been possible, the land should have been made over to him.

APPEAL from a decree (6th March 1885) modifying a decree (3rd September 1883) of the District Judge of Sitapur.

The suit out of which this appeal arose was brought by the respondents against Seth Sitaram, whom the appellant, by revivor, represented, and related to the following transaction: Seth Sitaram, the defendant, being indebted to Shukulji Gur Parshad, a Mahajan of Cawnpore, to the amount of Rs. 16,000, in consideration of that amount and the promise of a further loan of Rs. 5,000, mortgaged to him by way of zur-i-peshgi lease, dated 11th June 1877, villages comprised in a talukdari estate, in effect contracting to give possession for a term commencing on the 23rd September 1877. The Rs. 5,000 were not advanced by Gur Parshad, and he never entered into possession of the land. On the 7th July 1877, the mortgaged estate, which had previously been under attachment in execution of a decree, was taken under the direct management of the Collector, the Deputy Commissioner of Sitapur, under s. 326 of the Civil Procedure Code. On the 13th April 1882, Gur Parshad issued a notice to the defendant, calling upon him to pay the money due under his contract. To this the defendant replied, asserting that the contract had become void in consequence of the non-performance by Gur Parshad of his part of it. On the 17th June 1882, Gur Parshad died, having left all his property to the second and third plaintiffs, then minors, of whom the first became guardian, obtaining a certificate under Act XL of 1858. The suit, commenced on 11th June 1883, claimed completion of the terms of the zur-i-peshgi lease of 11th June 1877, offering to pay at the time of possession delivered, Rs. 5,000; and, in the alternative, a decree for Rs. 27,520 to be realized by the sale of the property, with a mortgage lien thereon until such sale; also, any other relief. The defence was that the document of the 11th June 1877 was inoperative, being an attempt to revive a time-barred debt for Rs. 15,000; and, further, that the contract had become null and void.

The District Judge dismissed the suit, upon the grounds adverted to in the judgment of the Judicial Commissioner, who, after stating the above facts, continued thus:—

Upon these facts, the Judge held that the contract was void, in the terms of s. 56 of "the Indian Contract Act 1872," and dismissed the plaintiffs' suit. The grounds upon which the Judge refrained from acting under the final clause of s. 56 of Act IX of 1872 are thus stated in his decision:—

"There remains the question whether the plaintiffs are entitled to any equitable relief other than the remedies which they have themselves indicated.

"When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement

I. L. R., 17 Calc., 432.

is bound to restore it, or to make compensation for it, to the person from whom he received it.

"I am however unable to find that the defendant in this case received any advantage under the agreement, which became void on the 7th July 1877. Prior to that date the plaintiff's representative could scarcely have recovered from him the amount of the debt on the notes; and in any case, the rights of Gur Parshad, as endorser, revived against the defendant as acceptor as soon as the contract as to the lease became void. It would be impossible to hold that the void contract had the effect of extending to six years the term within which the plaintiffs might sue on the promissory note."

I agree with the Judge in thinking that the zur-i-peshgi lease became void in the way stated by the Judge, but I am unable to follow the learned Judge in his reasons for refusing to award compensation for the loss sustained by the promisor through the non-performance of the promise. I consider it proved that, on the execution of the document of the 11th June 1877, the obligation created by the note of hand, last renewed on the 20th May, which fell due on the 11th June 1877, was cancelled, and the first obligation created by the zur-i-peshgi lease was substituted for it. This was, I consider, a valid novation; and in the terms of s. 62, Act IX of 1872, the defendant was thereby discharged from his liability to perform the original contract, *i.e.*, pay Rs. 16,000. And this being so, I must hold that plaintiff is equitably entitled to recover from the defendant Rs. 16,000, with reasonable interest thereon from the 11th June 1877 up to date of payment. [illegible] has been objected for the defendant that the suit is barred (*quâ*) the relief to which I hold the plaintiff to be equitably entitled) by the provisions of the Indian Limitation Act 1877, Sched. II, Arts. 57 and 64. But, in my judgment, neither of these articles applies; and the article applicable is Art. 116.

The decree of the District Judge is modified. The plaintiff will recover from the defendant Rs. 16,000, with interest at the rate of 6 per cent. per annum, from the 11th June 1877 to date of payment. The rest of the plaintiff's claim is dismissed. The costs of the suit will be borne by the parties in proportion to the extent of the plaintiff's claim now decreed and dismissed.

In assessing costs the valuation of the claim as now decreed will be taken as Rs. 21,760.

Mr. *R. V. Doyne*, for the appellant, argued that the suit was not maintainable. The plaintiff's equity was to be remitted back to the rights existing at the time when the document of 11th June 1877 was executed; performance having been impossible, and the contract void (s. 56 of the Indian Contract Act IX of 1872) Those rights, which had arisen out of the advances made by Shukulji Gua Parshad on hundi-transactions, in and before 1877 might be enforceable, if a suit upon them was not barred by time. It was submitted that such a suit was barred, however, there not having been any complete novation effected, as had been supposed by the Judicial Commissioner.

Mr. *J. D. Mayne*, for the respondent, was not called upon.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR BARNES PEACOCK.—

Their Lordships are of opinion that the decree of the Judicial Commissioner is correct, and ought to be affirmed.

The action was brought upon a contract, dated the 11th June 1877, and was commenced on the 11th June 1883. The contract was not a void contract as was supposed by the Subordinate Judge. It was a binding contract; but it was one which the defendant was not able to fulfil. He states: "I have of my own accord and free will, in consideration of my having taken an advance of Rs. 21,000, put the said share, with the exception of talukhdari sir lands, in possession of Shukulji Gur Parshad, Mahajan, resident of Cawnpore, by way of settlement in a lease and farm for a period of twelve years from 1285 till 1296 Fusli," that is, from the 23rd of September 1877, a date within the period of limitation. Then he shows that the whole of that Rs. 21,000, which he admits having received, in fact had not been received: he had not received Rs. 5,000 of that amount; and although the contract states that he had put Shukulji into possession, he had not in fact put him into possession. Then the contract goes on: "The first condition is that the said Shukulji" (that is the ancestor of the plaintiffs) "shall retain possession as lessee of all the villages of the ilaka to the extent of seven annas for the stipulated term." There was a contract, therefore, that he was to have possession of that property for a term commencing on the 23rd of September 1877. It turned out that the estate had

been seized into the hands of the Collector under a decree against the defendant and it was impossible for him to put the plaintiffs into possession.

Then the question arises, What were the damages for their not being put into possession? The damages awarded were for the Rs. 16,000 which had been received, and interest upon that amount, from the date of the contract, at 12 per cent. If the defendant had given possession, as was intended by the terms of this contract, the plaintiffs would have had the property for a period to commence from the 23rd of September 1877 as a security for Rs. 16,000 and interest.

The plaintiffs not having been put into possession, and the defendant not being able to give them possession, the damages which they sustained by not having that security for the Rs. 16,000 and interest were the Rs. 16,000 and interest which the Judicial Commissioner has allowed.

Their Lordships will therefore, humbly advise Her Majesty that the decree of the Judicial Commissioner ought to be affirmed, and the appellant must pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Barrow & Rogers.*

6th November 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock and the Right Hon. Sir Richard Couch.

RAM SING AND ANOTHER * ...*Plaintiffs,*

and

DEPUTY COMMISSIONER OF BARA BANKI ... } *Defendant.*

* 17 Cowell's Ind. ap. 154; 17 Calc., 444.

436 & 445

On appeal from the Court of the Judicial Commissioner of Oudh.

Oudh Talukhdars—Title obtained by Talukhdar under his sanad—Effect of confiscation of 1858 upon previous gift—Attempt to establish trust for claimants as to part of talukhdari estate—Claim to sub-proprietary right distinguished.

The sanad granting a talukhdar's estate confers *primâ facie* an absolute title upon the grantee.

A gift of villages by a talukhdar to collateral relations, if effectively made in 1850, and whether absolute or only for the maintenance of the donees out of the rents and profits, was rendered, by the effect of the confiscation of 1858, inoperative after that event to establish an interest as against the talukhdar holding under a sanad comprising the villages.

Where a claim was based upon the principle that the conduct of a sanad-holding talukhdar and of his predecessor had been sufficient to establish against him a liability to make good, out of his taluk, interests, as to which ground was supposed to have been given for his relations to claim: *Held*, that such a claim was not established merely by the claimants having been left in possession of villages, and having paid to the talukhdar only the proportion of the revenue assessed upon them, during the whole time of the troubles in Oudh, and afterwards. *Held*, also, that the question of the claimants having an under-proprietary right in such villages was entirely irrelevant to a claim for a declaration that they had proprietary right therein, on which latter title they sought to found a right to have their names entered in the settlement record; and *held*, that, although there are cases in which the claimant of a proprietary right may be allowed to maintain, on the same facts, that he is an under-proprietor, this claim was not one of them.

APPEAL from a decree (5th April 1886) of the Judicial Commissioner of Oudh, affirming a decree (31 th October 1885) of the District Judge of Lucknow, dismissing the suit of the appellants with costs.

In the suit out of which this appeal arose, the plaintiffs sought a declaration that they were in full proprietary possession of six villages in Pergunnah Haidargarh, part of the Pokhara Ansari Taluk, of which the Deputy Commissioner of Bar Banki was Manager on behalf of the talukdar, a minor under the Court of Words. They claimed under a deed a gift to their father, Babu Gurdet Singh, from

his nephew Rajah Sahaj Ram Buksh, then the talukdar, executed in 1258 (Fasli, corresponding to 1267 (Hijri), and to 1850 (Christian). This alleged donor was the deceased elder brother of the present minor talukhdar. The question on this appeal was, whether they had established their proprietary right, it being insisted against them that the mere fact of their possession for many years was consistent with the villages having only been given to them for their maintenance; and that, according to the defendant, was what had occurred. The plaintiffs alleged that they were entitled to mutation of names in the settlement record, but had only recently required and applied for it; having lately mortgaged parts of the villages, which rendered it necessary for them to have their names recorded as proprietors.

The defendant, the Deputy Commissioner of Bara Banki, as Manager of the Pokhra Ansari state, on behalf of the minor talukhdar, admitted that the parties were descended from a common grand father Rajah Surkam Singh; but alleged that the taluk descended by old family custom, and in accordance with the Oudh Estates Act I of 1869, to a single heir, while the *chutbhayas* (or cadets of the family) were entitled only to maintenance; the plaintiffs holding the disputed villages as *guzaradars* (or holders) of subsistence allowance. He disputed the deed of gift of 1850, which, as he contended, was of no operation, in consequence of the confiscation of the 15th March 1858, the revival of the talukhdari system in place of the village system, the summary settlement of 1859, the talukhdari-sanad, and the legislation of the Oudh Estates Act I of 1869. The minor talukhdar was entitled, according to the defendant, to an absolute proprietary right, without being liable in respect of any trust, express or implied.

At the hearing, upon issues raising the questions of the genuineness of the deed of gift, and the effect of the plaintiffs' long possession, it appeared that the latter held possession, paying to the talukhdar only the revenue assessed upon the villages some of their witnesses describing their tenure as *pukhtadari*.

The District Judge, without finding that the alleged deed of gift was genuine, decided that, if it was, it would have been inoperative, for the reasons above stated. Although the sanad, and the law, protected inferior rights, this suit having been brought for the full proprietary right, being to all intents and purposes a suit for the partition of the taluk, could not be maintained for the under proprietary right.

On the appeal, urging that the talukhdar had by his conduct constituted himself a trustee for the appellants, who also, failing their rights as proprietors, were entitled to a declaration of their rights as under-proprietors, the Judicial Commissioner, intimating that he had no doubt of the genuineness of the deed of gift of 1855, said:—

"But I am of opinion that under the terms of Lord Canning's proclamation of the 15th March 1858, the deed of gift ceased to be of effect from the date of that proclamation. The words of the proclamation are clear. 'With the above-mentioned exceptions the proprietary right in the soil of the province is confiscated; and the plaintiffs' right is not among the exceptions. If the plaintiffs had a right to a sub-settlement, their right was no doubt protected by the letters printed in the Schedule to Act I of 1869; but the plaintiffs cannot bring themselves within the terms of Act XXVI of 1866, and what they claimed in this suit was the proprietary right in the villages. The statement that under-proprietary right only was claimed is an after-thought put forward for the first time at the hearing of the appeal.

"I am unable to find that 'the evidence shows that the talukdar by his conduct constituted himself a trustee for the plaintiffs.' The trust must [*Hardeo Baksh* v. *Jawahir Singh*, (1),] have been created at some time after the grant of the talukhdari-sanad, and I can find nothing in the evidence to suggest the creation of any such trust. The evidence goes no further than to show that plaintiffs were allowed to hold the villages as cadets of the family. When attempts at alienation were made, whey were resisted: and in 1871 the talukhdar endeavoured to get the villages made liable for his debts."

"The appeal fails and is dismissed with costs.'

On this appeal,

(1) I L. R., 3 Calc., 523; L. R., 4 I. A., 178; 3 P. C. J., 704 L. R., 6 I. A., 161. 4 P. C. J., 10.

Mr. *J. H. A. Branson*, for the appellants, adverted to their uninterrupted possession, and that of their father before them, of the villages, in which he contended that they certainly had rights. The family connection of the parties, their payment only of the Government revenue, the acquiescence of the talukhdar for the time being in a state of things favourable to the plaintiffs' claim, went far to show that he had recognized a trust for them. At all events, the appellants had shown themselves entitled to rights as under-proprietors. He referred to the judgment in *Gauri Shunker* v. *The Maharajah of Bulrampore* (1), showing that a plaintiff, seeking by his plaint a direct settlement in superior-proprietary right, might modify his claim to one for a sub-settlement of an under-proprietary right. The appellants were entitled to a decree stating what their rights had been found to be, and that there ought to be a sub-settlement with them.

Mr. *W. F. Robinson*, Q. *C.*, and Mr. *C. C. Macre*, for the respondents, contended that the only ground on which the plaintiffs could maintain the claim which they had made, upon the issue which they had raised, had failed entirely, leaving them no right of falling back on the claim to a sub-settlement. The case cited was distinguishable, and the present claim was, in effect, disposed of by what their Lordships had said in *Haidar Ali Khan* v. *Nawab Ali*(2). The plaintiffs could not, on this record, rely, for a decree, upon any title they might have as under-proprietors which might or might not be brought forward, but had not been put in issue.

Mr. *J. H. A. Branson* replied.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD HOBHOUSE:—

The villages which are the subject of this suit are part of the defendant's talukh, and are included in the sanad under which he holds that talukh. The plaintiffs claim to be proprietors of the villages by virtue of a deed of gift, which was dated in the year 1850, and of possession taken under that deed, and continued up to the present time. The deed of gift was made by the son of the then Rajah, or talukhdar, who was the manager of the estate, and made to the brother of the then talukhdar, who is the father of the plaintiffs. The genuineness of the deed is disputed but it has been held to be genuine by the Judicial Commissioner; and for the purposes of the present appeal the correctness of the holding may be assumed. But there is no doubt that the deed of gift (whether it is an absolute gift, or one for maintenance only, is a matter of dispute) was displaced by Lord Canning's proclamation; and that the sanad of the taluk conferred an absolute title upon the grantee *primâ facie*.

The plaintiffs base their claim upon the principle of those decisions of this Committee, in which it has been held that the conduct of the holder of a sanad has been sufficient to establish against him a liability to make good, out of his sanad, interests in the property which he has by that conduct either granted to other people, or given them ground to claim. But the plaintiffs do not show that there has been any such conduct beyond the fact that they have been left in possession of the property during the whole time of the troubles in Oudh, and down to the present time.

The talukhdar has paid to the Government the revenue for the whole taluk, and the plaintiffs have paid the talukhdar that share of the revenue which would be payable for the villages that they hold.

They are now desirous of selling or mortgaging the property. They have attempted to do so, and they have failed because they cannot get a mutation of names; and the present suit is a declaratory suit, in which they seek a declaration that they are the proprietors of the property in order that they may obtain a mutation of names.

Their Lordships are of opinion that the mere fact of possession, which is consistent with an intention to give maintenance

(1) L. R., 6 I. A., 1; I. L. R., 4 Calc., 839. 3 P. C. J., 873.

(2) L. R., 16 I. A., 183; I. L. R., 17 Calc. 311. *Anti*, p. 458.

as well as proprietorship, does dot establish any case against the talukhdar obliging him to make the plaintiffs proprietors of that portion of his taluk.

Other cases are now set up. One is that the plaintiffs have a good title by adverse possession. Possession may be adverse or not according to circumstances; and the question of adverse or non-adverse possession is mainly a question of fact. But there has been no allegation of adverse possession in the plaint, and no issue raised as to it before the Court below. Their Lordships think that it is impossible now to suggest a case of adverse possession.

Then the plaintiffs claim that, if they are not proprietors, that have at all events a sub-proprietary right, and there are cases in which it would be quite just and proper to allow one who comes to claim recovery of villages, or the right to a settlement in villages, on the ground of a proprietary right, to maintain upon the same facts that he is in effect a sub-proprietor; but this is not such a case. The question of sub-proprietary right is entirely irrelevant to the relief claimed in this suit, which is for a declaration of right on which to found a mutation of names in order that effect may be given to the dealing with the estate by the plaintiffs.

Their Lordships, thinking that the suit fails upon the main point, hold that it also fails upon the other points; and the result will be that they will humbly advise Her Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Watkins & Lattey.*

Solicitor for the respondents: *The Solicitor, India Office.*

14th & 20th November 1889.

PRESENT;

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

MAHABIR PERSHAD ... } *Purchaser from one of the Defendants.*

and

MOHESWAR NATH SAHAI *Defendant,*

AND ANOTHER ... } *One of the Plaintiffs.*

On Appeal from the High Court in Bengal.

Sale in execution of decree—Sale of joint family estate in execution of a decree against the father upon debts contracted by him—Liability of son's share—Hindu Law—Alienation.

It is only on condition of the son's showing that the father's debt has been contracted for an illegal or immoral purpose that the son, upon a decree against the father alone being executed by the attachment and sale of the family estate, can claim to have the liability limited to the father's own share under the Mitakshara.

In the absence of such proof, whether the entirety of the family estate has been transferred at the sale in execution, or not, is a question of fact, in each case dependent on what was understood to be brought, and has been brought to sale.

Nanomi Babuasin v. *Modhun Mohun*(1) and *Bhagbut Pershad Singh* v. *Girja Koer*(2) referred to and followed.

The description of the property, in the certificate of sale, as the right, title and interest of the judgment-debtor was consistent with every interest, which he might have caused to be sold passing at the sale.

APPEAL from a decree (16th July 1885) of the High Court affirming a decree (10th June 1884) of the Second Subordinate Judge of Sarun.

* 17 Cowell's Ind. Ap., 11; 17 Calc., 584.

(1) L. R., 13 I. A., 1; I. L. R. 13 Calc., 21.

(2) L. R., 15 I. A., 99; I. L. R., 15 Calc., 717.

The suit related to a 5-anna 4-pie share in mouzah Maharajgunge, in the Sarun district, being the ancestral estate of a family consisting of a father, Rai Maheswar Nath Sahai, Mussumat Murat Koer his wife, and their minor son, Markanda Nath. The latter sued by his mother as his guardian, and he was a respondent in this appeal. The father was joined as one of the defendants in the suit, but was a respondent in this appeal. He had, on 11th September 1869, mortgaged a fractional part of the above share to Sheogolam, father of the principal defendant Chowaram, to secure Rs. 4,381. Again, on 5th November 1869, Moheswar Nath had mortgaged a 2-anna share of the family estate to Sant Lal to secure Rs. 500. And on 30th August 1871, he mortgaged a 6-pie share to Chowaram to secure Rs. 1,050. These sums were debts; Moheswar's father having begun to contract them, and he himself having increased them.

Sheo Golam, Sant Lal, and Chowaram obtained decrees against Moheswar in respect of principal and interest due on their bonds. Their decrees were dated 11th September 1873, 7th April 1874 and 10th March 1874. One Sobh Narain also held a decree against him for at least Rs. 2,166.

Chowaram proceeded to execute his decree, and the whole 5 annas 4 pie share of Maharajgunge was advertised to be sold on the 15th January 1875. But Moheswar's son and wife, on the day before the sale, brought a suit against him and Chowaram, claiming that the family estate might be protected by a declaratory decree from the impending sale. Also on 5th January a petition was presented for the sale to be postponed on the ground that the ancestral lands ought not to be sold for a personal debt of the judgment-debtor, and while a suit was pending to exempt that estate from sale. The sale, however, took place.

Chowaram subsequently, on the 21st February 1875, obtained possession of the whole 5 annas 4 pie share from the Court, having paid the purchase-money, Rs. 10,000. This money was appropriated to the payment of various decree-holders against Moheswar, as appears by a proceeding of the Court, dated 10th May 1875. The appellant purchased the rights of Chowaram.

Meantime the plaintiff proceeded with the declaratory suit. This, however, was dismissed on 12th May 1875, the Court being of opinion that after possession of the whole estate, in pursuance of the sale, had been given to the auction-purchaser a declaratory suit would not lie, and that it must be a suit for possession. A suit which Moheswar Nath, on the other hand brought to have the sale set aside on the ground of fraud was dismissed on 25th June 1878 by the High Court (having been decreed in the first instance), so that the purchaser remained in possession. Upon this the objection was raised under section 332 of Act X of 1877, amended by section 43 of Act XII of 1879, then in force that the co-sharers were entitled to joint possession with the purchaser. This was disallowed.

The plaintiff, accordingly, brought the present suit on 15th December 1880, in which issues were settled raising the questions whether the shares, other than Moheswar Nath's in the family estate, were bound by the debt, and whether possession of the whole, or any part could be recovered by the son as his share.

The Subordinate Judge found it not proved that Moheswar Nath had applied to immoral purposes the proceeds of the loan in respect of which Chowaram had obtained a decree against him. He, however, made a decree for possession of the third share by the minor plaintiff, declaring that the purchaser at the sale was entitled only to the share of Moheswar Nath. This was supported, in the main (with a reversal as to mesne profits which had been decreed), on an appeal to the High Court; the Judges (CUNNINGHAM and MACPHERSON J.J.) being of opinion that only the father's shares had been sold.

From this decree an appeal by Mahabir Pershad, the purchasers of Chowaram's decree was admitted to Her Majesty in Council. Thereafter the respondent Mas-

sammat Murat Koer, died; and by an order in Council, the appeal was revived against her husband, Moheswar Nath, on a certificate of the High Court that such revivor should be made; and on a like certificate, Massamat Bubbuh Bibi was appointed guardian *ad litem* to the infant respondent.

Mr. *J. D. Mayne* and Mr. *H. Cowell* for the appellant.—The sale was intended by the Court executing the decree, with the knowledge of all concerned, to transfer the whole joint family estate. The Subordinate Judge was right in holding that Moheswar was not proved to have applied the proceeds of the loan, upon which Chowaram's decree was obtained, to any immoral purpose. The minor respondent, by reason of the son's liability for his father's debts, not incurred for immoral purposes, cannot impeach the sale or limit the application of the execution to the father's share. The decree also was based upon a debt incurred by the successive heads of the family, and therefore bound the entirety of the estate, including the son's interests. Where the father of a family under the Mitakshara law has contracted a debt—on the one hand neither necessary nor beneficial to the family—but still, on the other, not for an immoral or illegal purpose, then, in execution of a decree upon that debt, the whole family estate may be sold, and not merely the father's share. This being the general rule, the exceptional case is where the creditor issues execution against the interest of the father alone. In every one of the cases it is enough to see whether the facts bring it within the general rule as given in *Nanomi Babuasin* v. *Modhun Mohun*(1), or within the exception as found in *Deendyal* v. *Jugdeep Narain Singh*(2). The claim is not under the mortgage, but under the sale upon the decree. They also referred to—*Giridharee Lall* v. *Kantoo Lall*(3); *Suraj Bansi Koer* v. *Sheopersad Singh*(4); *Simbhunath Pande* v. *Golap Singh*(5); *Bhagbut Persad* v. *Girja Koer*(6); *Minakshi Nayudu* v. *Immudi Kanaka Ramaya Goundan*(7).

The respondents did not appear.

Afterwards, on 20th November, their Lordships' judgment was delivered by—

THE RIGHT HON. LORD HOBHOUSE.—

The sole question in this appeal is whether the purchaser, whom the defendant represents, acquired the entirety of the 5 annas 4 pie which were put up to sale in execution, or only such share as the judgment-debtor, Moheswar Nath, would take on a partition Other questions have been raised in the Courts below which are not relevant to this appeal. It has been considered whether the sale was necessary for the benefit of the family estate; but the question is whether the plaintiff, who is the son of the judgment-debtor, can set up his right as a co-sharer to impeach a a sale decreed against his father for the purpose of defraying the debts of his father and grandfather. He can only do so on condition that he shows the debts to have been contracted for immoral purposes, and that issue has been found against him in this suit. Again, the first Court then examined the circumstances at considerable length to show that the purchaser bought the property subject to encumbrances, and that his purchase money ought not to have been applied, as the Court in fact applied it, to the payment of those encumbrances. But if the plaintiff could have raised any such case as that, he must have done so in a suit differently framed in point of parties, of allegations, of prayer, of issue, and of proofs. Except for the issue raised as to immorality, this suit is solely for the purpose of treating the defendant as nothing more than a co-sharer in the estate, and the decree which the plaintiff has obtained does so treat him.

(1) L. R., 13 I. A., 1; I. L. R., 13 Calc., 21.
(2) L. R., 4 I. A., 217; I L. R., 3 Calc., 198.
(3) L. R., 1 I. A., 321; 14 B. L. R., 187.
(4) L. R., 6 I. A., 88; I. L. R., 5 Calc., 148.
(5) L. R., 14 I. A., 77; I. L. R., 14 Calc., 572.
(6) L. R., 15 I. A., 99; I. L. R., 15 Calc., 717.
(7) L. R., 16 I. A., 1; I. L. R., 12 Mad., 142.

There have been of late years great number of suits of this kind, and some difficulties have been felt as to the proper mode of treating them. It is to be hoped that recent decisions by this Committee have lessened these difficulties. At all events, their Lordships feel none in this case, treating it on the principles laid down in the cases of *Nanomi Babuasin* v *Modhun Mohun*(1) and *Bhagbut Persad Singh* v *Girja Koer* (2); and addressing themselves to the question of fact whether the thing meant to be sold and bought was the entirety of the estate or only a share in it.

It would be more convenient if the record contained the whole of the proceedings in the execution and sale, because they must always be important evidence, often the best, as to the nature of the thing sold. In this case the application for attachment and sale, and the orders made thereon, and the notification of sale, are not to be found, and their Lordships are left to infer their tenor from an adverse petition presented on behalf of the plaintiff, and from the sale certificate. The difficulty is increased by the circumstance that there were three, or probably four, decrees then standing against Moheswar, whereas the sale proceeded on one of them, founded on a mortgage to one Chowaram of only a fraction of the estate. From the pleadings and judgments, their Lordships conclude that in some way not explained the various creditors combined to have the estate sold for the common benefit. At all events, no difficulty on the score has been felt in the Courts below.

Chowaram's decree, dated 7th March 1874, is for the realisation of a sum of money out of the property mortgaged to him by Moheswar, viz, "my rights and interests in 6 pie out of 5 annas 4 pie of the entire 16 annas" of the estate in question.

The day fixed for the sale was the 5th January 1875. On the 4th January 1875 the plaintiff filed a plaint against Chowaram and Moheswar, in which, after alleging fraud and immorality, he claimed that "the ancestral property of the plaintiff, which he has inherited from his grandfather, ought not to be sold in satisfaction of such illegal and personal debts;" and he prayed for a declaration protecting his estate. On the next day the plaintiff's pleader presented a petition in the execution proceeding, stating that the 5 annas 4 pie share of mouzah Udoypore, &c., "which is the ancestral property of my client, is to be sold to-day in this Court." The petition then states the suit commenced the day before, and prays postponement of the sale till the suit should be disposed of. That petition was rejected, not on the ground that the thing to be sold was only the share of Moheswar, which could not prejudice the plaintiff, but on this ground, that "the plaintiff is at liberty, in case of the sale taking place, to make the purchaser a defendant in his suit, so that he (the purchaser) may defend the right purchased by him."

It is hardly possible to make it clearer that all parties, judgment-creditors, judgment-debtor, the plaintiff and his advisers, and the Court itself, considered that the thing put up to sale was the entirety of estate.

The sale certificate was issued on the 6th February 1875 to the vakil of Chowaram, the decree-holder. After stating that all the "right, interest and connection which the judgment-debtor had in the property" had been purchased "from the decree-holder," and "that in future the certificate shall be considered as a good evidence of transfer of the right and interest of the judgment-debtor," it describes the property thus—"Five annas four pie of mouzah Udoypore *alias* Maharajgunge, pergunnah Cherand, which belonged to the judgment-debtor, Rai Moheswar Nath, is sold (for) Rs. 10,000."

The Procedure Code at that time required that property sold in execution should be described as the right, title and interest of the judgment-debtor, and it has been held in many cases that the presence of these words in the sale certificate is consistent with the sale of every interest which the judgment-debtor

(1) L. R., 13 I. A., 1; I. L. R., 13 Calc., 21.
(2) L. R., 15 I. A., 99; I. L. R., 15 Cal., 717.

might have sold, and does not necessarily import that when the father of a joint family is the judgment-debtor nothing is sold but his interest as a co-sharer. It is a question of fact in each case; and in this case their Lordships think that the transaction of the 4th and 5th January 1875, and the description of the property in the sale certificate, are conclusive to show that the entire corpus of the estate was sold.

They are of opinion that the High Court should have reversed the decree of the Subordinate Judge and have dismissed the suit with costs, and that a decree to that effect should now be made in reversal of the decree of the High Conrt. The appellant should have his costs in the High Court and also his costs of this appeal. Their Lordships will humbly advise Her Majesty accordingly.

Appeal Allowed.

Solicitors for appellant: Messrs. *Sanderson, Holland and Adkin.*

15th November 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock and the Right Hon. Sir Richard Couch.

BADRI NARAIN * ... *Plaintiff,*

and

SHEO KOER ... *Defendant.*

On appeal from the High Court in Bengal.

Secretary for costs—Civil Procedure, section 549—Power of Appellate Court to extend the time for furnishing security—costs.

Where the High Court, under section 549, Civil Procedure Code, has demanded security from an appellant, it has power to extend the time for complying with this order on application made, as well after as before the time first fixed has expired; and may nevertheless reject the appeal under that section, if the security is not in the end furnished. *Haidri Bai* v. *The East Indian Railway Company* (1) overruled.

In this case the Registrar was directed to allow only the costs applicable to the question argued and decided.

APPEAL from a decree (2nd June 1818) of the High Court(2) made under section 549 of the Civil Procedure Code, rejecting the appellant's appeal from a decree (19th December 1882) of the Subordinate Judge of Patna.

This suit (which was to establish an adoption and title to an estate valued at nearly twelve lakhs of rupees) brought by Mussumat Manki Koer on behalf of Badri Narain, a minor, having been dismissed, an appeal to the High Court was filed on 12th March 1883. Security under s. 549 was demanded on 26th August 1884. This was followed by an order on 12th February 1885, directing that the appellant should furnish security for Rs. 5,000, in respect of the costs of the appeal, and the hearing below, within two months. The orders which are set forth in their Lordships' judgment having then been made, the appeal was dismissed on 2nd June 1885, by a Divisional Bench (GARTH, C.J., and MITTER, J.) (2).

On this appeal.

Mr. *J. H. A. Branson*, for the appellant, argued that the High Court had wrongly construed section 459, and was not bound to reject the suit. He referred to *Balwant Singh* v. *Dowlat Singh*(3) and to *Rajab Ali* v. *Amir Hossein*(4).

Mr. *C. W. Arathoon*, for the respondent, referred to the cases in which it had been held that the security demanded must be furnished within the time first prescribed,

* 17 Cowell's Ind. Ap., 1; 17 Calc., 512.

(1) I. L. R., 1 All., 687.
(2) I. R. L., 11 Calc., 716.
(3) L. R., 13 I. A., 57; I. L. R., 8 All., 315.
(4) I. L. R., 17 Calc., 1.

and cited *Haidri Bai* v. *The East Indian Railway Company* (1).

Mr. *J. H. A. Branson* was not called upon to reply

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR RICHARD COUCH.—

This is an appeal from a decree of the High Court of Calcutta, made on the 2nd of June 1885.

On the 12th of February 1885, an order was made by that Court, directing that the appellant should within two months furnish security to the extent of Rs. 5,000 in respect of the costs of the appeal before it, and of the original suit. It appears that on the 10th April, two days before the expiration of the period of two months, the appellant offered as security a bond by two parties of two sets of properties, and on the 13th April the pleader of the respondent asked that the matter might stand over, and that it should be referred to the Registrar to enquire whether the security was sufficient, that being the day after the expiration of the two months. The matter went to the Registrar. There was first an extension of time until the 20th April, and on the 18th of April a further extension until the 27th. On the 28th of April the Registrar submitted a report in which he stated that each of the two sets of properties included in the security bond, which had been executed on the 24th March 1885, and registered on the 1st April, was of sufficient value, but he submitted for the judgment of the High Court questions of law which had been raised before him with regard to the power of the parties executing the bond to deal with the properties. On the 2nd of June the High Court, on the matter coming before them, made a decree by which they said: "It is ordered, under the provisions of section 549 of the Code of Civil Procedure, that this appeal be and the same is hereby dismissed." Their reason for dismissing it appears in their judgment, in which they say: "We find that it has been decided by the Allahabad High Court in the case of *Haidri Bai* v. *The East Indian Railway Company* (1) that where the High Court orders an appellant to give security for costs, the Court may extend the time within which it orders the security to be furnished, if an application is made within that time, but if the security is not given within the time ordered by the Court, and no application is made within that time to extend the time for giving security, the Court is bound, by section 549 of the Civil Procedure Code, to reject the appeal." It is contended before their Lordships that the effect of that section is that the security which was tendered on the 10th April is the only security which can be looked at, and if, upon the enquiry which was afterwards made, it turns out to be insufficient, the Court has no power under the Act to extend the time for giving security so as to enable the appellant to do what, when it appeared that there was this doubt about the right of the parties to pledge the property included in the bond, he was willing to do, namely, deposit the sum of Rs. 5,000. In the present case this observation arises, that in fact the Court did give an extension of time beyond the 12th April, and if the appellant is right the proceedings by which the matter was referred to the report of the Registrar on the 13th, on the application of the respondent's pleader, would be altogether nugatory and idle. The Court, up to the time of the Registrar making his report, did give time for enquiry, and substantially did give an extension of time up to that period. The question is this: Is the Act so framed as to make it imperative upon the Court to reject the appeal if it turns out, upon the inquiry, that the security is insufficient? The words do not seem to be such as to require that conclusion. The section says: "That the Appellate Court may, at its discretion, either before the respondent is called upon to appear and answer, or afterwards, on the application of the respondent, demand from the appel-

(1) I. L. R., 1 All., 687.

lant security for the costs of the appeal and if such security be not furnished within such time as the Court orders, the Court shall reject the appeal." Those words appeared to be consistent with the Court having power to make fresh orders with regard to the time within which the security should be furnished, and not to fetter it in the way that is contended for by the learned counsel, that having once made an order and fixed a time they can make no alteration in it, no matter what circumstances might occur which would render it impossible for that order to be complied with. That would not be a reasonable construction of the Act. The other construction is a reasonable one, that the application to the Court to enlarge the time for giving security may be made either before or after the expiration of the time within which the security has been ordered to be furnished, and the Court may thereupon enlarge the time according to any necessity which may arise where it is just and proper that they should do so. If ultimately the order is not complied with, and the security is not furnished, the appeal may be dismissed. That agrees with the view which their Lordships have taken of the section in a case in which judgment was delivered on the 3rd of April last of *Rajab Ali* v. *Amir Hossein*(1).

In the present case it appears to their Lordships that the High Court were wrong in holding that they had no power to extend the time for giving the security and that they were bound, by the section 549, to reject the appeal. It was certainly a case in which they might properly have considered whether they should not allow the appeal to be heard. There was an application for review after the order of the 2nd of June was passed, and it then appeared that the party was ready to give the security by deposit of the Rs. 5,000. It is to be regretted that the Court did not allow that to be done, but adhered to its view of section 549 which appears to their Lordships to be erroneous.

With regard to what should be done in the present case, the decree of the High Court of the 2nd June 1885 should be reversed, and an order similar to that which was made in the case of *Balwant Singh* v. *Dowlut Singh*(2) should be made. That was: "That the appellant may give security for the costs mentioned in the order of the 3rd of June 1882"—in this case it will be the order of the 12th February 1885—"of such nature as shall be satisfactory to the High Court and within such reasonable time as shall be fixed by that Court, and that upon his giving such security his appeal shall be restored to the files of that Court." The appeal will then be heard by the High Court. It should be also ordered that the respondent should pay the costs of the petition of the 2nd July 1885, and the hearing thereon. Their Lordships will humbly advise Her Majesty to that effect.

The respondent will pay the costs of of the present appeal, but when those costs are taxed it will be proper for the Registrar, in considering what should be allowed for the cost of perusal of the record, to allow only so much as is applicable to the question which has been argued before their Lordships and now decided.

Appeal allowed.

Solicitors for the Appellant: Messrs. *Watkins and Lattey.*

Solicitors for the Respondent: Messrs. *T. L. Wilson & Co.*

(1) I. L. R., 17 Calc., 1.

(2) L. R., 13 I. A., 57; I. L. R., 8 All., 315.

15th November 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

MODHUSUDAN DAS* ... *Plaintiff,*

and

ADHIKARI PRAPANNA AND ANOTHER } *Defendants.*

On Appeal from the High Court in Bengal.

Security for costs—Civil Procedure, section 549—Rejection of appeal—Discretion of Court.

The security for the respondents' costs which the High Court had demanded under section 549 not having been furnished within the time fixed, and the Court, in the exercise of its discretion, having refused to extend the time, the appeal was rejected under that section. *Held,* that this was not a case for interference.

APPEAL from two orders and a decree (8th December 1885) of the High Court, the latter rejecting, under section 549 of the Civil Procedure Code, an appeal from a decree (8th December 1884) of the Subordinate Judge of Cuttack.

The first Court dismissed the suit between the parties (relating to a claim to succeed as Mohant of a religious institution in Puri, valued at Rs. 35,18,303) and ordered costs, Rs. 2,816, to be paid by plaintiff to the defendants. On the plaintiff's appealing to the High Court, the defendants made an application under section 549, on which it was ordered (3rd July 1885) that cause be shown; and an ordered followed that the plaintiff should within three weeks from that date furnish adequate security for the costs both in the original and the appellate courts. This order was not obeyed, and the plaintiff (24th November 1885) applied for an extension of the period after its expiration. This the High Court (WILSON and FIELD, JJ.) refused (8th December 1885,) observing that "though the Court might have power to extend the time for furnishing the security demanded, after the time allowed by the order had elapsed, still in this case there were no good grounds for so doing. Three months had been allowed, and that was ample. On the plaintiff's own statement it was clear that he had not taken such steps as with reasonable probability would have enabled him to furnish the security in time.

The plaintiff now appealed from the orders of 21st August and 24th November, and from the decree of 8th December 1885.

Mr. *C. W. Arathoon,* for the appellant, argued that the High Court should not, in the exercise of a judicial discretion, have rejected the appeal. He referred to *Rajab Ali* v. *Amir Hossein*(1), *Budri Narain* v. *Sheo Koer*(2), *Balwant Singh* v. *Dowlut Singh*(3).

Mr. *H. Cowell,* for the respondent was not called upon,

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

Their Lordships are of opinion that this appeal ought to be dismissed. The Court exercised their discretion on the 20th November as to whether they would enlarge the time far giving security for costs. Having considered the evidence and all the facts which were brought before them at the time, they exercised their discretion, and thought it was a case in which they ought not to enlarge the time. Their Lordships think that this is not a case with which they ought to interfere. The appeal upon the merits of the case was under the circumstances

* 17 Cowell's Ind., Ap., 9; 17 Calc., 516.

(1) I. L. R., 17 Calc., 1.
(2) I. L. R., 11 Calc., 716.
(3) I. L. R., 8 All., 315; L. R., 13 Ind. Ap. 57.

properly dismissed under section 549 of the Civil Code of Procedure.

Their Lordships will therefore humbly recommend Her Majesty that this appeal be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L Wilson & Co.*

Solicitors for the respondents: Messrs. *Sanderson, Holland & Adkins.*

19th November 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

GOBIND LAL ROY * ... *Plaintiff,*

and

HEMENDRA NARAIN ROY CHOWDHRY } *Defendant.*

On Appeal from the High Court in Bengal.

Lease—Construction of lease, as to the inheritance of it by the heir on the lessee's death.

An ijara for one hundred and twenty-five years granted to a wife stated that it was for the performance of pious acts by her, and that on her death her sons were to take. Her only son died before her, leaving a son.

Held that the construction that the grandson inherited the term on the death of the lessee was correct.

Tej Chand Bahadoor v. *Srikanth Ghose*(1) referred to.

APPEAL from a decree (13th May 1887) of the High Court affirming a decree (22nd March 1886) of the Subordinate Judge of Rungpore.

This suit was brought by the present appellant against the respondent to obtain possession of three villages. It raised the question whether the plaintiff, within whose putni estate the villages, but for an outstanding ijara, would have been included, was entitled to treat that ijara as ended by the deaths of the grantees.

The defendant's grandfather, Bhairabendra Narain Surma, within whose zemindari the villages then were, granted an ijara, dated February 17th, 1843, of the villages for a hundred and twenty-five years to his wife Hara Sunderi in these words:—"The ijara is granted to you for the performance of pious acts. At present you have a son, Jagadindra Narain Surma, and if other sons or another son be born, and if during the term of the ijara you die, then they will in equal shares enjoy the profits down to the end of the ijara."

Jagadindra, having inherited the zemindari of which the villages were part, granted a putni to the present plaintiff. It contained the words "I convey to you my powers of making measurement, and jummabundi assessment of rent, and enhancement, making settlement, and ejectment of tenants."

Jagadindra died in 1883, and his mother Hara Sundari died in 1884. But Jagadindra left a son, Hemendra Narain whom the plaintiff now sued, alleging that the ijara was only to last for the lives of Hara Sundari and her sons, and that upon the deaths of her son Jagadindra and herself it came to an end, so that the plaintiff as putnidar was entitled to khas possession of the three villages.

The defence was that the ijara vested in Hara Sunderi and her heirs down to the end of the term of years.

Both the Courts below construed the ijara in favour of the defendant. The High Court (MITTER and BEVERLEY, J.J.) held that the ijara was to Hara Sunderi and her heirs.

On this appeal.

Mr. *T. H. Cowie*, and Mr. *J. D. Mayne*, for the respondent, argued that upon the

* I. L. R. 17 Calc., 686.

(1) 3 Moore's I. A. 261.

true construction of the ijara it was a personal grant to Hara Sunderi and her sons. When her son died and she died it ceased to operate, not being intended for the benefit of any heirs more distant than those specified. Although in *Tej Chand Bahadoor* v. *Srikanth Ghose*(1) it was said that the grantor was not to be taken to have limited his grant, when made agreeably to law and custom, unless he had done so by qualifying words, the expressions used here were sufficient to make a limitation to the sons only.

Mr. *R. V. Doyne*, for the respondent, was not called upon.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

Their Lordships are of opinion that the decision of the High Court was correct. Each case must be determined on its own circumstances, and each document must be construed according to the words which are contained in it. Their Lordships are of opinion that the High Court put a proper construction upon the documents. In their judgment they say:—"There is nothing in that lease which would go to show that it was the intention of the grantor to limit it to a shorter period." That is quite in accordance with the decision in *Tej Chand Bahadoor* v. *Srikanth Ghose*(1) which was cited by Mr. Mayne in the course of the argument. Then on the same page of their judgment the High Court say:—"In this case it seems to us that the reference to the sons was made in order to indicate that the ijara was not to come to an end on the death of Hara Sunderi. Even if these words were not used the lease, under its terms, would have descended to the heirs of Hara Sunderi; but it was probably thought necessary to make that point clear, and in order to make it clear the last condition, that the ijara should continue to the benefit of the son or sons of Hara Sunderi, was inserted." Their Lordships are of opinion that the ijara was to Hara Sunderi and her heirs, and that is the proper construction to be put upon the lease. In this case the widow had no daughters, and it is stated that the only issue was the son who was named. Their Lordships think that the High Court have put the proper construction upon the document, and they will therefore humbly advise Her Majesty that the decision of the High Court be affirmed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitor for the appellant: Mr. *G. Thatcher.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

(1) 3 Moore's I. A., 261, at p. 272.

19th November 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

MOHINY MOHUN DAS AND OTHERS* } *Plaintiffs,*

and

BUNGSI BUDDAN SAHA DAS AND OTHERS } *Defendants.*

On appeal from the High Court in Bengal.

Parties—Joinder of parties—Civil Procedure, ss. 30 and 34—Limitation—Signature of plaint by one of several co-plaintiffs.

There is no rule that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint.

Three suits for money were filed by one of three joint-creditors, the others being named as

* I. L. R. 17 Calc., 580.

co-plaintiffs with him in the plaints, which he alone signed and verified. An order was made by the Court after the filing of the plaints that one of these joint-creditors should be added as a co-plaintiff, as if he had not been on the record already. If the date of that order had been the date of suit brought, limitation under Act XV of 1877, sched. II, art. 67, would have applied; but it was *held* that all the joint-creditors became plaintiffs when the plaints were filed, the order adding parties being inoperative, and that the suits when instituted were not defective for want of parties.

THREE consolidated appeals from three decrees (24th February 1886), affirming three decrees (March 31st, 1884) of the First Subordinate Judge of Zilla Dacca.

The plaints (filed 2nd November 1883) in the three suits were signed and verified by Mohini Mohun Das, son of the late Modhusudan Das; but Govind Rani Dasi, widow of another son deceased, Mohini Mohun being described as manager acting on her behalf, and Khetter Mohun, another brother, described as "interested plaintiff," were named as co-plaintiffs. The cause of action was money lent from the money-lending business carried on by the plaintiffs in the name of the late Modhusudan Das, the defendants having singed *hat chittas*, and the loan with interest having amounted to Rs. 2,991. An agreement dated 22nd Aughran 1268 (8th December 1875) was filed to show that Mohini Mohun was manager for the brothers.

Mohini Mohun petitioned (22nd November 1883) to be allowed to sue on behalf of Khetter Mohun; the latter petitioned (2nd January 1884) that he might be joined as a plaintiff. An order (8th January 1884) was made that he should be made a plaintiff in the suits. The Subordinate Judge having heard the three suits together or issues raising the questions of Mohini Mohun's authority and of limitation, dismissed them, on the ground that the admission of the debt, which without admission would have been barred by limitation, was made (Assin 1287, September 1880) more than three years before the order making Khetter Mohun a party (8th January 1884) was passed. Till that order was made, the suits in the opinion of the Judge had not been effectively filed, being defective for want of the proper parties having been made plaintiffs.

The High Court (CUNNINGHAM and O'KINEALY, J.J), on appeals prefered by the three co-plaintiffs, supported this decision, on the ground that one of the three plaintiffs, who was a necessary party to the suits, had not been brought on to the record until after the expiration of the period of limitation.

The three alleged co-plaintiffs having appealed.

Mr. *J. H. A. Branson* (with whom was Mr. *T. H. Cowie, Q.C.*), for the appellants, argued that the decisions of the Courts below were incorrect. All the persons interested as plaintiffs were before the Courts, being properly on the record, so that the suit, when filed on the 2nd November 1883, at which time the debt was not barred, was not, as had been erroneously supposed, defective for want of parties. Where the interests of joint-contractors had to be enforced, one of them, if duly authorized, might sue on behalf of all interested; and his authority might be shown. Reference was made to the Civil Procedure Code, section 30 and 34, and to the requirement that any such objection as the present should be taken at the earliest possible opportunity. There was, however, no valid objection to Mohini Mohun's having sued on behalf of all the joint-creditors. He was manager on their behalf as shown by an agreement filed; and, in fact, neither of them had disavowed the claim, as filed by him, with their names mentioned as co-plaintiffs.

Reference was made to *Sujad Ali Khan* v. *Lalla Kasheenath Doss*(1), *Mokha Harakraj Joshi* v. *Biseswar Doss*(2); *Lisandas Magniram* v. *Lakmichand Kisanchand*(3), and the Civil Procedure Code, ss. 26, 32, cls. 3 & 4.

Mr *R. V. Doyne*, for the respondent Bungsi Buddan Saha contended that the suit was instituted by Mohini Mohun

(1) 6 W. R., 181.
(2) 5 B. L. R. Ap. 11 : 13 W. R., 344.
(3) 6 Bom. H. C., 150.

alone. He alone signed and verified the plaints. The agreement on which reliance had been placed did not expressly authorise bringing the suits by Mohini on behalf of Gobind Rani; but the main question was,—when did Khetter Mohun become a party to these suits? It was not at the institution of the suits on 2nd November 1883 that he did so. The suits, having been filed by Mohini Mohun alone, were defective till the 8th of January 1884, by which time they were barred by limitation. The attempted joinder, or ineffectual attempt to join Gobind Rani Dasi was also a complete objection. Reference was made to section 36, Civil Procedure Code, and to *Ramsibuk* v. *Ramlall Koondoo*(1).

Mr. *J. H. A. Branson* replied.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD MACNAGHTEN :—

These suits were instituted on the 2nd of November 1883 to recover moneys alleged to be due to Mohini Mohun, Gobind Rani, and Khetter Mohun jointly on an account acknowledged and signed in 1880. In both Courts the suits were held to have been originally defective for want of parties, and to have been barred by the Law of Limitation before the defect was cured.

On the face of the plaints the three joint-creditors are named as co-plaintiffs. The names of Gobind Rani and Khetter Mohun have not been struck out, nor did they, or either of them, attempt to repudiate the suits. But still it was contended that Mohini Mohun was the sole plaintiff, or, at any rate, that Khetter Mohun ought not to be treated as a co-plaintiff from the commencement of the litigation.

In the first place it was said that the plaints were signed and verified by Mohini Mohun alone. But that is immaterial. There is no rule providing that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint.

Then as regards Khetter Mohun, it was said that both Mohini Mohun and Khetter Mohun himself took the view that he was not originally a plaintiff. Having named Khetter Mohun as co-plaintiff, Mohini Mohun presented petitions asking for permisson to prosecute the suits on behalf of Khetter Mohun, relying, as appears by the plaints, on section 30 of the Civil Procedure Code of 1882, which only applies "when a suit is brought by one person on behalf of other persons having joint interests, but not named as co-plaintiffs." Notice of the petitions was given to Khetter Mohun, and he being named as co-plaintiff already asked to be made a plaintiff. By some oversight orders to that effect were made on the 8th of January 1884. The orders were merely waste paper. These various experiments or blunders cannot, in their Lordships' opinion, affect the real position of the parties, which is plain on the face of the record. The question, as Mr. Doyne put it, is simply this :—When was it that Khetter Mohun became a party to these suits? If it was on the 2nd of November 1883 the suits were in time. If it was not till the 8th of January 1884, they were too late. Their Lordships think that Khetter Mohun, as well as Gobind Rani, became a party, as plaintiff, on the 2nd of November 1883, and that the suits therefore are not barred by lapse of time.

Their Lordships will humbly advise Her Majesty that the appeals ought to be allowed, that the decrees of the Subordinate Court and the High Court ought to be reversed, and that the suits should be remanded to the High Court with a direction that they should be tried on the merits by the Subordinate Court, and giving the parties leave to raise such issues and to adduce such evidence as they may be advised, and that the costs which have been incurred in the Subordinate Court should abide the results of the suits, and the costs which have been incurred in the High Court be paid by Bungsi Buddan Saha Das. The respon-

(1) I. L. R., 6 Calc., 815.

dent, Bungsi Buddan Saha Das, will pay the costs of these appeals.

Appeals allowed : suits remanded.

Solicitors for the appellants : Messrs. *Watkins & Lattey.*

Solicitors for the respondent Bungsi Buddan Saha : Messrs. *T. L. Wilson & Co.*

22nd November 1889.

PRESENT :

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Ashbourne, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

BISESWAR ROY AND ANOTHER* ... } *Plaintiffs,*

and

SHASHI SIKARESWAR ROY AND ANOTHER ... } *Defendants.*

On Appeal from the High Court in Bengal.

Court of Wards Act (Bengal Act X of 1879), s. 55—Suit rejected when filed on behalf of a minor under the Court of Wards without sanction of that authority to proceed with it.

Where, under section 55 of the Bengal Court of Wards Act, IX of 1879, the manager of an estate authorised the plaintiff, in order to save limitation, to institute a suit on behalf of the Court of Wards, which refused afterwards to sanction the proceeding with the suit, *held* that the Judge rightly ordered that the suit be rejected, as incapable, under the above section, of being prosecuted.

APPEAL from a decree (26th January 1886) of the High Court, affirming orders (14th August 1880 and 27th February 1884), of the Subordinate Judge of Rajshahye.

The question raised on this appeal was whether a plaint filed on behalf of two minors under the Court of Wards, Kumar Biseswar Roy and Kumar Kasiswar Roy, by one Biseswar Moitra had been rightly rejected by the Subordinate Judge, having been by him struck off the file of pending suits as incapable of being prosecuted for want of the sanction of the Court of wards.

Raja Biseswar Roy left a widow, Rani Jai Sunderi Debi, the grandmother of the appellants and of the second respondent, between whom it was contested which had the right of succession to her estate. She died in 1867, leaving a son, Moheswar Roy, father of these appellants. He died in 1873, and under an order of 24th June 1874, made by the District Judge of Rajshahye under the 12th section of Act XL of 1858 (the Bengal Minors' Act), the Collector took charge of these appellants' estates.

By section 2, Bengal Act IX of 1879, "all persons and properties which at the commencement of this Act are under the charge of the Collector by virtue of an order of the Civil Court under section 12 of Act XL of 1858 shall from such commencement be deemed to be under the charge of the Court of Wards." From 1879, therefore, the minors came under the control of the Court of Wards; and upon this taking place, the Collector appointed to be manager of their estate one Hurrogobind Bose, who had also been manager under the Court of Wards of the estate of their cousin Kumar Soshi Sikar Eswar Roy, now the first respondent. His action in regard to the estate of Rani Jai Sunderi was one of the matters of complaint in this suit, of which the enforced termination was now in question. To obtain for the minors, now appellants, two-thirds of their deceased grandmother's property, Biseswar Moitra, describing himself as their "authorised guardian and well-wisher," brought this suit on the 19th November 1879. He had written authority, dated 19th November 1879,

* 17 Cowell's Ind. Ap., 5; 17 Calc., 688.

from Hurrogobind, who purported to act under the direction of the Commissioner and to be authorised by the Collector in charge, to sue at his (Biseswar's) own risk, in order to prevent the application of limitation to the minors' claim.

Afterwards, on the 8th May 1880, the Collector authorised Biseswar Moitra to act as next friend; but whether the Collector was empowered so to do was one of the present questions.

On the 14th August 1880 the Subordinate Judge, after several times postponing the suit to enable Biseswar Moitra to obtain the permission of the Board of Revenue to prosecute the suit, ordered that the plaint should be rejected and the suit struck off the file.

On the 27th February 1884, Kumar Biseswar petitioned the Judge to restore the suit to the file, he having attained majority, and having received possession from the Court of Wards. A similar petition was preferred by Kumar Kasiswar, the other appellant, who had reached eighteen years of age.

On the 30th June, the Subordinate Judge dismissed both petitions, being of opinion that the plaint had been properly rejected, and that he had no jurisdiction to restore it to the file.

An appeal from this order, and also from the order of 14th August 1880, having been admitted, a Division Bench (MACDONELL and BEVERLEY JJ.) dismissed it and affirmed the order rejecting the plaint. They said—

"We find from the proceedings of the Board of Revenue dated the 25th February 1880 that the question of this suit, and of the proper person to conduct it on behalf of the minors, was under the consideration of the Court of Wards, and from that resolution it is clear that the Court of Wards intended to reserve to itself the power of appointing a next friend of the minors for the purposes of this suit, if it should determine that the suit should be proceeded with; and on the 28th May 1880, only twenty days subsequent to the date of the Collector's letter, we find a letter from the Court of Wards to the effect that they do not authorise the prosecution of the suit. We are driven, therefore, to the conclusion that the Collector's letter of the 8th May 1880 was written without authority, and that it did not really convey the sanction of the Court of Wards for the institution or prosecution of this suit.

"Then it is said that under the proviso to section 25, Act IX of 1879, the institution of this plaint was authorised by the manager, Hurrogobind Bose; and we are referred to a letter written by Hurrogobind Bose to Biseswar Moitra, dated 17th November 1879, upon which this plaint was filed, authorising him at his own risk and responsibility to institute this suit in order to prevent the application of limitation.

"It is contended before us that this authority is sufficient, and that it was not necessary that the plaint should have been filed in accordance with sections 51 and 52 of the Act, but that the manager had the power of authorising any third person to institute the suit on behalf of the minors. We are unable to adopt this view. We think that the plain meaning of section 55 is this: That suits are not to be instituted on behalf of wards of Court without the authority of some order of the Court of Wards, provided that in special cases, in order to save suits from being barred by limitation while the order of the Court is being applied for, the manager of the estate may of his own motion cause a plaint to be filed; but the section goes on distinctly to say that no further proceedings in the suit so filed shall be taken without the sanction of the Court. We see nothing in this section to over-ride the plain provisions of sections 51 and 52, which prescribe the manner in which suits are to be instituted on behalf of minors. In such suits either the manager, or the Collector, or some other person appointed by an order of the Court of Wards, must be named as next friend. In the present case neither the Collector nor the manager, nor any person authorised by the Court of Wards, was named as next friend, and we therefore find that the suit was brought in an improper form, and for this reason alone we think that it was properly rejected.

"For these reasons, then, we think that the present appeal must fail. The appeal is dismissed with costs."

Mr. *R. V. Doyne*, for the appellant, argued that, reference being made to the 15th section of the Act IX of 1879, the letter of 17th November 1879 conferred on Biseswar Moitra an authority to sue on behalf of the present appellents sufficient to satisfy the 55th section of the Act. Also in regard to the letter of 8th May 1880 it was to be presumed that the Collector was acting under the orders of the Court of Wards, and in accordance with the resolution of 25th February 1880. The Collector after that could not, by his letter of 28th May 1880, interfere with the hearing of the suit, which had

been duly instituted. At most, the withdrawal of authority should only have the effect of staying the suit until these appellants should be released from the control of the Court of Wards.

Mr. *J. D. Mayne*, for the respondents was not called upon by their Lordships, whose judgment was delivered by

THE RIGHT HON. SIR LORD HOBHOUSE.—

The matter in dispute in this case lies within a very narrow compass. The 55th section of the Bengal Court of Wards Act, Act IX of 1879, provides that "no suit shall be brought on behalf of any ward unless the same be authorised by some order of the Court"—(that is, the Court of Wards): "provided that a manager may authorise a plaint to be filed in order to prevent a suit from being barred by the Law of Limitation; but such suit shall not be afterwards proceeded with, except under the sanction of the Court." The appellants in the year 1879 were wards of Court, and Hurrogobind Bose had been appointed manager of their estate. On the 17th November 1879 Hurrogobind Bose wrote a letter to the plaintiff in this suit, Biseswar Moitra, authorising him to institute a suit on behalf of the wards at his own risk and responsibility, in order to prevent the application of limitation. The letter refers to applications to the Collector and to the Commissioner, and to opinions expressed by them, but it does not mention any order of the Court of Wards, nor does it purport to come from the Court of Wards at all. It is an authority of the manager under the second clause of section 55 of the Act to Biseswar Moitra to institute a suit for the purpose of saving the time of limitation. On the same day the plaintiff instituted the suit. It seems to have been doubted in the High Court whether he had authority to institute the suit. Their Lordships consider that the manager had the right to give Biseswar Moitra the authority, and that the suit was properly instituted. Then came the question whether the suit should be prosecuted. Biseswar Moitra took immediate steps to get an authority from the Court of Wards to prosecute the suit, and he applied to the Civil Court several times to give him time to produce his authority to prosecute the suit. On the 8th May 1880 a letter was written, which, if it came from the Courts of Wards, would show that they were then of opinion that the suit should go on, for it purports to be an authority from the Officiating Collector of Rajshahye, authorising Biseswar Moitra to act as next friend of the infants. But it does not purport to come from the Courts of Wards, and it is quite clear that nobody treated it as being an authority from the Courts of Wards, because on the 10th May an application was made to the Civil Court to postpone the case, without any mention of the letter of the 8th May as being an authority to prosecute the suit. However that may be, on the 28th May a letter was written which does purport to convey the opinion of the Court of Wards. It was written by the Assistant Collector to the Government Pleader and the writer requested the Goverment Pleader "to take steps at once to inform the Court and intimate to the Mookhtar of the junior branch, Biseswar Moitra, that the Court of Wards does not "authorise the suit." That letter was communicated to the Court. On the same day an application was made to the Court, and the letter was produced which refused sanction to the prosecution of the case. Upon that the plaintiff applied for time to get the sanction of the Court of Wards, and time was given him and on two subsequent occasions further time was given that he might get the sanction of the Court of Wards. Ultimately the time was enlarged until the 14th of August, and on the 14th of August, there being nothing said in contradiction of the letter of the 28th of May, the Subordinate Judge ordered that the case should be struck off the file. It appears to their Lordships, not only that he had jurisdiction to strike the case off the file, but that he was quite right in doing so. He had before him a suit which, however lawfully instituted, was by law incapable of being prosecuted without a sanction, which the plaintiff was unable to obtain.

Their Lordships therefore are of opinion that this appeal should be dismissed with costs; and they will humbly advise Her Majesty in accordance with that opinion.

Appeal dismissed.

Solicitors for appellant: Messrs. *Watkins & Lattey.*

Solicitors for respondent: Messrs. *T. L. Wilson & Co.*

23rd November 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Ashbourne, the Right Hon. Lord Hobhouse, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

GOUR MOHUN CHAKERBATI... *Appellant.*

and

TARA SUNDERI DEBI ... *Respondent.*

On petition referring to an appeal from the High Court in Bengal.

Privy Council, Practice of—Procedure—Circumstances and terms of substitution of an appellant.

An appellant, after the transmission of his appeal to England, obtained leave in the High Court to withdraw it. The appeal involved the rights of a minor, party to the suit, whose mother and guardian obtained an order for her to be substituted for the withdrawing appellant, on the terms that she should give security to the satisfaction of the High Court for costs already ordered, and should undertake to abide by any order as to general costs.

THIS was a petition preferred by Bamasunderi Debi, widow of the late Dwarkanath Chakerbati, who died in January 1886, leaving also another widow, the respondent Tarasunderi Debi. The petitioner asked to have her name, or that of her adopted son, Debender Nath Chakerbati, through her as his guardian, substituted in the abovenamed appeal for that of the appellant, Gour Mohun, who after the transmission of the record to England had applied to the High Court for leave to withdraw.

The appeal raised the question whether Dwarkanath had, by his will, given to the petitioner the power which she had purported to exercise in adopting Debender Nath. The execution of the will was denied by Tarasunderi, by whom Dwarkanath had a son who survived him, but this son had since deceased. Probate of the will, having been granted under Act V of 1881, was afterwards, on 23rd April 1888, revoked.

The appellant Gour Mohun, on 17th February 1888, had obtained a certificate giving leave to appeal, and the petitioner now represented the injury that would be caused to the minor should the appeal be discontinued. The petition set forth that an application had been made on the 5th June 1889 to the High Court for leave to substitute the petitioner Bamasunderi, either as executrix appointed by the will or as guardian of the adopted minor, Debender Nath. This, however, had been refused, on the ground that it was for their Lordships, and not for the High Court, to dispose of the matter.

Mr. *R. V. Doyne* supported the petition.

Mr. *T. H. Cowie, Q.C.*, appeared for the respondent, Tarasunderi.

Their Lordships' judgment was that the petitioner ought to be substituted for the withdrawing appellant on the terms that she gave security to the satisfaction of the High Court for the costs already incurred, and undertook to abide by such order as might be made as to the general costs.

Solicitor for the petitioner: Mr. *G. Stevens.*

Solicitors for the respondent: Messrs. *Sanderson, Holland, & Adkins.*

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* I. L. R. 17 Calc., 693.

9th, and 14th November and 1st December 1888.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, The Right Hon. Lord Hobhouse, The Right Hon. Lord Macnaghten, The Right Hon. Sir Richard Couch, and the Right Hon. Mr. Stephen Woulfe Flanagan.

BHAIYA RABIDAT SINGH*...*Plaintiff,*

and

MAHARANI INDAR KUNWAR AND OTHERS ...} *Respondents.*

On appeal from the Court of the Judicial Commissioner of Oudh.

Oude Estates Act of 1869, s. 13, sub-s. 1—"Intestate"—Written Authority to adopt need not be registered—Law of Adoption—Effect of Agreement between Adoptive Mother and Natural Father.

Act I of 1869 requires an authority to adopt to be in writing, but does not require such writing to be registered, and Act III. of 1877, sec. 17, excepts from registration authorities to adopt which are conferred by will.

"Intestate" in sub-sec. I, sec. 13, means intestate as to estate. An adopted son is a person who would have succeeded to an intestate within the meaning of that section, although the authority to adopt him was conferred by the will of such intestate.

An adoption otherwise valid is not prejudiced by an agreement between the adoptive mother and natural father that the former should retain her husband's estate during her life. Such an agreement does not affect the rights of the son or render his adoption conditional.

APPEAL from a decree of the Judicial Commissioner (March 27, 1886), affirming a decree of the District Judge of *Fyzabad* (May 19, 1885), which dismissed the Appellant's suit.

The judgment of their Lordships was delivered by

THE RIGHT HON. LORD MACNAGHTEN:—

It appears to their Lordships that this case is free from difficulty.

The will of the late Maharajah of Bulrampur, Sir *Digbijai Singh*, was recently under the consideration of this Board on the occasion of a claim by his junior widow to joint proprietary rights in his estate. Their Lordships then expressed their opinion that, according to the true construction of the will, the Maharajah conferred upon his senior widow (who is the first Defendant in the present suit), and upon her alone, a life estate in all his property, and authority to select and adopt such minor male child of his family as she might think fit. The adoption which she was not only authorized but required to make was to be "according to the custom of the family and according to the Hindu law," and the adopted son was to "be in place of an actual son the owner of the entire riasat, and the assets moveable and immoveable," the widow taking a provision for her maintenance.

The senior widow selected for adoption a minor male child of the Maharajah's family. It has been admitted in this suit that "the ceremonies of adoption were duly performed." They took place on the 8th of November, 1883. On the 5th of December following the senior widow executed a deed of adoption, which was duly registered, by which she declared that, in accordance with the written permission of her deceased husband, she had adopted *Udit Narain Singh* (who is the second Defendant to this suit), and that he would be the proprietor of the Maharajah's estate and property both moveable and immoveable like a real son.

The Appellant, who is a distant relative of the late Maharajah, and the person upon whom, according to the rules of intestate succession prescribed by the *Oudh Estates Act*, 1869, in default of any widow of the Maharajah, or any son adopted by her, as provided by the Act, or any male lineal descendant of such son, the Maharajah's talukdari estate would descend, brought this suit for the purpose of having it declared that the

* 16 Cowell's Ind. Ap., 53.

adoption of the second Defendant was invalid, fraudulent, and void.

Three grounds of objection to the validity of the adoption were urged before their Lordships.

In the first place it was contended that the adoption was invalid, because the authority to adopt was not contained in a registered document. Their Lordships are of opinion that there is no ground for this contention. The Act of 1869 requires the writing by which an authority to adopt a son is exercised to be registered. It also requires the authority to be in writing. But it does not require that writing to be registered. Act III of 1877, sec. 17, which does require authorities to adopt a son to be registered, expressly excepts authorities conferred by will.

In the next place it was contended that the adoption was invalid, and the bequest to the adopted son of no effect, so far, at any rate, as regards the talukdari property, because the adopted son was not a person who could take the talukdari property under an unregistered will. It is obvious that this objection, assuming it to be well founded, would not better the position of the Appellant if the senior widow had authority in writing to make the adoption, and did in fact make the adoption in manner prescribed by the Act of 1869. The adopted son would not take until the widow's death, but still he would take to the exclusion of the Appellant. Their Lordships, however, are of opinion that the objection is not well founded. In order to make the objection good the Appellant has to establish the proposition that the adopted son is not within the exception contained in sec. 13, sub-sec. 1, of the Act, that he is not a person who, under the provisions of the Act or under the ordinary law to which persons of the testator's tribe and religion are subject, would have succeeded to the talukdari estate or to an interest therein if the Maharajah "had died intestate." The Appellant endeavoured to support that proposition by arguing that if the Maharajah had left no will there would have been no authority to adopt in existence. And then, in regard to succession to the estate, *Udit Narain Singh* would have ranked as the son of *Guman Singh*. But the word "intestate" in sub-sec. 1 evidently means intestate as to his estate, that is, his estate as that expression is defined by the Act, the taluk or immoveable property to which alone the Act is declared to extend. This is plain on consideration of sec. 13 taken by itself, but it is made still plainer, if possible, by reference to sec. 22, which is closely connected with sec. 13, and which expresses what otherwise would necessarily be implied, and qualifies the word "intestate" by the addition of the words "as to his estate."

The last point urged on behalf of the Appellant was described by the learned counsel in support of the appeal as his strongest point. It was this. The senior widow seems to have been unwilling to disregard her husband's injunctions, but at the same time she was anxious to keep the estate during her life. She obtained from the natural father of the child whom she proposed to adopt a document dated the 26th of October, 1883, in which it was declared that she should have full control during her lifetime over the property left by the late Maharajah. It was not suggested that there was or could have been in the ceremonial of adoption any such condition or reservation, nor is any trace of that condition or reservation to be found in the deed of adoption of the 5th of December, 1883. But some months afterwards, on the 28th of March, 1884, the senior widow executed what is called a second deed of adoption, by which she purported to revoke the deed of the 5th of December, on the allegation that it ought to have contained a provision postponing the interest of the adopted son until her death.

On these facts it was argued that the adoption was a fraud upon the authority to adopt, and therefore void.

This point seems to their Lordships equally untenable.

The conduct of the senior widow is not altogether to be commended, but it would be extravagant to describe it as fraudulent, or to maintain that the adoption was made for a corrupt purpose or for a purpose foreign to the real object for which the authority to adopt was conferred. It may be true, as suggested by Mr. *Arathoon*, that the child of *Guman Singh* was selected in preference to the child of the Appellant because the senior widow had reason to believe that the selection would be less likely to lead to her position being challenged. But it is difficult to understand how a declaration by *Guman Singh* or an agreement by him, if it was an agreement, could prejudice or affect the rights of his son, which could only arise when his parental control and authority determined. The ceremonies of adoption are unimpeached. The deed of adoption is open to no objection. The second deed is admittedly inoperative. No conditions, therefore, were attached to the adoption. Had it been otherwise, the analogy, such as it is, presented by the doctrines of Courts of Equity in this country relating to the execution of powers of appointment to which Mr. *Arathoon* appealed would rather suggest that, even in that case, the adoption would have been valid and the conditions void.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed. The Appellant will pay the costs of the appeal.

Solicitors for Appellant: Messrs. *Young, Jackson, & Beard.*

Solicitors for *Maharani Indar Kunwar* and *Udit Narain Singh:* Messrs. *T. L. Wilson & Co.*

20th, and 21st November 1889, 19th July 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

UMES CHUNDER SIRCAR * *Plaintiff,*

and

ZAHUR FATIMA AND OTHERS ... } *Defendants.*

On appeal from the High Court in Bengal.

Mortgage—Redemption of prior mortgage by puisne mortgagee—Sale, at his suit, of mortgaged property, on what terms, and with payment of what incumbrances—Purchases before and during mortgage's suit, and after decree therein how affected by it—Interest on mortgage debt, when reducible by the decree from its date; and when continuing payable at the contract rate—Execution of decree—Civil Procedure Code, s. 266—Attachment of future estate—Construction, according to Mahomedan law, of grant of such estate.

Upon a claim by a puisne mortgagee to redeem prior incumbrances, and in the alternative, for a decree ordering a sale of the property mortgaged, the sale was decreed, with application of the purchase-money to pay incumbrances in their due order; and with redemption by the plaintiff of a prior mortgagee, who was to have an option to redeem.

Previously to the mortgage, a fractional interest in the property (which interest was purchased by the plaintiff at a judicial sale) had been the subject of a settlement by a Mahomedan on his wife, under the condition that if he should have no child by her, his two sons by another wife should each have an estate therein. He died without other children. *Held*, that the two sons had taken definite interests capable of being attached, within section 266 of the Civil Procedure

* 17 Cowell's Ind. Ap., 201.; 18 Calc., 164.

Code, not being mere expectancies. *Held*, also, that a judicial sale of property, purporting to be of all the interests of a judgment debtor, carries with it any enlargement thereof that may have occurred after the attachment and before the sale; and that, accordingly, the above-mentioned settlor having died without a child by that wife, between the date of the attachment and the sale, the sons' augmented interests passed thereby.

The plaintiff in this suit had succeeded to four, out of five, mortgages, subsequent to his own, which had been executed before a decree obtained by a mortgagee. This decree had been purchased by the first defendant, who also bought the property at the execution sale. The plaintiff had also succeeded to several mortgages executed pending the suit in which the decree was made. *Held*, that a distinction must be made in respect of whether the mortgages so transferred to the plaintiff had been executed before or after the bringing of the above suit. As regards the mortgages executed before it, the plaintiff, not having been a party to that suit, was entitled to redeem the first defendant who was purchaser of the decree. As regards the mortgages executed after that suit was brought, the plaintiff was bound by the decree, and his interest in the mortgages, transferred *pendente lite*, passed to the purchaser. On the other hand, persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit, between the prior mortgagee and the mortgagor, to which they have not been made parties.

As regards the Court's power to regulate the interest, *held*, that although, in the decree for sale, the rate of interest on the debt, payable to the mortgage decree-holder, was reducible from the date of the decree from the rate stipulated, to the Court rate, an order to that effect could only be made for the benefit of the judgment-debtor as a party to the suit. The plaintiff, seeking to redeem a mortgage prior to the suit, must pay the interest at the rate agreed upon in the mortgage; there being no authority, either under section 10 of Act XXIII of 1861, or under the Civil Procedure Code, section 209, to reduce it to the Court-rate.

APPEAL from a decree (10th September 1885) of the High Court varying a decree (7th September 1883) of the District Judge of Gaya.

The appellant, who was plaintiff, having made all interested parties, claimed in the right of a puisne mortgagee of twelve annas of mauza Sirdilla in the Gaya district, having also obtained transfers of other mortgages upon the same estate, and having bought at judicial sales fractional parts of it. The defendants had also acquired mortgage interests in the mauza, and they were now sued by the plaintiff, who sought to redeem prior incumbrances, so as to make his own charges the first on the property. In the alternative, he claimed to have a direction made for the sale of the mortgaged property, and an order that out of the proceeds the mortgage money due to all parties should be paid according to their several priorities.

The first Court, substantially, decreed the latter claim; and from that decree the only defendant who appealed to the High Court was Zahur Fatima, now one of twelve respondents here. The questions now raised related to points on which the Courts below had differed, and were, in effect, as to the ownership, disputed between the parties, of a fractional share, *viz.*, seventeen dams, of the twelve annas of Sirdilla, and as to the right to redeem, on the plaintiff's part, another share of two annas. The priority of transfers and the right of mortgagees to redeem and to transfer were involved; also the terms on which redemption was to be made, and the quantum of interest on the mortgage debts.

By a butwara made in 1867, Sirdilla was partitioned, the shares amounting to nearly twelve annas, being thus distributed, *viz.*, to Saiyed Sultan Ali five annas thirteen dams six cowries; to his sons Farzund Ali and Farkut Ali, two annas each; to Mussamut Hosseini, wife of the latter, two annas two dams four cowries. On the 26th January 1871 Sultan Ali granted a mokarari lease of one anna fourteen dams for life, at a rent of one rupee to his wife Amani Begum, step-mother of Farzand Ali and Farkut Ali, with the condition that if she should not bear any child to him that share should go to his two sons; that if she should have a child living at his death, such child should take the share. Soon afterwards a series of mortgages, some executed by the two sons and Hosseini jointly, and others by the sons jointly or singly, commenced and continued to be made during a period of about eight years, down to near the death of Sultan Ali, which occurred on 29th

April 1879, no child having been born of Amani Begum.

The mauza Sirdilla being situated in the Nawada sub-division of the Gaya district, it was considered necessary, in order to bring the mortgages within the registration area of the sub-registrar of Gaya, to include in each mortgage some property within that jurisdiction. A house at Sahebgunge, belonging to the family, but undivided at the butwara, answered the purpose. The primary object in including a kothri of it in some of the bonds and in mortgaging, in four of the mortgages, the entire house, was, as the first Court found, to enable the parties to complete the transaction in Gaya. First, were mortgaged on the 14th April 1871 a four-anna share of the twelve annas and a room in the house at Sahebgunge to Hossein Ali to secure Rs. 8,000 and interest thereon. Then followed a mortgage of 29th July 1873 to Arshad Ali by the two brothers and Hosseini of two annas of the sixteen annas of Sirdilla; and this was part of the title made by Zahur Fatima to her interest in the two annas. It was referred to, in their Lordships' judgment, as the mortgage bond marked B2.

Other mortgages followed; some to Arshad Ali, and others to Sheochurn Lal, the interests in all of which came by assignment to the plaintiff. Arshad Ali having died, his widow, Akhtar Fatima, became solely entitled to his rights as mortgagee, which she exercised by suing the mortgagors on the mortgage of 29th July 1873, and she obtained an *ex parte* decree on 23rd June 1875, with an order for the sale of the mortgaged property. Zahur Fatima, the present respondent, inherited the rights of Akhtar; and it was as to the effect of the sale under this decree that arose one of the differences of opinion between the Court of First Instance and the High Court. A series of mortgages, direct to the plaintiff, came after that decree, and on the 15th September 1876, the brothers and Hosseini mortgaged to him for Rs. 4,000, to be repaid in 1878, the whole sixteen annas of their family interest in Sirdilla. Also on the 16th March, 14th August, and 26th September 1877, similar mortgages to the plaintiff were executed by them; the whole of the twelve annas share in Sirdilla, subject to the mortgages thereon, having become vested in the latter, after the death of Sultan Ali, on the 29th April 1879.

As to these incumbrances, the following was stated in the judgment of the First Court:—"There were in all twenty-six mortgages of the whole, or part, of the Sirdilla estate between the 15th December 1874 and the 25th February 1879. Of these thirteen were to the plaintiff direct, and seven to the mahajun, Sheochurn Lal. The plaintiff thus became the assignee, by purchase, of all the bonds of Sheochurn Lal, and was thus the holder of twenty mortgages on the estate subsequent to the mortgages to Mahomed Hossein Khan and Arshad Ali. On the 24th September 1880, plaintiff also became the assignee of a bond, dated 19th March 1874, by purchase from an heir of Arshad Ali. Of the remaining bonds, one was given to Lalan, mortgaging a one anna share; one to Gonesh Lal, defendant No. 5, mortgaging two annas; one to Iswardyal, mortgaging a one anna share; one to Zahur Fatima, one to Asgur Ali Khan, defendant No. 6, and one to Muhammad Hakh, defendant No. 7, each mortgaging a one anna share."

On the following dates the plaintiff became transferee of the under-mentioned, *viz.*, on 15th April 1879, a three annas share; 15th September 1879, a two annas share; 17th July 1879, a one anna share; 15 July 1880, whole interest of Farzand Ali not transferred at previous sales; 15th July 1881, the share of Farhat Ali inherited from his father Sultan Ali; and 15th July 1881, the share of Farzand Ali inherited from his father, with the exception of seventeen dams, excluded on the objection of Zahur Fatima. The other purchasers were—15th May 1879, Moulavi Fazlul Bari, two annas; 15th December 1879, Zahur Fatima, three annas; 15th May 1880, seventeen dams

of the inherited share of Farzand Ali, as to which arose the above questions of construction and priority; 15th May 1880, the entire house at Sahebgunge; 15th May 1880, defendants Nos. 8 and 9, one anna share; 15th March 1880, defendant No. 7, one anna share.

The question relating to the seventeen dams contested on this appeal, being originally half the share granted in mokarari by Sultan Ali to his wife Amani, arose thus. The respondent, Zahur, having obtained a decree against Farzand Ali alone on the mortgage which had been executed to her by Farzund Ali alone on the 18th July 1878, which was in the life-time of Sultan Ali, of a one-anna share of Sirdilla, caused the attachment and sale, not only of that one anna, but also of the seventeen dams, the moiety of the proprietary interest which had been retained by Sultan Ali, and which had descended on his death to Farzand Ali. The respondent also brought to sale the entire house and Sahebgunge. At this sale she became the purchaser of the interest of the judgment-debtor in those seventeen dams.

Iswardyal, who was one of those who afterwards assigned his interests to the appellant, obtained a mortgage, on the 27th March 1878, from Farzand Ali, of one anna out of the sixteen annas of the family estate in Sirdilla to secure repayment of Rs. 500 with interest. On the 14th April 1879, a few days before Sultan Ali died, Iswardyal applied for execution of a decree upon this mortgage against one anna mortgaged, and against another seven annas, the interest of the debtor which was not mortgaged, *i.e.*, in all the moiety of the family share in Sirdilla, which Iswardyal by his application alleged to belong to Farzand Ali. Attachment issued, accordingly, after the 23rd April, when the report of the office was made, but it did not show whether this was before or after the death of Sultan Ali. The sale took place on 17th July 1879 after his death, and Iswardyal became the purchaser of the whole interest so attached and sold, including the seventeen dams in dispute. This was found by the High Court in concurrence with the First Court. The interest so acquired was sold by Iswardyal afterwards to the plaintiff, who claimed against Zahur Fatima under this title.

The other question as to which the Court, differed arose thus. As has been stated, on the 29th July 1873 the two brothers and Hosseini mortgaged two annas of the entire sixteen annas of Sirdilla together with one room of the house in Sahebgunge to Arshad Ali, the interest in which passed on Arshad Ali's death to his widow, Akhtar Fatima, who obtained a decree on the 23rd June 1875 against the mortgagors for sale of the mortgaged share, the interest in which decree on the death of Akhtar Fatima passed to the respondent, Zahur Fatima, as her heiress. The latter took out execution of this decree, and caused the sale by the Court on the 15th December 1879 of what was described in the execution proceedings as "two annas out of sixteen annas of Sirdilla belonging to the debtors."

The description by number and amount of revenue in the Collectorate books was the same as that of the twelve annas estate. A question arose as to whether Zahur Fatima had purchased two annas of Sirdilla as a whole, or only a two-anna share of the twelve-anna share; as well as a question in regard to the effect of her purshase of either of these fractional parts, whichever it might have been.

The First Court, as to the whole case, was of opinion that any one who was entitled to an equity of redemption had a right to redeem, so as to have his own interest released from the mortgage, on payment of the mortgage debt; that the mortgagor, by mortgaging the property to second mortgagees, made them his assigns, and as between him and them, the latter had the preferable right to redeem; that if there were several successive mortgagees, the right of a prior incumbrancer to redeem was preferable to that of a subsequent one; and that, where the plaintiff had only a partial

interest, a decree had to be made, reserving the equities of the other persons interested. In applying these principles to this case, the First Court held that, so far as the prior mortgage was concerned, the execution purchaser stood exactly in the position of the prior mortgagee; so far, also, as regards the subsequent incumbrancer's right to redeem. The First Court was not of opinion that the subsequent incumbrancer's right of redemption was liable to be defeated by the circumstance that, although aware of the sale about to take place in realization of the prior mortgage debt, he had neglected to come in and redeem by paying up the amount of the judgment-debt. It was the main argument on behalf of the defendant, Zahur Fatima, that the plaintiff should have done so. But this the First Court did not allow to prevail.

It found that Akhtar Fatima and Zahur Fatima had actual notice of the plaintiff's mortgages. But it held that this did not affect the question, which was governed by the following consideration, *viz.*, that whenever a mortgage lien passed over to a purchaser in execution of a decree against a mortgagor, it passed over subject to the same equities as against the purchaser, to which the mortgagee himself was subject. That being so, the purchaser was obliged to to take it as liable to the contingency of redemption by persons holding outstanding interests in the equity of redemption. Neither could he claim a greater interest in the equity of redemption than that held by the judgment-debtor. Upon the first of the questions now in dispute, *viz.*, as to the seventeen dams, the First Court held that the plaintiff's purchase was prior to that of Zahur Fatima, and and his title was better than her's. Upon the second question, *viz.*, as to what was acquired by the mortgagee of the two annas share, the First Court held that as assignee of the mortgages of the 17th March 1874, of the 11th May 1875, and of the 4th June 1875, by which each brother mortgaged his entire share; also by the effect of the two mortgages of the 15th May by which the shares of Sirdilla (as well as the house in Sahebgunge) were mortgaged to Sheochurn Lal; also under the mortgages by which the two brothers and Hosseini had mortgaged to the plaintiff the entire family share, the plaintiff was a puisne mortgagee of the two annas purchased by the respondent. The mortgage of the house in Sahebgunge was held to be a valid one, and "to confer the legal consequences resulting therefrom."

Having decided that the plaintiff was entitled to redeem, the First Court held that an order for sale should be substituted, that being the usual practice when the mortgagor did not appear to pay off incumbrances, the net proceeds of the sale being ordered to be divided among them according to their priority. It was added that the following directions should be observed in taking the accounts:—

(1)—Parties deriving title under an execution sale will be allowed a lien on the property hypothecated in the bond, and purchased in execution of the decree on that bond. There is no lien in respect of property of the debtor, other than that pledged in the bond, purchased in the execution of the decree.

(2)—The lien so allowed will only be for the amount of the mortgage debt for which the property was sold. For this purpose it is quite immaterial whether the purchase-money fell short of, or was in excess of, the amount of the judgment debt. In either case, the purchaser acquired the judgment-creditor's mortgage lien together with the debtor's interest in the equity of redemption. A portion of the price paid would represent the value of the latter; the purchaser has no lien for it, but as a proprietor to that extent he will have the right to share in the surplus sale-proceeds after paying off all incumbrances. The lien here allowed to the auction-purchaser is only on so much of the sale-proceeds as represent the mortgaged share.

(3)—Where the party has been in

possession of his purchased share of the estate, he is not entitled to interest on the amount secured by his lien, it being presumed that the mesne profits are a fair equivalent for further interest. Where the party has not been in possession, interest on the amount secured by the lien is only to be allowed at 6 per cent. per annum from date of purchase.

(4)—With respect to bonds now sued upon for the first time, interest will be allowed on the secured debt at the rate stipulated in the bond down to date of suit, and from that date to sale at 6 per cent. per annum.

The decree that followed, dated 17th September 1883, directed a sale of the entire estate, free of all incumbrances. The upset price to be fixed at a sum equal to the aggregate amounts of the purchase-money paid by defendants, Fazlul Bari and Zahur Fatima, being the value of their proprietary right and mortgage liens, but without interest, they having been in possession of their shares, plus costs of suit and costs of sale. Both parties to have liberty to buy at the sale, of which the proceeds were to be applied in discharge, of the incumbrances found by the accounts in order of their priority. Any surplus to go to the proprietors in the proportion of their shares. Of the seventeen dams, the right and possession of the plaintiff were maintained against Zahur, whose purchase was declared invalid. The purchase by the plaintiff of the two-anna share on the 15th April 1879 was confirmed, and he was declared entitled to a lien on the property, mortgaged in fourteen bonds, with interest. The decree directed the taking of accounts, stating the order in which charges were to be paid, with regard to the above judgment.

The High Court (PRINSEP and GRANT, JJ.) holding it to be settled law that all puisne incumbrances at the time of the institution of a suit on a prior mortgage, to enforce payment by sale of the mortgaged property, are entitled to redeem, in a proceeding to which they are properly made parties, adverted to the fact that the plaintiff, claiming to be a puisne incumbrancer at the time of Zahur Fatima's suit, decreed in 1875, was no party thereto. He could, therefore, in the present suit, claim the right to redeem that mortgage, or to have the property sold. But they were of opinion that, although the plaintiff had a valid mortgage of Sultan Ali's entire share, which the plaintiff was entitled to insist upon, in the hands of the mortgagors, the respondent could make out her title thus. She was entitled, notwithstanding the above, as a *bonâ fide* purchaser for valuable consideration without notice of the appellant's mortgage over the sventeen dams; and thus she had a title superior to that of the plaintiff. The High Court, therefore, dismissed the suit as to the seventeen dams. It dealt with the two annas' share in the same way, holding that the plaintiff had not satisfactorily shown that this share had been included in the earlier mortgages assigned to him, under which he claimed.

In other respects, the judgment of the First Court was affirmed, and the decree for the sale remained, except so far as it affected the seventeen dams, and the two annas' shares of the twelve annas of Sirdilla, as to which it was reversed.

The plaintiff having appealed on the points on which the judgment of the High Court had been adverse to him.

Mr. *R. V. Doyne* for the appellant, argued that the High Court should not have varied the decree of the First Court. The sale of the house at Sahebgunge had, however, been omitted from the decree, and should be ordered. This had been pointed out in the cross-objections filed by the plaintiff in the High Court. In regard to the seventeen dams share, the First Court was right in holding that the plaintiff has the prior and better title. On the proper construction of the deed of 26th January 1871, the interest of Farzand Ali was a definite one, and on Sultan Ali's death without addition to his family, became vested in the judgment-debtors beyond the possibility of displacement. He referred to section

266 of the Civil Procedure Code, 1877 and 1882. The sale was after Sultan Ali's death, and passed the whole interest that had become vested in Farzand. Even if the plaintiff had not been entitled as a prior purchaser, his suit should not on that account have been dismissed as to the seventeen dams. He was at least entitled to treat Zahur Fatima as a mortgagee, and to redeem, or to have the seventeen dams sold, with distribution of the proceeds according to the several priorities of the incumbrancers. That was so, on the understanding that the Courts were correct in ordering a sale, but as to this it might be doubted whether redemption was not the only proceeding which should have been directed. As regards the other question upon which the Courts had differed, the First Court was right in holding that the plaintiff was a mortgagee, both directly and by assignment, of the two annas share, and of the room mortgaged therewith.

Mr. *J. D. Mayne*, and Mr. *C. W. Arathoon*, for the respondent Zahur Fatima, argued that the High Court had rightly reversed so much of the judgment of the First Court as related to the seventeen dams share, which had erroneously decided that the burden of proof that this share had not been attached, and had not been sold in execution of Iswardyal's decree, was on Zahur Fatima. The First Court ought to have held that the seventeen dams in question were neither attached nor sold to the plaintiff. The purchase by Zahur was proved, and took place without notice of any claim by the plaintiff. His claim, in fact, was an afterthought, and was not made till 1882, after the sale to the respondent Zahur had taken place. The seventeen dams had not been included in the property attached, the judgment-debtor not having had any definite interest, but only an expectancy, not legally liable to attachment. Not having been attached, the seventeen dams were not affected by the death of Sultan Ali between the date of the attachment and the sale. Extension of his interest happening to Farhut on this event would not alter the effect of the previous attachment. The claim to redeem set up was supported only by analogies taken from the English law of mortgage. But the Indian law, founded on the legislation of 1806, differed from the English in this respect. The sale which took place in 1879 had the effect of shutting out the mortgagees, who at that time had notice and stood by. On the other hand, Zahur Fatima was a *bonâ-fide* purchaser without notice, and as against her the plaintiff had no right in respect of the mortgage under which he claimed. This applied to the conflicting interest put forward in respect of the two annas share. The plaintiff had notice of the sale at which Zahur Fatima bought, and she was led to believe that she purchased the two annas share. Reference was made to—*Brajaraj Kissori Dasi* v. *Mohamed Salem*(1); *Lutf Ali Khan* v. *Futteh Bahadur*(2); *Shringanpure* v. *Pethe*(3); *Kasandas Lalcas* v. *Pranjivan Asharam*(4); *Sheo Prosun Singh* v. *Brojoo Shaha*(5); *Balwant Singh* v. *Gokaran Prasad*(6); *Rajnarain Singh* v. *Sheera Mean*(7) *Emam Momtazoodeen Mahomed* v. *Rajcoomar Das*(8); *Gupinath Singh* v. *Shai Sahai Singh*(9).

Mr. *R. V. Doyne* replied.

Their Lordships' judgment was delivered on a subsequent day (19th July 1890), (a brief statement of their opinion having been given at the conclusion of the arguments of counsel) by

THE RIGHT HON. LORD HOBHOUSE :—

Their Lordships are of opinion that the house in Sahebgunge should be included in the direction to sell, and they will now express their opinion as to the question of the seventeen dams of pro-

(1) 1 B. L. R., A. C., 152.
(2) L. R., 16 I. A., 129; I. L. R., 17 Calc., 23.
(3) I. L. R., 2 Bom., 662.
(4) 7 Bom. H. C., A. C., 146.
(5) 7 W. R., 232.
(6) I. L. R., 1 All., 433.
(7) 7 W. R., 67.
(8) 14 B. L. R., 408.
(9) B. L. R., Sup., Vol. 72; 1 W. R., 315.

perty as to which the plaintiff and the defendant Zahur each claims to be the absolute owner. The question is who acquired the ownership first in point of time. The plaintiff's claim depends on his purchase of the 17th July, completed on the 22nd September 1879. If that is a valid purchase, it is prior to the purchase of the defendant, which did not take place till the year 1881; and the plaintiff is entitled to that share of the property.

The purchase took place under these circumstances. On the 14th April 1879 one Iswardyal, who for this purpose is identical with the plaintiff, having got a decree on a mortgage, applied to enforce it by attachment and "sale of the immoveable properties owned by the judgment-debtor" (the judgment-debtor being Farzand Ali, the mortgagee), "as specified in the inventory mentioned below." The inventory mentioned below specifies 1 anna out of sixteen annas of mouza Sirdilla, the property mortgaged in the bond; and also seven annas out of sixteen annas of Sirdilla owned by the judgment-debtor, which was property not mortgaged in the bond. That application includes eight annas of the family property. Eight annas was a larger share than Farzand Ali was actually entitled to, because he and his brother held equal shares in the property, and their sister-in-law Hosseini had a share also; but the circumstance that the description of the property includes more than the judgment-debtor was actually entitled to would not tend to exclude the seventeen dams in question from that description.

The sale took place, and the certificate was granted on 22nd September 1879, and it is there certified that the decree-holder has been declared as the purchaser of the judgment-debtor's right in one anna out of sixteen annas which was mortgaged, and so forth, and by another certificate there is a similar declaration as to the seven annas. So that it is quite clear that the intention was to attach and to sell whatever right and interest the judgment-debtor Farzand had in the eight annas of the property. The question is, what interest had he as regards these seventeen dams. That depends upon the construction of the deed of the 26th January 1871. In that deed there may be some obscurity as to the exact interest that the children of Sultan Ali and his wife Amani Begum were to take, but as applied to the events that have happened there is no obscurity about it. Sultan Ali, the then owner of one anna and fourteen dams, grants that share in mokurari farm to his wife Amani Begum on this condition, that if she has a child by him the grant shall be taken as a perpetual mokurari. Whether descendible to children or taken by children in remainder does not matter now (the deed is rather obscure on that point), but it is to go to the child of Sultan Ali and Amani Begum in perpetual inheritance. In case of no child being born, then it is only to be a life-mokurari, and after the death of Amani Begum the property is to come to the possession of the settlor's two sons Farzand and Farhut. There is to be paid the Government revenue on the share of the estate and one rupee to the settlor. At the time of the attachment Sultan Ali was still living, and at all events in contemplation of law there might be a child to take; but the deed confers upon the sons Farzand and Farhut a definite interest, like what we should call in English law a vested remainder, only that it was liable to be displaced by the event of there being a son of Sultan Ali by Amani Begum. Between the attachment and the sale—very soon after the attachment—Sultan Ali died, and then the contingency, such as it was, was entirely put an end to. It is quite true the parties might not know whether Amani Begum was with child by Sultan Ali or not, but the fact was determined at that time, and there was no longer any contingency in the eye of the law. It does not, in their Lordships' view, very much signify whether Sultan Ali was alive or dead at the time of the sale, but they wish to guard themselves

against being supposed to concur in an argument that was presented at the bar, to the effect that if between the time of attachment and the time of sale events should happen which would have the effect of accelerating or enlarging the interest of the judgment-debtor as it stood at the time of attachment, that augmented interest would not pass by the sale which purports to convey all that the judgment-debtor has at the time. But taking the case most strongly against the plaintiff, supposing that he could get nothing but that which was capable of attachment, and was actually attached on 14th April 1879, their Lordships hold that this interest in remainder is a property which was capable of being attached, and which was intended to be attached. It is said that by section 266 this property was not liable to attachment, because it is there provided that:—"The following particulars shall not be liable to attachment;" and among them is:—"an expectancy in succession, by survivorship or other merely contingent or possible right or interest." It seems to their Lordships that in all probability the High Court, who held that the seventeen dams were not attached, must have had this section in their view, though they do not refer to it, because they treat the case as if the two sons had no interest during the life of their father, but as if, upon the father's death, they inherited the property from him. But that is not the case, excepting as regards the one rupee which for this purpose may be thrown out of consideration altogether. Except as regards that one rupee they inherited nothing from him. He had in his lifetime parted with the whole property, either to Amani Begum his wife and her children by him, or to his two sons. That interest given to the two sons appears to their Lordships not to fall within the description of an expectancy or of a merely contingent or possible right or interest. Their Lordships therefore hold that as regards the seventeen dams the plaintiff has the priority, and that the decree of the High Court is erroneous to that extent.

The next question, on which also the Courts below have differed, is whether the plaintiff has a right to treat the defendant Zahur as being only a mortgagee of the share of the property which was purchased by her in execution, and on that footing to redeem her mortgage. The District Judge thought that the plaintiff had that right, and gave him a decree accordingly. The High Court thought otherwise, and varied the decree by dismissing the plaintiff's suit so far as regards the two annas in question.

By the mortgage bond marked B2, dated the 29th July 1873, Farzand Ali, who owned four annas, of Sirdilla, Farhut his brother, who owned four annas, and Hosseini their cousin, who owned about two annas four dams, mortgaged two annas of the whole mouza to Arshad Ali, the predecessor in title of Zahur, to secure Rs. 2,000 with interest at 24 per cent.

On the 26th May 1875 the then owner of the mortgage brought a suit against the three mortgagors, and obtained a decree on the 23rd of June 1875. The decree was for "the amount of the suit" with costs and interest for the period of pendency of the suit, and for future interest at the rate of Rs. 6 per cent. per annum, and for sale of the mortgaged property.

The decree was not executed till the 15th December 1879, when the property described as two annas of Kushba Jurra was put up for sale to realize Rs. 3,582-5-1 the decretal amount, and was purchased by Zahur, who then owned the mortgage, for Rs. 4,700.

Between the date of Zahur's mortgage and the suit brought to realize it, five other mortgages were executed, two by the three mortgagors, two by Farzund and Farhut, and one by Farhut alone, each mortgaging undivided shares (not further identified) in Sirdilla; and four of these mortgages became vested in the plaintiff. Afterwards a number of other mortgage deeds were executed, some by one of the owners of Sirdilla, some by another, making altogether about 30

mortgages of undivided shares, most of which became vested in the plaintiff.

In deciding that the plaintiff had become mortgagee of the property comprised in Zahur's mortgage, and was therefore entitled to redeem her, the District Judge allowed no distinction between the mortgages prior to the suit of the 26th May 1875 and those subsequent to it, or those subsequent to the decree of the 23rd June 1875. He appears to think that because at any time before actual sale the mortgagor himself and anybody to whom he may have transferred the property can come in and redeem the property by paying the debt, therefore it follows that after sale the mortgagor's transferee, if not a party to the proceedings, can do the same thing. But if the transfer took place *pendente lite* the transferee must take his interest subject to the incidents of the suit; and one of those is that a purchaser under the decree will get a good title against all persons whom the suit binds.

Their Lordships think that the High Court were right to confine their attention to the mortgages made prior to Zahur's suit, for the purpose of deciding whether the plaintiff is entitled to redeem Zahur. But the High Court thought that it was necessary for the plaintiff to show that the whole of the two annas comprised in Zahur's mortgage passed under the subsequent mortgages to the plaintiff, and calculations of great nicety have been entered into for the purpose of showing that the whole did not pass. Their Lordships do not follow the calculations, because they are founded on an erroneous view. After effecting the joint mortgage, each of the three mortgagors had a right to redeem the mortgagee, and each could transfer his interest, and with it that right. And it is sufficient to say that by mortgage B7, dated the 11th May 1875, Farhut transferred to the plaintiff's predecessor in title a share in the property which he had not got without taking in his share comprised in Zahur's mortgage. Probably by earlier mortgages, certainly by that mortgage, the right to redeem Zahur in a properly constituted suit was acquired; and it has never been lost, because the plaintiff was no party to Zahur's suit.

It was indeed argued by Mr. Mayne that the sale in 1879 had the effect of shutting out all puisne incumbrances. But their Lordships consider that the right view on this point has been taken in both the Courts below. Persons who have taken transfers of property subject to a mortgage cannot be bound by proceedings in a subsequent suit between the prior mortgagee and the mortgagor to which they are never made parties.

Mr. Doyne then contends that the decree is wrong in directing a sale of the whole property, and leaving the rights of the parties to be worked out against purchase-money, and he claims to treat the suit as a redemption suit. To this it is sufficient to answer that the plaint asks for a sale, and that the plaintiff has not till the hearing of this appeal suggested that the Court should deal with the property in any other way. The decree is right in ordering a sale, and the respective rights of the plaintiff and Zahur in the purchase money must be adjusted on the footing that the plaintiff has the right to redeem Zahur's two annas.

Next comes the question on what terms the redemption is to be made. The District Judge has laid down certain rules to guide the course of the accounts. One of them (No. 3) is that a possession of a mortgage shall be taken as equivalent to interest. This rule, which appears to be just and convenient, and is not objected to by either party, will relieve Zahur from giving an account of her receipts, and will deprive her of interest, from some time in the year 1880, when it appears that she took possession. Under rules 1 and 2 she will be entitled to a lien on the property mortgaged to her for the amount of the mortgage debt for which the property was sold, without regard to the amount paid by her on the purchase. But nothing is said as to the

amount of interest to which she is entitled prior to her possession, probably on the ground that possession was given to her immediately after the sale. And the question has been discussed at the bar to what rate of interest she is entitled. Their Lordships suppose that up to the date of the decree of the 23rd June 1875 interest was computed according to the rate allowed by the mortgage deed, viz., 24 per cent. After that date the decree gives interest at 6 per cent.

The Court's power to regulate interest is given by section 10 of Act XXIII of 1861, which answers to the 209th section of the present Civil Procedure Code. That power is given when a plaintiff sues for money due to him, and it is a discretionary power to give such rate as the Court may think proper by decree. The decree can only operate between the parties to the suit, and those who claim under them. The plaintiff getting the security of a decree has his interest reduced in the generality of cases. But the plaintiff in this case comes to take away from Zahur the benefit of the decree. It would be unjust if he could use the decree to cut down her interest, while he deprives her of the whole advantage of it. His case is, that as to him Zahur is still but a mortgagee, and if so, she should be allowed such benefit as her mortgage gives her. If Zahur had not got a decree, and the plaintiff had come to redeem her mortgage, he must have paid whatever interest her contract entitled her to, and the Court would have had no jurisdiction to cut it down; and that is the position in which the parties are placed by the decree in this suit. There is a penal rate of interest (120 per cent.) imposed by the mortgage, but it is clear that in 1875 that was not claimed. Nor do their Lordships conceive that it can now be claimed. Setting that aside, the justice of the case demands that Zahur should be able to claim such interest as her contract gives her, up to the time when she took possession of the mortgaged property.

Supposing the redemption effected by the plaintiff, what is Zahur's position? She was mortgagee of the two annas of the old mouza Sirdilla or Jurra, the touzi number of which was 1013, and the sudder jumma Rs. 797. She then purchased the ownership, subject to the plaintiff's mortgage or mortgages, of two annas of Kusba Jurra, which bears another touzi number and a smaller sudder jumma, and which was formed out of twelve annas of the former mouza Sirdilla or Jurra, belonging to the family of the mortgagors. She has therefore a right to redeem the plaintiff as regards these two annas, on paying such sum as he can properly claim against them in respect of the four mortgages effected prior to the 26th of May 1875. What that sum may be it is impossible to tell on the present materials, but it can and should be ascertained by inquiry, and a reasonable time should be allowed to Zahur to elect whether or no she will redeem.

Their Lordships will humbly advise Her Majesty to discharge the order of the High Court passed on the 10th September 1885, and instead thereof to order as follows:—

Declare that the plaintiff is entitled to redeem the mortgage of the 29th July 1873 upon payment to Zahur of the principal and interest moneys secured thereby, reckoning interest at the rate of 24 per cent. per annum up to the day on which possession of the mortgaged property was awarded in execution to Zahur, and no later.

Declare that if the plaintiff exercises such right of redemption, then on payment by Zahur to him of all moneys paid by him for redemption of the mortgage of the 29th July 1873, and of such costs of this suit, including the costs of the appeal to the High Court, and of this appeal, as are properly chargeable on the property comprised therein, and of all other moneys, if any, which are due to him on the security of the property comprised in the mortgage of the 29th July 1873 in respect of the other mortgages which were effected prior to the 26th May 1875, and which afterwards became vested in him,

Zahur is entitled to redeem the share of Kusba Jurra which was purchased by her under the decree of the 23rd June 1875, and possession of which was awarded in execution to her by the Court in the same suit.

Let the Court make such inquiries and take such accounts as are proper for carrying the above declarations into effect, and fix reasonable periods of time within which the plaintiff and Zahur respectively shall exercise the rights of redemption hereby declared to belong to them.

Declare that if the plaintiff and Zahur respectively do not exercise their rights of redemption within such time as the Court by its final order in that behalf may direct, they shall respectively be foreclosed and debarred from all right of redemption.

In all other respects let the decree of the 17th September 1883 stand affirmed.

Order Zahur to pay to the plaintiff the costs of the appeal to the High Court. Zahur must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Wrentmore & Swinhoe.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

22nd November and 11th December 1889.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

LALA GAURI SANKER LAL AND OTHERS* } *Defendants,*

and

JANKI PERSHAD AND OTHERS ... } *Plaintiffs.*

* 17 Cowell's Ind. Ap., 57 ; 17 Calc., 809.

On appeal from the High Court in Bengal.

Sale for arrears of revenue—Act XI of 1859, sections 18 and 33—Collector's order of exemption.

A Collector's order under section 18 of Act XI of 1859 for exempting an estate from sale for arrears of revenue must be an absolute exemption, and not an order having effect as an exemption or not, according to what may happen, or be done, afterwards. It must not depend on an act which may, or may not, be performed.

The High Court having set aside a sale, as contrary to the provisions of the Act XI of 1859, upon a ground other than that declared and specified in an appeal made to the Commissioner of Revenue against the order for the sale, the Judicial Committee, referring to section 33 as prohibiting such a course, reversed the decision of the High Court.

APPEAL from a decree (28th June 1887) of the High Court, reversing a decree (9th March 1886) of the Subordinate Judge of zilla Chupra.

The suit out of which this appeal arose was instituted on the 23rd May 1885 by numerous co-plaintiffs, some of whom were zemindars owning, and others were interested in, a mehal named Dumaria in Chupra, of which the jumma was Rs. 458-10-8, in respect of which there had been a default for certain months of 1883. The March and June kists being in default, the estate was sold by order of the Collector of Sarun on the 25th September 1883. It was purchased in the name of the defendant and present appellant, Lala Gauri Sanker Lal. Against this sale an appeal was preferred by the plaintiffs to the Commissioner of Revenue of the Division; but he, on the 18th September 1884, dismissed it, holding that there was no ground for interference.

The proprietors of Dumaria accordingly brought this suit on 23rd May 1885, alleging the sale to have been contrary to the provisions of the Sale Law, and specifying irregularities. They claimed that the sale should be set aside, and that they should have possession, mesne profits, and costs.

The auction-purchasers and the Government were made defendants. The grounds of defence were substantially the same, viz., that there had been actual default.

The issues raised questions whether there was any cause of action against the Government, and whether the sale was or was not contrary to the provisions of the Sale Law. The plaint alleged that an application tendering payment had been made on 22nd September 1883, whereupon the Collector after inquiry in effect ordered that the arrears should be received. This was called the special order in the judgments below. It was also alleged that the Collector, before the sale, viz., on 24th September 1883, made an order that the mehals on which arrears should have been deposited before a certain time would be released. This was termed the general order.

The Subordinate Judge decided that the sale was in accordance with the Sale Law, Act XI of 1859, and dismissed the suit with costs. On an appeal by the plaintiffs to the High Court, a Division Bench found that the arrears were not paid in due time, but were tendered before the sale. Differing from the Subordinate Judge, the High Court held that the special order had the effect of exempting the estate from sale. They, therefore, upon this special order, decided in favour of the plaintiffs. They were of opinion, at the same time, that had the plaintiffs failed on the strength of that order in getting the sale set aside, they could not have succeeded upon the general order of the 24th September. The appeal was decreed, the sale was set aside, and possession was awarded to the plaintiffs, with an account of mesne profits.

The Government, not having joined the co-defendants in preferring this appeal, were in the record made respondents under the statutory name.

On this appeal,

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the appellants, contended that the special order of the 22nd September 1883, even if proved to have been made as alleged by the plaintiffs, had not the effect of exempting the estate from sale under Act XI of 1859. Nor had the general order of the 24th September that effect. There was a subsisting arrear of revenue for which the mehal was liable to be sold. There was no obligation, legally binding on the Collector, to postpone the sale or to accept payment after sunset on the last day allowed for payment. The sale was regular, and the plaintiffs were bound by it, with the result that the property had passed to the purchaser.

None of the respondents appeared.

Their Lordships' judgment, on a subsequent day, 11th December, was delivered by

THE RIGHT HON. SIR RICHARD COUCH.—

The appellants were defendants in a suit to set aside a sale of an estate or mehal called Dumaria for arrears of revenue due from the plaintiffs, made by the Collector of Sarun under the provisions of Act XI of 1859. The Lower Court dismissed the suit, but the High Court of Bengal reversed its decree, and ordered the sale to be set aside, and that the plaintiffs should recover possession of the estate.

On the 13th August 1883, Rs. 8-13-5 of Government revenue due on the 7th June 1883 being unpaid, a notification was issued by the Collector of Sarun that the estate would be publicly sold on Monday, the 24th September, and was duly published. On the 24th September the Collector made an order in these terms:—"Payments of revenue in arrear will be received in the treasury up to the time of sale. Applications for exemtion on the ground of payment will be received up to 1-30 p.m., but they must be supported by treasury receipts for payment in full of all demands. No applications will be received, and no payments will be accepted, after the sale has commenced." On the 22nd Septem.

ber, Bindeswari Pershad Singh, one of the respondents, presented a petition to the Collector, stating that in mehal Dumaria there was an arrear of Rs. 8-12-5 in consequence of default in payment of revenue made by the other shareholders, and that he had brought the amount of arrears, and praying that it might be received and entered in the account and the mehal released from sale. On the back of this petition there is a written order, dated the 24th September, that the office report be submitted, and after entries of the office reports there are the following :—

"Receipt not produced before sale."

"C. C. QUINN."

"The 25th September 1883."

"Accept on payment of all Government demands."

"R. C. P., Sarun Collectorate."

"The —— September 1883."

In the Lower Court, and in the High Court, the last entry is spoken of as made on the 22nd September 1883. It does not appear for what reason. Mr. Quinn was the Collector. It is not known who was the person who used the initials R. C. P., but no issue was raised in the suit as to the authority to make that entry, and that cannot now be disputed.

In the judgment of the Lower Court it is found that the payment was not made before 1-30 p.m. on the 25th September, to which day the sale of Dumaria and a number of other estates in arrear had been duly adjourned by the Collector, and at the time of the sale no treasury receipt was produced. The payment was made at the Collector's office some time before 2 p.m. on the 25th and before the commencement of the sale, but after the officers had left the office and gone to the Collector's ijlas (bench) to attend it.

Thus the order of the 24th September, called the general order, under which an exemption might have been granted, was found not to have been complied with, and the plaintiffs were obliged to rely upon what is called in the issues the special order dated the 22nd September. The Lower Court held that this is not an order for exemption under section 18 of Act XI of 1859. The High Court has held that it is. That Court says the effect of the order may be expressed as follows :—"I exempt this estate from sale, provided the arrears are paid before sale." It appears to their Lordships that what is called the special order is not such an order as is intended by section 18. It should be an absolute exemption not an order which may have effect as an exemption or not according to what may happen or be done afterwards. The section says it shall be competent to the Collector or other officer, at any time before the sale, to exempt the estate from sale. The Collector is to record in a proceeding the reason for granting exemption. Although this, as the High Court says, may be done at any time, the reason should exist at the time the exemption is granted, and not be a fact which may happen afterwards, or an act which may or may not be performed. The words "accepted, &c.," have been called by the Lower Courts an order and considered as one, but it may be doubted whether they are more than a note by one of the Collector's officers that the Rs. 8-12-5 would be received, and therefore the mehal would be released from sale.

There is another and, their Lordships think, a fatal objection to the decree of the High Court. Section 25 makes it lawful for the Commissioner of Revenue to receive an appeal against any sale made under the Act if preferred within a specified time, and gives him power to annul any sale made under the Act which shall appear to him not to have been conducted according to its provisions. Section 26 gives power to the Commissioner, on the ground of hardship or injustice, to suspend the passing of final orders in any case of appeal from a sale, and to represent the case to the Board of Revenue, who, if they see cause, may recommend the Local Gov-

ernment to annul the sale, and the Local Government may do so, and cause the estate to be returned to the proprietor on such conditions as may appear equitable and proper. And section 33 enacts that no sale shall be annulled by a Court of Justice upon the ground of its having been made contrary to the provisions of the Act, unless the ground shall have been declared and specified in an appeal made to the Commissioner. The plaintiffs appealed to the Commissioner. In their grounds of appeal they say the Collector on the 24th September passed a general order and they complied with it. They do not mention any order of the 22nd September. The Subordinate Judge thought paragraph 1 of the memorandum of appeal was sufficient, but it is not. It only says the sale is fit to be set aside for reasons detailed in the following paragraphs. If the case now set up had been stated in those paragraphs, the Commissioner would have inquired into it, and if he thought there was hardship or injustice might have represented the case to the Board of Revenue. The second issue, as summarized by the Subordinate Judge is, "Does section 33 of XI of 1859 bar the suit?" and upon his opinion of paragraph 1 he held that it did not bar the suit. In the judgment of the High Court this issue is not noticed. It is said that the two points upon which the parties went to trial were—1st, Was the amount due for arrears paid before the sale commenced? 2nd, What was the meaning and legal effect of the orders of the 22nd September and 24th September? This is a misapprehension. The issue upon section 33 was tried by the Subordinate Judge. It was decided against the defendants, but the decree being entirely in their favour, it was not necessary for them to file a notice of objection under section 561 of the Code of Procedure. They could support the decree on the ground that the second issue ought to have been decided in their favour. The High Court ought to have decided that issue, or have shown in their judgment a reason for not doing so. If it had been decided that the suit was barred by section 33, the appeal to the High Court ought to have been dismissed.

Upon both the grounds which have been considered, their Lordships are of opinion that the decree of the High Court ought to be reversed, and the appeal to that Court dismissed, with costs, and the decree of the Lower Court affirmed, and they will humbly advise Her Majesty to order accordingly.

The respondents, other than the Secretary of State for India in Council, must pay the costs of this appeal.

Appeal allowed.

Solicitors for appellants: Messrs. *T. L. Wilson & Co.*

22nd, 23rd, and 24th January, and 8th February 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Lord Hobhouse, the Right Hon. Lord Morris, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

HAYAT-UN-NISSA AND OTHERS* ... } *Plaintiffs,*

and

MUHAMMAD ALI KHAN ... *Defendant.*

On Appeal from the High Court for the North-Western Provinces.

Inheritance by Muhammadan law—Sunni and Shia rules of descent—Evidence as to deceased having been a Sunni.

A Muhammadan widow, who by birth was a Sunni, but whose deceased husband had been a

* 17 Cowell's Ind. Ap., 73, 12 All., 290.

Shia, had during her married life conformed outwardly to his religion. The Sunni and Shia rules of inheritance differing, her true heirs could only be ascertained by determining to which of these sects the deceased belonged at the time of her death.

The evidence relating to the period after her husband's death led to the conclusion that throughout her widowhood she was a Sunni, having returned to the religion of her youth when freed from the necessities of her position as the wife of a Shia.

APPEAL from a decree (27th November 1884) of the High Court, reversing a decree (4th December 1882) of the Subordinate Judge of Moradabad.

The suit out of which this appeal arose was brought by the appellants against the respondent to obtain a declaratory decree that they were entitled, by the Imamia, or Shia, law to the estate of Wazir-un-nissa, who died in 1881. It was not disputed by the defendant that the plaintiffs were related to the deceased in the degree alleged by them, and that, had Wazir-un-nissa been a Shia at her death, they would have been her next heirs, the Imamia, or Shia, law ordaining a succession different from that which prevailed among Sunnis.

The High Court, reversing the finding of the first Court, decided that Wazir-un-nissa, when she died, was a Sunni. And the principal question on this appeal was whether the deceased at the time of her death was a Shia or a Sunni, points as to the admissibility of evidence being also involved. No question now remained as to a will, alleged by the plaint to have been made by the deceased, the first Court having found that it was not a genuine document, and that finding not having been appealed.

Karamat Ali, the common ancestor of the parties, had two sons, the younger of whom was the grandfather of Saiyid Muhammad Ali Khan, the defendant in this suit, who had obtained possession of the estate of Wazir-un-nissa, the granddaughter of the elder of Karamat's two sons. The right of Muhammad Ali to the inheritance, clear enough by Sunni law, was disputed by the daughters of the maternal uncle of Wazir-un-nissa, on the ground that the latter having belonged to the Shia sect, the Imamia law, which gave it to them, as nearer of kin to the deceased, was applicable.

The plaint alleged:—"Wazir-un-nissa, the parties and their families, have always professed the Shia religion, and therefore, according to the Muhammadan law, the plaintiffs alone are entitled to the whole estate."

This was denied by the defendant, Muhammad Ali Khan, who alleged that in her family "the estate of a deceased member has, since old times, been divided according to the law prevailing among Sunnis; and all the questions relating to the partition of the estate are settled according to the tenets of the latter."

The Subordinate Judge of Moradabad found that Wazir-un-nissa was a Shia; that the plaintiffs were the daughters of her maternal uncle; and that the whole estate was their inheritance, to no share of which was the defendant entitled.

On the defendant's appeal to the High Court, a Division Bench (PETHERAM, C.J., and MAHMOOD, J.) reversed that decision. They held that the law to be applied here was that of the widow at the time of her death; that law was the Sunni law, and therefore the defendant was entitled to succeed.

In reference to an argument in favour of the plaintiffs, attempted to be made out of the use of the word "parties" in section 24 of the Bengal Civil Courts Act (VI of 1871), the Chief Justice said—"This argument, against the devolution of the property in favour of defendant, is based on the section of the Act which provides that the law of the 'parties' is to be administered by the Court. But if this were held to mean the parties to the suit, and one were a Shia and the other a Sunni, it would follow that two laws, would have to be administered. To my mind the meaning of the section is clearly that the devolution of the property is to be in accordance with the law of the person leaving the property, without distinction being made between a case of

intestacy and one in which a will may be in dispute."

Mr. *J. D. Mayne*, for the appellants, argued that the Shia law should be applied, because, upon the whole evidence, the High Court should have found as a fact that Wazir-un-nissa died a Shia. The High Court has been wrong in holding that the litigation carried on in 1805 indicated the application of Sunni law to the parties, as distinguished from Shia law. And that Court had failed to give proper effect to admissions made in 1864, which should have led to the belief that all the parties to the proceedings in that year, as well as Farzand, the common ancestor, were Shias. The High Court had also erred in admitting certain documentary evidence, which, however, if admissible, had not shown that the family property devolved in any manner opposed to Shia law. Wazir-un-nissa's pilgrimage to Ajmir was commented on, and it was contended that neither this act, nor her having consulted a pir, were inconsistent with her having been a Shia, the evidence in another part showing that she had maintained Shia ceremonies.

Mr. *R. V. Doyne* and Mr. *R. C. Saunders*, for the respondent, argued that the judgment of the High Court had correctly maintained the devolution of the property of the deceased in accordance with Sunni law. On the evidence, the deceased was a member of the Sunni sect at the time of her death.

Mr. *J. D. Mayne* replied.

The following authorities and cases were referred to on both sides :—

Hamilton's Hedaya, Prelim. Discourse, Baillie's Digest of Muhammadan Law, Book VII, of faraiz, or inheritance. *Raja Didar Hosein* v. *Rani Zahuran Nissa*(1), *Mirza Kassim Ali* v. *Mirza Muhammad Hosein*(2).

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD WATSON :—

This suit relates to the immoveable estate of Wazir-un nissa, a Muhammadan lady, who died childless and intestate on the 26th October 1881. Her father, Ghulam Ali, died without male issue in the year 1838, leaving three widows, two of whom were childless. Besides the deceased, whose succession is now in dispute, Ghulam Ali had another daughter, Kulsum, married to Iradat Ali, there being one son of their marriage, who died in minority; and eventually Iradat Ali became entitled, as heir of his minor son, to his wife's share of her father's estate. After the death of Kulsum, Iradat Ali became the husband of Asmat-un-nissa, one of the parties to this appeal.

The appellants, plaintiffs in the suit, are the female descendants of Basawan Ali, the maternal uncle of the deceased Wazir-un.nissa. The defendant in the suit, and respondent in this appeal is Muhammad Ali Khan, a collateral relative of the deceased in the ascendant line. The common ancestor of the parties was Karamat Said, whose younger son was father of Daud Ali, the father of the respondent. The elder son of Karamat had two sons, Kasim, the father of Ghulam Ali already mentioned, and Farzand, who died without issue. The appellants are Muhammadans, and so were Karamat and all his descendants, and the case must be decided according to the principles of Muhammadan law. But the rules of that law applicable respectively to Shia and Sunni succession are different; and, therefore, the true heirs of Wazir-un-nissa can only be discovered by first ascertaining to which of these rival sects the deceased belonged at the time of her death. The appellants allege that she was a Shia, the respondent that she was a Sunni. It is admitted that, according to the Shia rule, the appellants are her legal heirs; and it is also matter of admission that, according to the Sunni rule, the respondent, being a paternal ascendant tracing his connection with the deceased through an

(1) S. D. A., Sel. Ca. (1830), p. 29., 2 Moore I. A. 441.

(2) S. D. A., 5 Sel. Ca. (1832) p. 213.

unbroken line of males, is entitled to take her estate to the exclusion of the appellants, whose relation to her is through a female. Whether the deceased was, in point of fact, a Shia or a Sunni, is the single issue presented for decision.

Wazir-un nissa was for many years the wife of Saiyid Hadji, a staunch member of the Shia sect, who died in the beginning of the year 1865. The case made by the appellants in their pleadings and evidence is to the effect that Karamat and all his descendants were Shias; that Wazir-un-nissa was the daughter of a Shia, and brought up as a Shia; that she married a husband of her own sect, and ever after his death continued to adhere to the faith and to practise the ceremonies of that sect. On the other hand, the case presented in the respondent's evidence is that Ghulam Ali and his daughter Wazir-nn-nissa were Sunnis; that she was under the necessity of suppressing her true faith during the subsistence of her marriage, and of conforming outwardly to that of her husband; and that, on his decease, she resumed observance of the rites peculiar to the Sunni sect, and lived and died a member of it.

Upon all points material to the issue thus raised, with one or two exceptions, the oral evidence adduced by the parties is in direct conflict. There is evidence of a more reliable character, which may be used to test the value of the oral testimony, but even that evidence is not wholly consistent. The onus of proving that the deceased was a Shia rests in the first instance with the appellants, because they are seeking to eject the respondent, who is in possession and has been duly registered as owner in the books of the revenue authorities. The Subordinate Judge gave decree for the appellants in terms of their plaint, but his decision was reversed on appeal by the High Court, consisting of Chief Justice Petheram and Mr. Justice Mahmood, who dismissed the suit with costs. In his elaborate opinion the Subordinate Judge rests his judgment mainly on the evidence of the appellants' witnesses. He refers by name to two of these, whom he describes as respectable and literate men, *viz.*, Mirza Abid Ali Beg, the Subordinate Judge of Mainpuri, and Maulvi Tafazzul Hussain, the Pesh Imaum of the Shias, by whom prayers are read to the congregation. There can be no reason to doubt that the learned Judge rightly describes the character of these witnesses, but the first of them does not state to which sect Wazir-un-nissa belonged; and the second, although he was acquainted with her husband, did not know Wazir-un-nissa, and his belief that she was a Shia was derived from "women of his brotherhood." On the other hand, the learned Judges of the High Court placed little reliance upon the statements of witnesses to the effect that the deceased was a Shia or a Sunni, being of opinion that certain facts, as to which there is no conflict of testimony, were sufficient, when taken in connection with the written evidence, to indicate that Wazir-un-nissa, although she appeared to be a Shia during her married life, was in reality a Sunni.

The oral evidence is not only contradictory but vague, and it is obvious that the bulk of the witnesses speak with little knowledge or from hearsay. But one part of it which is not open to that observation, is unquestionably favourable to the respondent's case. It shows that, after her husband's death, Wazir-un-nissa made at journey to Ajmere, in order to visit a Sunni shrine, in the company of a 'pir,' or spiritual guide of the Sunni sect, whose office and its functions are unknown among the Shias. It also shows that on her way to Ajmere the deceased partook of the holy meals, which are intended for Sunnis, in the house of the *pir*. These facts were hardly disputed in the argument addressed to us for the appellants; but the Subordinate Judge, who is conversant with the religious customs of both sects, disposes of them by the observation that "thousands of Hindus and Muhammadans, both Shias and Sunnis,

especially women who are not acquainted with their religion, visit the shrine without changing their creed." The learned Judge makes no reference to the length of the pilgrimage, or to the companionship in which it was made. Mr. Justice Mahmood, who has no less knowledge of Muhammadan sects, says that the fact of the deceased having availed herself of the pious services of a *pir* implies a state of things which has no existence among the Shias, and that "it may safely be asserted that, if Wazir-un-nissa had been a Shia, she would have never gone to Ajmere as she did." The opinions thus expressed by the learned Judges are not necessarily inconsistent. According to that of the Subordinate Judge, the deceased, being a Shia, might very well have visited the Ajmere shrine if she was a woman unacquainted with the distinctive tenets of her sect; but he does not go so far as to say that she would, even in that case, have resorted to the ministrations of a Sunni *pir*. In any aspect of them, the facts create an inference adverse to the appellants. The most favourable inference of which they are susceptible is, that Wazir-un-nissa, after her husband's death, did that which would naturally be expected of a devout Sunni; but that she might possibly have acted as she did, if she was an ignorant professor of Shia principles. On the other hand, if the opinion of Mr. Justice Mahmood be taken as correct upon this point (and there is nothing in the opinion of the Subordinate Judge which necessarily controverts it), these facts show that at the time of her pilgrimage Wazir-un-nissa professed her adherence to the Sunni faith. There is also oral evidence, not so clear or reliable as that which relates to the Ajmere pilgrimage, but tending in the same direction, to the effect that the deceased, during her widowhood, regularly observed the eleventh day of each month, and held Maulud Sharif meetings in her house, these being admittedly Sunni rites.

The facts proved, with respect to the religious observances of the deceased Wazir-un-nissa after her husband's death, all support the conclusion that she was a Sunni at the time of her own decease. It is, however, possible that these circumstances might be explained away, at all events, the evidence in support of some of them, which is not without contradiction, would be materially weakened if it were established that her father was a Shia, in which case there would be a very strong presumption that she was educated in his faith and continued in it until her marriage That fact, if proved, might cast upon the respondent the onus of showing that on the dissolution of her marriage, she left the Shia and joined the Sunni sect. It is therefore necessary to refer to the period antecedent to her widowhood, and the evidence which bears upon it. The oral testimony as to the sect of her father, Ghulam Ali, is vague and directly conflicting; and the written evidence, which is not free from conflict, becomes the only reliable test of the truth of the statements made by witnesses on the one side or the other.

Their Lordships do not attach much weight to the litigations in 1805 and 1810 between Kasim, the paternal grandfather of Wazir-un-nissa, and his brother, Farzand, with respect to the successionto their father. In the first of them Kasim founded on a deed of gift from his father, which Farzand alleged to be invalid; and the question of validity was referred by the Sardar Judge to the kazi and the muftis of his Court, who returned an opinion that the gift was bad. The judgment of the Court went in favour of Kasim, upon grounds which did not involve any question as to the validity of the deed. In the second of them, which raised the same controversy, the Court merely repeated its former judgment. It is admitted that the opinion of the kazi and and muftis was founded upon a principle peculiar to Sunni law, which denies effect to a gift of lands in which the shares of the donees are not specially defined. The respondent relies upon the terms of that opinion as evidencing the

agreement of the parties to the suit that their father, Shah Ali, was a Sunni. But it must be kept in view that, at the date of these proceedings, the only course of succession recognised by the Native Courts was that of the Sunnis, which had been the general law of the country from the time when it first came under Muhammadan rule; and it is by no means certain that the Sadar Court, or litigants before it, always paid regard to, or understood their rights under the Shia law.

The observation just made does not apply to the state of the law in 1838, when the estate of Ghulam Ali was divided. Long before that time the supremacy of Sunni law had disappeared, and it must have been generally known that the Shia rule governed the succession of Shias, and the Sunni rule that of Sunnis. If Ghulam Ali was a Shia, his two childless widows had no right of inheritance, and were only entitled to maintenance from his estate. If he was a Sunni, then these widows were proper heirs, entitled to a share of his estate along with his other representatives, who were the same according to the rule of either sect. That Ghulam Ali's succession was treated by all parties interested as that of a Sunni, and that his childless widows received the shares which the Sunni law allots to them, appears to be established by the evidence. There is in process an attested copy of the official report made to the Collector of Revenue on the occasion of Ghulam Ali's death, in which it is stated that these two widows, along with the two daughters of the deceased, Kulsum and Wazir-un-nissa, and their mother, were his heirs at law. Vilayat Husain, a witness for the appellants, states that "Husaini Begam, wife of Ghulam Ali Khan, also received a twenty-fourth share out of her husband's property; other wives also received share in the same proportion." Now it is significant that Husaini was one of the childless wives, and that one twenty-fourth is the exact proportion to which each of the three widows was entitled in terms of Sunni law. That each of the widows got that share of her husband's estate is not contradicted, but two of the appellants' witnesses allege that they did not inherit it, and that it was given them in compromise of their claim of dower under the Shia law. On the face of it the statement is improbable, and it is disproved by the written evidence. There is a sale deed, dated the 11th July 1877, by Kulsum, one of the childless widows, by which she made over to Shaikh Imam-ud-din her interest in property "held conjointly with Saiyid Iradat Ali, Abid Ali and Musammat Wazir-un-nissa, muáfi holders, of which the 24th share belongs to me, as inherited from my husband, and up to this moment I am in possession thereof." That was followed in September 1877 by a pre-emption suit, at the instance of Iradat Ali, which he was entitled to bring, as in right of his minor son, on the ground that the interest sold by Kulsum came to her by inheritance from her husband, Ghulam Ali. There would have been no pretext for such a claim, if Kulsm had acquired her share by purchase, and not by inheritance. An ingenious argument was addressed to us by the appellant's counsel for the purpose of showing that the deed of sale and the copy plaint were not duly filed, and were not proved to be genuine; but both documents have been transmitted as part of the record in this appeal, and were founded on, in the judgment of the judgment of the High Court. Besides, the fact that such a suit was brought is elicitated by the appellants themselves on cross-examination. In these circumstances it is impossible to reject the documents *quantum valeant*, and it is obvious that, if the appellants meant to discredit them, Iradat Ali, who is husband of one of them, ought to have been called as a witness.

The fact that Ghulam Ali's succession was, immediately after his decease, treated as that of a Sunni by all parties interested, who were also those most nearly connected with him by ties of blood or affinity, would be well nigh conclusive,

if it stood alone, as to the sect of which he was a member; and, in the absence of other evidence, would naturally lead to the conclusion that, before her marriage, Wazir-un-nissa was also a Sunni. But the appellants rely upon a judicial statement made on behalf of Wazir-un-nissa herself, in 1864, as evidencing the contrary. In the beginning of that year Daud Ali, the respondent's father, brought a suit for redemption of a mortgage granted by Farzand, his own cousin and paternal uncle of Ghulam Ali. In that suit Iradat Ali and the deceased Wazir-un-nissa intervened and claimed the right of reversion, on the ground that they, and not Daud Ali, were the legel heirs of the mortgagor, under the rules of the Imamia, which is the Shia sect. The rights of the parties claiming the reversion did not depend upon their own religion, but upon that of Farzand, the mortgagor; but in the written statement lodged for them it was broadly averred that not only Farzand, but all the parties to the suit, belonged to the Imamia sect. In answer to that averment Daud Ali stated that "although the parties belong to the Imamia sect, yet in the family of the parties the distribution of inheritance takes place according to the rules of the Sunni sect, and the same are still acted upon."

Had Daud Ali contented himself with the admission that Farzand was a Shia, his statement would have been sufficient for the purposes of the suit. But he does not dispute the allegation that the parties to the suit, including Wazir-un-nissa, were Shias. If the assertion made by the interveners had been deliberately sanctioned by Wazir-un:nissa, it would prove her to be a Shia at the time when it was made, and might also suggest the inference that she had been brought up as a member of the Shia sect. But there is no evidence to show that Wazir-un-nissa personally authorized the statement which was made on her behalf. The probability is that it was made by Iradat Ali, either at his own hand and for his own purposes, or with authority of her husband. The latter was alive at the time, and she was, outwardly at least, conforming to his religion, which was undoubtedly that of a Shia. It has already been noticed that Iradat Ali must be taken to have admitted, in 1858, against the interest of his family, which was virtually his own interest, that Ghulam Ali was a Sunni and that begets a presumption that his daughter was also a Sunni until the time of her marriage. In the absence of any explanation from Iradat Ali, it cannot be assumed that the statement made in 1864 was meant to contradict that inference, or to go beyond the assertion that at the time when it was made Wazir-un-nissa was a Shia.

In these circumstances, their Lordships have come to the conclusion that the evidence applicable to the period preceeding the death of her husband tends, though not strongly, to the inference that, from her birth until her marriage, Wazir-un-nissa was a Sunni. It is not matter of dispute that, during the whole period of her married life, her outward acts and observances amounted to a profession of the Shia faith. What the just inference from these facts would have been, had she died on the same day as her husband, it is not necessary to consider. The evidence applicable to the period following the dissolution of her marriage appears to their Lordships to point strongly to the conclusion that, throughout her widowhood, she was a member of the Sunni sect, having returned to the religion of her youth, and discarded that which was temporarily imposed upon her by the necessities of her position as a Shia wife. They will accordingly humbly advise Her Majesty that the judgment of the High Court ought to be affirmed. The appellants must bear the costs of this appeal.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Robinson* and *Turnbull.*

Solicitors for the respondent: Messrs. *Bird* and *Moore.*

31st January and 4th and 5th February 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Lord Morris, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

KHAGENDRA NARAIN CHOWDHRY AND OTHERS* ... } *Plaintiffs,*

and

MATANGINI DEBI AND ANOTHER ... } *Defendants. (consolidated appeal.)*

Cowie Q. C. and Branson for the Appellants.

Doyne, and C. W. Arathoon for the Respondents.

On appeal from the High Court in Bengal.

Practice—Suits for exclusive possession of a sota—Decree for a moiety in favor of each party in a consolidated appeal—Costs.

Disputes arising between the zemindars of of Mechpara and Charpar as to a *Sota,* lying at the confines of their estates and claimed by either party as part of their zemindari, in two separate suits, the Subordinate Judge decreed in favour of Mechpara zemindars, setting aside an order of attachment made sec. 530 and 531, Cr. Procedure Code and declaring their title to the *Sota* :—

Held, in a consolidated appeal, reversing the decrees of both the lower Courts, that the evidence being insufficient to establish an exclusive possession by either of the parties and equally cogent to shew that there was possession between the two, each of the parties should be declared entitled to an equal moiety of the *Sota,* opposite to and adjoining their respective zemindaries and possession decreed accordingly ;

Held, further, that both of the parties having failed to establish exclusive possession, each party should bear their own costs of all the courts.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD MORRIS :—

These two appeals, which have been consolidated, come before their Lordships on appeal from the High Court at Calcutta. The High Court came to the conclusion that neither party had proved their case, and that both the suits instituted in the Subordinate Court should be dismissed with costs.

It appears that the Subordinate Judge had decided in favour of the zemindars of *Mechpara,* and had given them a decree, setting aside an order of attachment which had been issued by the Magistrate under the 530th and 531st sections of the *Criminal Procedure Code,* and declaring in favour of their title to the sota in dispute, and to the consequent relief.

Their Lordships are of opinion that the decrees of the High Court cannot be sustained, although their Lordships concur in the decision on the matters of fact which the High Court arrived at, namely, that neither of the parties, the zemindars of *Mechpara* or their representatives on the one side, or the zemindars of *Chapar* or their representatives on the other, has proved a title to the exclusive possession of the sota in question. The *Mechpara* zemindars claim the piece of water as the northern boundary of that part of their estate, and included in their estate, and known as "the Kodalkatl Bill, Bahirgacha danga," while the *Chapar* zemindars allege that the piece of water is a portion of their estate and is called the "Tiluckmara sota." The identity of the place appears to be very clear upon the map made by the Amin who was sent to survey it, and that is the map which their Lordships now deal with, and which was dealt with by the High Court, and by the Subordinate Judge. Their Lordships arrive at the same conclusion as the High Court with regard to the insufficiency of proof given either by the zemindars of *Mechpara* or by the zemindars of *Chapar* as to the right and title to the exclusive possession of the sota in question. But their Lordships are of opinion that the decrees of the High Court can

* 17 Cowell's Ind. Ap. 162.

not be supported as pronounced by the High Court. They are of opinion that, although neither party has proved a title to an exclusive possession, there can be no doubt that possession belongs to the zemindars of *Mechpara* and to the zemindars of *Chapar*.

The Government who have attached the valuable point of the fishery pending this litigation make no claim, and they are really in the position of stakeholders.

The evidence, in the opinion of their Lordships, is insufficient, as already stated, to establish an exclusive possession by either of the parties. On the other hand, it is equally cogent in their Lordships' opinion to shew that there is possession between the two.

The result that their Lordships arrive at is, that the decrees of the Subordinate Court and of the High Court should be respectively reversed, and each of the parties be declared entitled to an equal moiety of the sota opposite to and adjoining their respective zemindaris, and be decreed to be put into possession thereof accordingly, and that both of the parties having failed in their contention as to an exclusive possession, each should bear their own costs of the litigation in the Subordinate Court, in the High Court, and of these appeals; and their Lordships will humbly advise Her Majesty accordingly.

Solicitors for Appellants above-named: *Watkins & Lattey.*

Solicitors for Respondents above-named: *T. L. Wilson & Co.*

13th February and 14th and 15th March 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and Right Hon. Sir Richard Couch.

HAIDAR ALI AND ANOTHER*... *Plaintiffs,*

and

TASADDUK RASUL KHAN AND OTHERS ... *Defendants.*

On appeal from the Court of the Judicial Commissioner of Oudh.

Oudh Estates' Act, I of 1869, ss. 2, 13, 20, 22 (6)—Will of Talukdar—Registration of will—Succession to talukdari—Son of deceased elder brother preferred to younger brother.

A written statement by a talukdar made in 1860 in reply to inquiries by the Government, issued in the districts under circular orders regarding the succession of talukdars, may come within the definition of a talukdar's will in section 2 of the Oudh Estates' Act, I of 1869. The statement was described by the talukdar in a letter to the authorities, in 1877, as "the will which has been submitted to the Lucknow district, through the tahsil of Kursi, on 6th April 1860." *Held*, that this showed that he intended the statement of 1862 to be his will, and that the statement, as was held with regard to a similar one in *Hurparsad* v. *Seo Dyal* (1), was a will within the definition in the above section.

The talukdar declared in a subsequent will, of 19th August 1879, that no document purporting to be a will, the context whereof was repugnant to the will of the latter year, should be admitted as a will. But the instrument of 1860 was not repugnant to the will of 1879. Also the latter document was not registered in accordance with section 20 of the Oudh Estates' Act, 1869, and, being inoperative as to the talukdari estate, it could not revoke the will of 1860, which, also, was not rendered inoperative by any of the provisions of the Act.

Held, that by the true construction of section 22, sub-section 6, brothers take in the same manner as sons are directed to take by the pre-

(1) L. R., 3 I. A., 259; 3 P. C. J.; 611.
* 17 Cowell's Ind. Ap. 82; 18 Calc., 1.

ceding sub-sections; and that the descendants of a deceased elder brother are preferred as heirs to the younger surviving brother.

APPEAL from a decree (8th June 1885) of the Judicial Commissioner, affirming a decree (19th November 1883) of the District Judge of Lucknow, which dismissed appellant's suit.

This suit related to the right to succeed to the estate of Raja Farzand Ali, deceased on 30th November 1880, who held the taluk of Jehangirabad, in the Lucknow district, under a sanad containing a condition of descent to the nearest male heir by primogeniture, in the event of the talukdar's dying intestate, and without having adopted a son. Raja Farzand Ali, whose name was entered in the second of the lists of talukdars, prepared under section 8 of the Oudh Estates' Act, 1869, was the youngest of the five sons of Lutf Ali, among whom were Haidar Ali, the plaintiff, and Mardan Ali, the deceased father of Tasadduk Rasul, Faida Rasul, and Nawab Ali (the latter now represented by his son Naushad Ali), who were defendants. Raja Farzand Ali acquired the taluk in consequence of his having married, in 1856, Abbas Bandi, the daughter of Raja Razzuk Baksh, talukdar of Jehangirabad, under the Oudh dynasty which ended in 1852. The taluk of Jehangirabad was given by Razzuk to his daughter, and on 7th February 1854 a royal firman confirmed this gift, and conferred the title of Raja on Farzand Ali, the daughter's husband. Abbas Bandi died in 1855, leaving one daughter, the present respondent Zebun-nissa. After the death of Abbas Bandi, her father Razzuk, on the 3rd October 1855, executed a hibbanama assigning the taluk and other property to Farzand Ali and his infant daughter Zebun-nissa. Farzand Ali was in possession when the taluk came under the general confiscation of 1858. However, the summary settlement was made with him and he remained in possession. Some time elapsed before he received his sanad from the British Government, and the date of it was not shown. However, the second letter of the Government, appended to the Oudh Estates' Act, 1869, forwarding to the Chief Commissioner a form of sanad, was dated 19th October 1859. Before issuing sanads, the Chief Commissioner, on the 11th November 1859 and the 18th January 1860, sent a circular order to each district to ascertain whether the talukdars desired that their taluks should descend according to the "gaddidari" rule, or whether the ordinary rule of descent should prevail. In reply Farzand Ali, on 6th April 1860, sent the statement which is set forth in their Lordships' judgment, the effect of which constituted one of the principal matters in contest in this suit. another being as to the construction of sub-section 6 of section 22 of the Oudh Estates' Act, 1869, whether the same principle of representation introduced by the earlier sub-sections of section 22 as to sons should be understood to prevail as to sub-section 6.

Farzand Ali left no issue except his daughter Zebun-nissa, who was given by him in marriage to his nephew Tasadduk Rasul, son of Mardan Ali (third of the five sons of Lutf Ali, and now deceased). Haidar Ali on the 27th March 1882 brought this suit, claiming to succeed to the taluk; also claiming in accordance with section 14 of the Oudh Estates' Act, 1869, to succeed to all the immoveables which Farzand Ali had acquired from other talukdars, and to heirlooms under the 7th section. Disputing the genuineness and validity of any will, including that of 1879, he claimed, under the Hanifa, or Sunni, Mahomedan law, his one-fourth share of the estate and assets.

The first defendant, Tasadduk, and the fifth, Naushad Ali, son of Nawab Ali (another of the five brothers, now deceased), filed written statements to the same effect, setting forth the acquirement of the taluk from Razzuk, and the circumstances under which Farzand Ali became the sanad-holder. They relied on the wills of 6th April 1860 and of 19th August 1879, and the treatment of Tasadduk as a son by the testator. They also alleged that by the custom of the Shaik

Kidwai tribe, to which Razzuk and Farzand Ali belonged, a daughter, or an adopted son, was preferred in the succession to an elder brother of the deceased. The other defendants supported this defence.

Both the Courts below concurred in holding that the statement of 6th April 1860 was genuine and testamentary. But the first Court held that it had been revoked by the latter will executed on the 19th August 1879, which the Court held to have been sufficiently registered to pass all the talukdari estate. The Judicial Commissioner was of a different opinion as to this last matter. He held that the will was not registered, citing *Abdul Razzak* v. *Amir Haidar* (1). As regards the adoption of Tasadduk, he stated his views as follows:—

"The key to the whole case is to be found in the facts that, from the first, Raja Farzand Ali Khan, while insisting on his own legal position as sanad holder, invested with full power to dispose of the taluk as he pleased, nevertheless uniformly recognized the equitable claim of his daughter to succeed after him to the estate of her grandfather, and did all that in him lay to secure the property to her and her issue. At the same time, not unmindful of the interests of his own family, he decided on giving her marriage to Tasadduk Rasul, his brother's son.

"I think that the evidence on record sufficiently establishes that Tasadduk Rasul was brought up and educated from his boyhood by the Raja with this end in view. The arrangement itself was a very natural one for Farzand Ali to make in 1860, and it is particularly that to which he sought to give effect by the will of 1879."

As to the will of 6th April 1860 the Judicial Commissioner found that it was genuine—in fact, that it was not revoked by anything except the will of 1879; and that this will being invalid, the earlier will remained in force. He concurred with the District Judge in finding that the custom whereby a daughter takes the property of her deceased father in preference to his brother had been proved.

On this appeal.

Mr. *R. V. Doyne* and Mr. *H. Cowell*, for the appellant, agreed that the document of the 6th April 1860 was not a will, but merely a reply to the question of the Government whether Farzand Ali desired that the rule of primogeniture should be applied to his taluk or not. If it should be held to be a will, then, in more than one way, revocation had taken place. His subsequent conduct, the words used when he applied for a sanad, and the effect of the latter will of 19th August 1879, had to be considered. Although the later will might be invalid to dispose of the talukdari estate, with regard to section 13 of the Oudh Estates' Act, 1869, revocation of an earlier will might be effected by it though unregistered. Moreover, if the reply of 1860 received effect as a will, it did not relate to estates acquired after its execution, but only to the original taluk of Jehangirabad. Again, the Oudh Estates' Act, 1869, which rendered inoperative wills not executed as it required, deprived the document of 1860 of effect as a will. At all events, as to the non-talukdari estate, there was no sufficient proof of the alleged custom superseding the Mahomedan law. That custom was not proved by the wajib-ul-araiz relating to other villages than those on the talukdari estate in question; and such entries were not to be implicitly relied on; see *Uman Parshad* v. *Gandharp Sigh* (2). Therefore, Haidar Ali was in any view of the case as regards the testamentary character of the statement of 1860, entitled to succeed to his share of all the property, other than talukdari, in excess of that one-third share which Farzand Ali could by Mahomedan law have validly bequeathed. In connection with statement of 6th April 1860, they referred to *Hurpurshad* v. *Sheo Dyal* (3).

Mr. *T. H Cowie, Q.C.*, Mr. *J. Graham, Q.C.*, and Mr. *J. H. A. Branson*, for the respondents, Tasadduk Rasul and Zebunnissa, were not called upon.

Mr. *J. D. Mayne*, for the respondent Naushad Ali Khan, argued that the

(1) I. L. R., 10 Calc., 976.

(2) L. R., 14 I A., 134; I. L. R., 15 Calc., 20; *Ante* page, 71.

(3) L. R., 3 I. A., 259; 3 P. C. J., 611.

bequests to this respondent under the will of August 1879, and a codicil thereto, were in any case valid, as relating to property other than talukdari. Besides, the custom deprived the appellant of any claim which he otherwise might have had under the ordinary law. The plaintiff had not shown any preferential title under section 4 and 22 of the Oudh Estates' Act, 1869. There was nothing to show the application of either section 14 or 15. By the true construction of section 22, sub-section 6. brothers were entitled, and the principle of representation, found in the earlier clauses as to sons, must also be understood to apply to brother's sons. Therefore, the desendants of Haidar Ali's elder brother, Mardan Ali, would exclude the appellant.

Mr. *R. V. Doyne* replied.

Their Lordships' judgment was delivered on 15th March by

THE RIGHT HON. SIR RICHARD COUCH :—

The plaintiff and appellant Haidar Ali is the elder brother of Raja Farzand Ali Khan, talukdar of Jehangirabad, who died without leaving any male issue. He held a sanad for the estate of Jehangirabad, and his name was entered in list No. 2, prepared according to Act I of 1869. He left fourkinds of property :—

1. The talukdari estate conferred by the sanad.
2. Landed property acquired by him from other talukdars.
3. Immoveable property acquired from persons other than talukdars.
4. Moveable property, money, and debts.

The plaintiff Haidar Ali claimed to be the Raja's sole heir and successor, and entitled to the first and second classes of property, and to so much of the fourth as might be held to be heirlooms under the provisions of sections 14 and 22 of Act I of 1869, and to a fourth share, according to Mahomedan law, of the third class of property and of the fourth, exclusive of heirlooms. The other plaintiff and appellant is a purchaser of part of Haidar Ali's interest. The defendants, the respondents, were in possession, and had obtained mutation of names in their favour in the Revenue Department. Their grounds of defence will be conveniently noticed as the case with regard to each class of property is considerd.

As to the first class, the defence of Tasadduk, who was in possession of it, was founded on a document, dated the 6th April 1860, and a formal will of the Raja dated the 19th August 1879. The first of these is a statement by Raja Farzand Ali in reply to inquiries by the Government under circular orders regarding the succession of talukdars. It is as follows :—

"I am Raja Farzand Ali Khan Bahadur, talukdar of Jehangirabad, &c. Whereas the Government has been pleased to confer upon me the proprietary rights in this estate, to be enjoyed from generation to generation, I do hereby request that after my death my estate may be maintaied intact and without partition according to Raja Gaddi custom, and that, owing to my not having a male issue, Zebun-nissa, who is my daughter by Rani Abbas Bandi, daughter of Raja Razzuk Bakhsh, shall be considered entitled to succession and inheritance. But as I have taken Tasadduk Rasul from my brother Mardan Ali Khan, and have commenced to bring him up and educate him as my son, if he finishes his education during my lifetime and is married to Zebun-nissa, he shall after me succeed to my estate as my adopted son."

The Raja made other replies about the same time, the taluk being the three districts, in which no inference was made to his daughter or Tasadduk Rasul, and it was contended that the reply of the 6th April was not intended more than the others to be testamentary; but in a letter from the Raja to the Deputy Commissioner, dated the 20th June 1877, in reply to questions that had been asked, he said in reply to the fourth question, which was to give the name and title of any boy who might be his successor,

whether his begotton or adopted son? "The reply to this question refers to the will which has been submitted to the Lucknow district through the tahsil of Kursi on 6th April 1860." This shows that he intended that to be his will. Their Lordships are of opinion, following the judgment of this Board in *Hurpursad* v. *Sheo Dyal* (1), that it is a will within the definition in section 2 of Act I of 1869. It is therefore a complete answer to the plaintiff's claim to Jehangirabad.

It was contended that it was revoked by the will of the 19th August 1879, the Raja having in that said that no document of any sort purporting to be a will or petition, the context whereof is wholly or partly repugnant to it, should be deemed to be admissible. But it is not repugnant. In this the Raja says that having adopted Tasadduk Rasul Khan as his son, he has appointed him his succes sor, and he is to be the owner of his entire property estate and raj, as a raja and talukdar, and as he is married to his daughter the estate shall successively "descend to devolve" on the descendants of the daughter. Also the will of 1879 was not registered in accordance with section 20 of Act I of 1869, and consequently as regards the talukdari estate is invalid. It cannot, therefore, operate as a subsequent will to revoke the will of 1860, nor was that will revoked by the Act of 1869 as was also contended.

There is, however, another defence to this part of the claim, which also applies to the second class of property if it was acquired according to section 14 of the Act. The pedigree, which is admitted by all parties to be correct, shows that Haidar Ali was not the eldest brother of Farzand. There were two elder brothers, Sahib Ali and Mardan Ali, who died before Farzand, both leaving sons, and the sons of Sahib were not parties to the suit. Tasadduk is a son of Mardan Ali, and Nawab Ali, who died pending the appeal, the father of the respondent Naushad Ali, was his eldest son.

(1) L. R. 3, I. A. 259; 3 P. C. J., 611.

The plaintiff claims, as the elder brother of Farzand, to be his sole heir and successor under section 22 of Act I of 1869. The section begins by saying that if a talukdar or grantee whose name shall be inserted in the 2nd, 3rd, or 5th of the lists mentioned in section 8, or his heir or legatee, shall die intestate as to his estate, such estate shall descend as follows; and then there are eleven sub-sections forming a scheme of descent. The plaintiff claims under sub-section 6; but in construing that the whole of the sub-sections should be looked at. The first says the estate shall descend to the eldest son of the talukdar and his male lineal descendants. The second says that if such eldest son shall have died in the lifetime of the talukdar leaving male lineal descendants, the estate shall descend to his eldest and every other son successively, according to their respective seniorities and their respective male lineal descendants. The third says that if such eldest son shall have died in his father's lifetime without leaving male lineal descendants, the estate is to descend to the second and every other son of the talukdar successively according to their respective seniorities and their respective male lineal descendants. That male lineal descendants here are intended to include the descendants of as on dying in his father's lifetime is apparent from sub-section 4; that is, "Or in default of such son or descendants," then to such son of a daughter as has been treated by the talukdar in all respects as his own son and to the male lineal descendants of such son. The estate is to go to the daughter's son only in default of male lineal descendants of a second or other son. In sub-section 4 male lineal descendants of a daughter's son must have the same meaning as in sub-section 3, for by sub-section 5 the estate is to descend to a person adopted by the talukdar only in default of such son or descendants, viz., a daughter's son or his male lineal descendants. The 6th section says, in default of an adopted son the estate is to descend to the eldest and every other

brother of the talukdar successively according to their respective seniority and their respective male lineal descendants. The words here should, in their Lordships' opinion, be held to have the same meaning as they have in sub-sections, 3 and 4. In sub-section 7 the words are, "in default of any such brother" to the widow, omitting "descendants;" but their Lordships cannot think it was intended by this omission to postpone the succession of male lineal descendants of brothers who died in the talukdar's lifetime till after the persons mentioned in sub-sections 7, 8, 9, and 10, and only to allow such male lineal descendants to succeed under sub-section 11 according to the ordinary law to which the talukdar is subject. It is the reasonable construction that the brothers were intended to take in the same manner as sons. It therefore appears to their Lordships that the plaintiff has no title to Jehangirabad or to the property which, by virtue of section 14, was subject to the same rules of succession.

This also disposes of the suit as regards the second class of property, which the plaintiff claimed under the same title as the first class. It was objected by Mr. Mayne, on behalf of Naushad Ali, who claimed to be entitled to it under a codicil of the 1st November 1879, that the property was not proved to have been acquired according to section 14. The question does not appear to have been raised in the lower Courts. Apparently it was assumed to be so acquired, possibly because it was known it could be proved by official documents, of which the Court was bound to take judicial notice. There is indeed some evidence of it in the record where there is what is called a list of villages held by Naushad Ali Khan, out of the villages purchased by Raja Farzand Ali Khan from sanad-holding talukdars. The validity of the codicil was in issue, but there is no finding upon that in either of the lower Courts. It would, however, be invalid as regards property acquired under section 14, for want of registration. But if this property is not within section 14, it is in the same condition as to succession as the property in classes 3 and 4. Haidar Ali claimed one-fourth of these classes, excluding heirlooms, as one of the heirs of Farzand Ali, according to the Mahomedan law, and alleged that the defendants did not acquire any rights to it under the will of the 1st November 1879. This will has been found by both the lower Courts to be genuine, and it excludes Haidar Ali. It is therefore an answer to his claim as heir.

But the defendants also relied upon a custom of the Shaikh Kidwai tribe, to which the Rajas Razzuk Buksh and Farzand Ali Khan belonged, that sons, adopted sons, and daughters succeed in preference to, and in exclusion of, other, heirs, by which the plaintiffs' claim in opposition to Zebun-nissia, the daughter, must fail. It was not disputed that the Rajas belonged to that tribe. Both the lower Courts have found that there is such a custom among the Saikh Kidwais, and their Lordships see no reason in this case for departing from the settled practice of this Committee where there are concurrent judgments of the Courts below upon a question of fact. There is therefore a good defence to the whole of the plaintiffs' claim, and the suit has been properly dismissed. Their Lordships will humbly advise Her Majesty to affirm the decree of the Judicial Commissioner which dismissed the appeal to him from the decree of the District Judge dismissing the suit, and to dismiss this appeal. The appellants will pay the costs of it.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Barrow & Rogers.*

Solicitors for the respondents, Tasadduk Rasul Khan and Mussamat Zebun-nissa: Messrs. *Watkins & Lattey.*

Solicitor for the respondent, Naushad Ali Khan: *The Solicitor, India Office.*

14th, 15th, 18th and 20th February, and 25th April 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Managhten, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Richard Couch.

WATSON AND COMPANY*... *Defendants,*

and

RAM CHAND DUTT AND OTHERS ... } *Plaintiffs.*

On Appeal from the High Court in Bengal.

Co-sharers—Suits concerning the joint property—As between tenants in common, refusal of decree for possession, for damages, or for an injunction—Resistance of one co-sharer to another's entering, not in denial of his title, but to prevent his interfering with cultivation by the former—Money compensation.

Land being held by two person in common, one of whom was in actual occupation of part, cultivating it as if it had been his separate property, the other attempted to enter upon the same land, in order to carry on operations thereon inconsistent with the work already being carried on by the former, who registered and prevented this attempted entry. *Held*, that the resistance being made by the co-sharer in occupation simply with the object of protecting himself in the profitable use of the land, in good husbandry, and not in denial of the other's title. such resistance was, no ground for proceedings on the part of the other, to obtain a decree for joint possession, or for damages: nor would granting an injunction be the proper remedy.

As the Courts in Bengal, in cases where no specific rule exists, are to act according to "justice, equity, and good conscience," so, on its being found that, where land was held in common between the parties, one of them was in the act of cultivating a part of the land which was not actually used by the other, it would not have been consistent with this rule to restrain the former from proceeding with his proper cultivation: but money compensation, at a proper rate, in respect of the exclusive use by, and benefit to, the one who, though possessing in common, was carrying on cultivation for himself, not unsuitable in itself, was awarded between the parties.

Title made by her transfer of her inheritance, through the daughter and heiress of a deceased member of a joint family of brothers, under the Dayabhaga, although her father had executed deeds dedicating his share of the family property to trustees, for the worship of the family deity; this dedication having been inoperative, because it was neither his, nor his brothers' intention that the deeds should be acted upon, and he had never divested himself of his share.

APPEAL from a decree (15th February 1887) of the High Court(1) modifying, on the appeal and cross-appeal of the parties, a decree (4th January 1886) of the District Judge of Midnapore.

This suit was brought by two brothers Gungaram and Ramchund Dutt on 29th February 1884, as the plaint stated, "for recovery of possession of a 14 annas share of khas lands by virtue of ijmali title, together with damages and for a permanent injunction restraining the defendants, Messrs. Watson and Company, from cultivating indigo."

Of the lands to which this suit related, part of an extensive zemindari named Silda, in the Midnapore district, the plaintiffs had as to a portion become putnidars in 1869; and they held another portion as mokarraridars, under a maurasi grant made in 1879. Watson and Company having obtained leases from the plaintiffs, which ended in 1883, as well as transfers from others owning interests, had reclaimed part of the land, settling cultivators, and themselves cultivated indigo on the khas or untenanted part. In August 1883 the plaintiff Ramchund Dutt gave notice of the approaching end of the lease on the 14th September following, and demanded joint possession of 14 annas of Silda, inclusive of the 4,128 bighas on which Watson and Company were growing indigo.

Gungaram having died in 1884, his sons Umeshchunder, Bepinbehari, and Notobur, were substituted for him in the suit. Pudmalochun, another brother, had died in 1879, leaving an only daughter Bamasundari, who was not joined,

* 17 Cowell's Ind. Ap., 110 18 Calc., 10.

(1) I. L. R., Calc., 214.

because the plaintiffs' case was that Pudmalochun had, by two deeds of religious endowment, dedicated his share of the joint-family property to the worship of the family deity; and had appointed as shebait of that worship, first himself, and then the plaintiff Gungaram; and on the death of Gungaram the plaintiff Ramchund Dutt to succeed him, and had thereby deprived his daughter Bamasunderi of all heritable right therein, except as to maintenance.

On the objection as to want of parties by Watson and Company, who made title in the suit, as to part of Silda, through Bamasunderi, who on 21st June 1884, after the commencement of this suit, granted a durputni to Bholanath Dhur, who on 5th November 1884 granted a seputni to Watson and Company, Bamasunderi was made a defendant; and issues were recorded on the questions arising between her and her uncle Ramchund, as to her right to her father's estate.

The plaintiffs' claim was in effect as follows: that as putnidars they, and their deceased brother Pudmalochun, had been jointly entitled to 12 annas of Silda, and as maurasi mokarraridars to other 2 annas of the same; that Pudmalochun by the two deeds of endowment, dated 24th July and 12th December 1887, had dedicated his one-third share of the putni interest in 12 annas of Silda, appointing himself shebait for life, and his brothers after him, and to this interest Ramchand had succeeded; that Watson and Company had been, while Pudmalochun lived, tenants to him and his brothers the plaintiffs and after his death to the plaintiffs alone, of those 14 annas for a term of years which expired on the 14th September 1883, and were tenants of the remaining 2 annas of Silda for an unexpired term under a lease granted by one Rani Durga Kumari; and that on the expiration of the first-mentioned term the defendants Watson and Company, though only then entitled to a one-eighth of the entire joint estate, continued to hold exclusive possession of, and cultivate with indigo, 6,894 bighas of the khas, or untenanted, lands of the zemindari. As to the 2 annas of Silda which the plaintiffs claimed as maurasi mokarraridars, and which they acquired on the 20th January 1879, which were not included in the deeds, the plaintiffs contended successfully before the High Court that, as the grant for those 2 annas had been made in the name of Ramchund Dutt alone, his brother Pudmalochun took no interest therein.

The defendants admitted the fact of the two deeds of endowment having been executed, but contended that they had never been acted upon; so that Pudmalochun's interest, having remained the same as before, down to his death, and then passed by inheritance to his daughter, Watson and Company had received from her a good title, through Bholanath Dhur, as to the whole of Pudmalochun's interest in the 12 annas putni. Also, as to the 2 annas of maurasi mokarrari interest acquired by Ramchund Dutt on the 20th January 1879, on Pudmalochun's death, his one-third share of those 2 annas descended to his daughter, and the plaintiffs had no right to it. Also that Watson and Company were entitled to a further one-anna share of Silda, under a lease for seven years dated 30th April 1883, granted to them by Ram Taruck Ghose, who was lessee of a longer term under the zemindar of Silda. It was submitted that the plaintiffs were not entitled as joint-proprietors to damages or to an injunction restraining Watson and Company from carrying on the cultivation of indigo on the khas lands: the allowance of such claims on the part of the plaintiffs would lead to cross-claims with regard to other land of which the plaintiffs were in possession.

Issues were fixed as to the areas, boundaries, and extent of the plaintiffs interest in Silda; whether they were entitled to khas possession, to an injunction, or to damages, with further issues as to the deeds of dedication and their effect.

The Courts below concurred in holding that the khas land under cultivation by Watson and Company was in area 4,128 bighas; and as to this no question was now raised. In other respects the Courts had differed. The District Judge decided that the plaintiffs' interest in the lands in suit, or in the 14 annas of the khas lands, was two-thirds and no more. He arrived at this by holding that, though the terms of the deeds of dedication were apt for constituting a valid endowment, yet the evidence showed that Pudmalochun did not mean to create a valid endowment as against his daughter, and did not divest himself of the property, continuing to hold jointly, as before, with his brothers; so that the dedication had been ignored, and was inoperative.

A division Bench (WILSON and O'KINEALY, J,J.) on the appeal of the plaintiffs, the cross-appeal of Watson and Company and the cross-objections of Bamasundari Dasi, held that the manner of dealing with the dedicated share had not had the effect of invalidating the endowment(1). They held that, under its terms, Gungaram, on the death of Pudmalochun, and Ramchand, on the death of Gungaram, were entitled to possession as shebaits, and that the plaintiffs were therefore entitled to possession of the three-third parts, or whole, of the 12 annas putni interest. As to the 2 annas mokorrari interest, the High Court was of opinion that Pudmalochun, by dedicating his property, made himself separate in estate from his brothers; and had thereby put an end to the ordinary presumption of Hindu law that property acquired by one member of a joint-family was acquired for the benefit of all; and that there was no evidence to show that he was jointly interested in this. As to one anna of Silda, claimed by Watson and Company under their sub-lease from Ram Taruck Ghose, the High Court, in this agreeing with the District Court (though not for the same reason), rejected the claim on the ground that the original lease from the zemindar had not been produced, but only a copy.

The High Court then considered to what remedy the plaintiffs were entitled, and they determined that acts had been done amounting to an actual ouster, as between the plaintiffs and the defendants, their co-sharers; although it might very well be that mere cultivation by one co-tenant was not necessarily an ouster. The evidence as to actual ouster, absolute and complete, was then considered by the Judges.

They declined to issue an injunction restraining Watson and Company absolutely from growing indigo upon these or any particular lands, provided that they could (and it was for them to find out how they could) grow it without excluding the plaintiffs from their equal rights as co-sharers. But they granted an injunction restraining the defendants from excluding by any means the plaintiffs from their enjoyment of ijmali possession of the lands in suit in the form given in *Lloyd* v. *Bibi Sogra*(2).

On this appeal by Messrs. Watson and Company,

Sir *Horace Davey, Q.C.*, and Mr. *R. V. Doyne*, for the appellants, argued that, on the case presented, the plaintiffs had no interest in more than two-thirds of a 14 annas share of Silda, Watson and Company having a right to the share, which had been Pudmalochun's, of the 12 annas, of the putni estate.

The deeds of dedication had never been acted upon, and had no effect to divest Pudmalochun of his interest. The defendants derived title from him as to his share through his daughter's transfer to Bholanath, and from him to them. On this point the judgment of the first Court was correct, and the High Court had been wrong in reversing it. As to the 2 annas share of Silda, granted to the Dutts in maurasi mokarrari after the above instruments had been executed, there was nothing in what had taken

(1) I. L. R., 15 Calc., 214, at p. 217.

(2) 25 W. R. 313.

place to prevent their then joint-brother Pudmalochun taking his share of the 2 annas joint estate; so that his share, one-third of the latter, descended to his daughter, as well as the share in the 12 annas putni, and had been lawfully transferred to Watson and Company. As to the 1 anna share which Ram Taruck Ghose sub-leased to Watson and Company, the plaintiffs had no interest therein. On the question of law, they contended that, as jointly interested parties, the plaintiffs were not entitled to claim damages, or to claim an injunction restraining Watson and Company from cultivating indigo on the area of the khas land, found by the Courts below to be 4,128 bighas. There had been prevention on the part of Watson and Company of interference by others with their cultivation, but no actual ouster of the plaintiffs, such as to affect the latters' title. As different parts of Silda were in the hands of both, and of either party, it was not competent to either to claim that there should be either eviction or an injunction. It was against the policy of the law to entertain claims or cross-claims for damages or for injunctions between tenants in common. The only remedy open to the plaintiffs was to demand a partition. But this was not the remedy decreed. An injunction was never granted between tenants in common; and there was no authority for the grant of one as made by the High Court. The opposition of Watson and Company had not been founded on any objection to the right or title to the land, but only to the plaintiffs, interference with their cultivation.

Mr. *J. B. Finlay, Q.C.*, and Mr. *J. H. A. Branson*, for the respondents, after going through the evidence as to the extent of the respondents' interest in the land, and as to the area held by them, contended that the acts of the defendants amounted to actual ouster of the plaintiffs from the land on which indigo had been grown. As in the English system, so under the Indian law, this gave rise to a right of suit. Under the English law, upon ouster of a co-tenant by a tenant in common, an action, either of ejectment or of trespass, would lie; and where either of these actions could be maintained, there was a case for an injunction. In reference to the Engish law on the point, they referred to Co. Litt, "Tenants in common," section 322 and 323. The claim to exclusive possession of part for a special cultivation had resulted in deprivation by the defendants, Watson and Company, of the plaintiffs in regard to their right of joint use and enjoyment. On the question whether they had any right to exclusive enjoyment, reference was made to *Stalkartt* v. *Gopal Panday* (1); *Lowndes* v. *Bettle* (2); *Wawn* v. *Horn* (3): [*Crowdee* v. *Bhekdari Singh* (4) was referred to by SIR R. COUCH]. Also *Lloyd* v. *Bibi Sogra* (5); *Curtis* v. *Price* (6); *Bassey* v. *Windham* (7); *Goodson* v. *Richardson* (8). Since 1856 there had been a recognition of the right to an injunction in such a case as this; *Jankee Singh* v. *Bukhooree Singh* (9) and *Rajendro Lall Gossami* (v) *Shamachurn Lahori* (10) were cited. Reference was made to the Specific Relief Act, 1877, section 10. [SIR B. PEACOCK, in regard to the deeds of dedication, referred to the judgment in *Hunooman Pershad Pandey* v. *Mundraj Koonweree* (11), 'and their Lordships' observations as to the heir not being barred by an unreal charge. He also intimated that the rule as to rights of persons holding land in common in Bengal was hardly to be found in the analogy of English cases, but might be derived from the direction in Bengal Regulation VII of 1832, section 9, viz., that, where there should be no specific rule, the case must be decided according

(1) 12 B. L. R., 197.
(2) 10 Jur. N. S., 226.
(3) 3 M. & W., 333; and 5 M. & W., 564.
(4) 8 B. L. R.. Ap. 45.
(5) 25 W. R., 313.
(6) 12 Ves. 89, 103.
(7) 6 Q. B., 166.
(8) L. R.. 9 Ch., p. 221.
(9) S. D. A. (1856), Ap. 761.
(10) I. L R., 5 Calc., 188.
(11) 6 Moore's I. A. 411, *et. seq*; 1 P. C. J., 552.

to justice, equity, and good conscience.]

Mr. *R. V. Doyne* replied.

Afterwards, on April 25th, the judgment of their Lordships was delivered by

THE RIGHT HON. SIR B. PEACOCK :—

Gungaram Dutt, Ramchund Dutt, and Pudmalochun Dutt were brothers, and constituted a Hindu family joint in estate. They also carried on business as money-lenders.

In the year 1877 Pudmalochun executed two deeds of endowment, or *nirdes patras*, one on the 24th of July, and the other on the 12th of December. On the former of those dates the three brothers were entitled to a 12-annas share or twelve-sixteenths of pergunnah Silda in zillah Midnapore, which they held under three putni bynama patras; the first for a four-annas share dated the 29th Sraban 1268, and registered on the 20th of August 1861; the second dated the 3rd Cheyt 1276 Amli, corresponding with the 14th March 1869, for a six-annas share; and the third dated 13th Kartick 1283, for a two-annas share.

The property was subject to the ordinary law of Bengal, according to which upon the death of any one of the brothers the share of the joint property to which at the time of his death he might be entitled would descend to his heirs. Pudmalochun had no son; but in 1877, at the time of the execution of the deed of the 24th July, he had a wife, a daughter Bamasunderi Dasi, one of the appellants, and a grandson, the only son of that daughter. His wife died in his lifetime, between the dates of the two deeds. He himself died on the 26th of October 1879, and upon his death his daughter was his heiress. The Watsons, appellants, claim through her. It is contended on behalf of the respondents that Pudmalochun divested himself of his one-third of the 12-annas share held in putni by the deeds of endowment executed by him.

It is not necessary to review the evidence in detail. It was carefully considered by the District Judge. It seems clear that from the time of the execution of the deed of the 24th of July 1877 until after the death of Pudmalochun, a period of about three years and three months, no change took place in the accounts, or in the management of or dealing with the business or estates, or the proceeds thereof. Mortgages were executed, in which Pudmalochun joined, and everything appears to have gone on in the same manner as if the deeds had never been executed, except that the family idol was removed from the house of Gungaram to that of Pudmalochun. No act was done by Pudmalochun or his brothers in which he was described as shebait.

Their Lordships concur generally with the District Judge in his findings of fact, and they are of opinion that it was not the intention of Pudmalochun or of his brothers that the deeds should be acted upon, or that Pudmalochun should thereby divest himself of his share of the property. The deeds were merely fictitious, or benami.

In arriving at that conclusion their Lordships agree with the District Judge that the deed of the 24th of July did not profess to postpone any of its avowed objects until the death of Pudmalochun, or to any period subsequent to the execution of the document, except in so far as it related to the allowance to Bamasunderi or her son Upendra Nath. They cannot concur with the High Court that the provisions relating to that allowance were the chief provisions of the deed, or that the deed purported on the face of it to postpone the gift, so far as it related to religious objects, to any future period.

It was strongly urged on behalf of the plaintiffs, on the argument of the appeal, that the receipt by Bamasunderi, after her father's death, of three monthly payments of the allowance provided for her by the deed was inconsistent with the fact that the deeds were not intended to take effect; but their Lordships do not attach much importance to those receipts. Bamasunderi was a widow, maintained by and residing in one of the houses

which formed part of the estate; she had apparently no means for embarking in litigation; she was then, so far as it appears, living on friendly terms with her uncles, and if she had not at that time received the allowance which on the face of the deeds was provided for her, she probably would have received nothing.

After the execution of the deeds of endowment, and during the lifetime of Pudmalochun, a maurasi istimrari mokarrari pottah of another two annas share of Silda was granted to Ramchund in consideration of the sum of Rs. 25,000.

It having been considered that Pudmalochun did not by the deeds of endowment divest himself of any part of the joint family property, the mokarrari pottah must be assumed to have been purchased with funds of the joint family, and to have enured for the benefit of the three brothers.

From the facts above stated it appears that at the time of his death, Pudmalochun was entitled to a one-third undivided share of a 14-annas or fourteen-sixteenths share of Silda, of which twelve-sixteenths were held by the three brothers in putni, and two-sixteenths under the mokarrari pottah; that the other two brothers were entitled to the other two-thirds thereof; and that the interest of Pudmalochun descended upon his death to his daughter Bamasunderi. Out of her interest in the putnis Bamasudori, on the 6th Assin 1292, after the commencement of the suit, granted a durputni to Bholanath Dhur, who on the 5th of November 1884 granted a seputni to the Watson defendants.

Their Lordships are of opinion that at the date of suit the interest of the plaintiffs in the lands in suit was only two undivided third parts of an undivided share of 14 annas or of fourteen-sixteenths of Silda; that Bamasunderi was at that time entitled to the other undivided third part thereof.

At the time of the death of Pudma the Watsons held the 14-annas share which belonged to the three brothers Dutt under leases, in respect whereof they paid rent to the Dutt brothers, and which leases expired on 31st Bhadro 1290 Amli, corresponding with the 14th of September 1883. After the expiration of the leases the Watsons, who were entitled to the remaining two-annas undivided share of Silda under an ijara pottah from Rani Doorga Kumari Debi, of the 6th Bysack 1290 Amli, corresponding with the 17th of April 1883, continued in possession of that portion of Silda which comes under the head of khas, and to cultivate and and sow it with indigo as they had done during the continuance of the leases. Their Lordships cannot, upon the evidence, say that that was such an improper course of cultivation or use of the land as to render an injunction the proper remedy.

The plaintiffs endeavoured to sow oil-seeds, and to prevent the Watson defendants from continuing the cultivation in which they were engaged; the Watson defendants persisted in the cultivation which they had commenced; quarrels and even riots ensued, and the plaintiffs commenced the suit in which the appeals have been preferred. They prayed to be put into ijmali possession of their 14-annas share, to have damages awarded to them at the rate of 8 annas per bigha on 6,894 bighas, and similar damages until they should be put into possession; also for a permanent injunction prohibiting the defendants from sowing indigo, and from allowing anybody else to do so without the consent of the plaintiffs, and from throwing any obstacles in the way of the plaintiffs' holding ijmali possession.

The 6th issue laid down for trial was, "What is the extent of the plaintiffs' interest in the land in suit?" Upon this the District Judge held that the plaintiffs were entitled to two-thirds of the 14-annas share of the khas lands of Silda specified in the decree, and to get joint possession of the same with the Watson defendants. The High Court, on the contrary, having arrived at the conclusion that the deeds of endowment were intended to take effect, that Pudma thereby divested himself of his interest in the

property, and that no part of it descended to his daughter Bamasundari, held that the plaintiffs were entitled to the whole of the 14-annas share.

The decree of the District Judge, after reciting the claim, and specifying the lands inculded in the 6,894 bighas, proceeded, amongst other things, as follows:—

"That a decree be passed in the following manner :—That by reducing the quantity of land claimed, viz. 6,894 bighas, to 4,128 bighas, the plaintiffs' right is established to a two-thirds share of the 14 annas, and the plaintiffs are entitled to get joint possession of the same with defendants No. 1 (that is, the Watsons) ; and that on payment of excess court-fees proportioned to the excess of amount found due over the valuation of the plaint, calculated at the rate of 8 annas per bigha of the decreed lands from the beginning of 1291 Amli until the date of possession, the plaintiffs shall get two-thirds of a 14-annas share in accordance with the decision of the 6th issue. The Court further directs that an order of injunction be issued to the defendants No. 1, prohibiting them from either themselves or through others sowing indigo on those khas lands of Silda on which indigo, is being now grown."

The High Court modified that decree, and ordered that, instead of a two-thirds share of 14-annas of the khas lands of Silda, the plaintiffs were entitled to get joint possession with the defendants (the Watsons) of the entire 14-annas of the said lands ? they increased the amount of compensation accordingly, and varied the injunction granted by the District Judge.

Their Lordships are of opinion that the judgment and decree of the High Court are erroneous and ought to be reversed, with costs, and that the decrees of the District Judge ought to be modified and partly reversed. It was contended on the part of the plaintiffs, respondents, that the acts of the Watsons amounted to what in England is called an actual ouster, and that the plaintiffs were entitled to a decree ordering them to be put into ijmali possession with the defendants, but it appears to their Lordships that the plaintiffs have not established a right to have such a decree; and for the same reason they think that so much of the decree of the District Court as declares that they are entitled to get joint possession ought to be reversed. It seems to their Lordships that if there be two or more tenants in common, and one (A) be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation as if it were his separate porperty, and another tenant in common (B) attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which A is engaged and the profitable use by him of the said part, and A resists and prevents such entry, not in denial of B's title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of A would not entitle B to a decree for joint possession. Their Lordships are further of opinion that the decree of the District Judge, so far as it orders an injuction to be issued, ought to be reversed. It appears to their Lordships that, in a case like the present, an injunction is not the proper remedy. In India a large proportion of the lands, including many very large estates, is held in undivided shares, and if one shareholder can restrain another from cultivating a portion of the estate in a proper and husband-like manner the whole estate may, by means of cross injunctions, have to remain altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected, a work which, in ordinary course, in large estates would probably occupy a period including many seasons. In such a case, in a climate like that of India, land which had been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In Bengal the courts of justice, in cases where no specific rule exists, are to act according to justice, equity, and good

conscience, and if, in a case of shareholders holding lands in common, it should be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other shareholdes to appropriate to himself the fruits of the other's labour or capital.

Upon the whole, their Lordships will humbly advise Her Majesty to reverse the decree of the High Court, and to order the plaintiffs, respondents, to pay the costs incurred by the defendants in that Court. And further to declare that the plaintiffs, respondents, are entitled to only two-thirds of 14 annas, or of fourteen-sixteenths of the khas land, or, in other words, to two-thirds of seven-eighths of the 4,128 bighas the quantity of the khas lands as determined by the decree of the Disrict Judge; also to reverse the decree of the District Judge so far as it declares that the plaintiffs are entitled to get joint possession with defendants No. 1; and also so far as it directs that an order of injunction be issued; also to reverse that portion of the decree which orders "that, on payment of excess court-fees proportioned to the excess of the amount found due over the valuation of the plaint, calculated at the rate of eight annas per bigha of the decreed lands from the bigining of 1291 Amli until the date of possession, the plaintiffs shall get two-thirds of 14 annas share, in accordance, with the decision of the 6th issue," and in lieu thereof to order and declare that the plaintiffs do recover from the defendants No. 1 a sum of money calculated at the rate of two-thirds of seven annas per bigha a year for 4,128 bighas, as compensation in respect of the exclusive use and benefit by the defendants No. 1 of 4,128 bighas, from the begining of the year 1291 Amli to the 4th of January 1886, the date of the said decree; also to affirm the decree of the District Judge so far as it relates to costs.

It may be right to mention, with reference to that portion of the decree above recommended which relates to compensation, that the rate of eight annas per bigha was not disputed by the Watson appellants, and that the High Court were not prepared to dissent from the finding of the District Judge in fixing the area of the khas lands at 4,128 bighas.

The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellants: Messrs. *Freshfield & Williams.*

Solicitor for the respondents: *Mr. E. Kimber.*

25th February 1890.

PRESENT:

Members of the *Judicial Committee*—The Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

HEMANTA KUMARI DEBI* ... *Plaintiff,*

and

BROJENDRO KISHORE ROY CHOWDHRY ... } *Defendant.*

On appeal from the High Court in Bengal.

Second appeal—Ground of second appeal—Civil Procedure Code. s. 584—Substantial error in a first appellate Court's finding without any evidence to support it.

The Court of first instance dismissed the suit upon the ground that the right, which it was brought to establish, had been taken away by a compromise, entered into by a gurdian on behalf of an infant party to former proceedings. This was reversed by the first Appellate Court, which decreed the claim, holding it unaffected by the compromise, on the ground that the latter was, in fact, contrary to the interests of the infant. The High Court, on a second appeal, set aside this finding, there having been no proof that the compromise was to the infant's detriment, and affirmed the decree of the first Court.

Held, that the High Court rightly reversed the decree of the first Appellate Court; the above finding, without any evidence to support it, being a substantial error in the proceedings, and good

* 17 Cowell's Ind. Ap., 65; 17 Cal. 875.

ground of second appeal within the meaning of section 584, sub-section (c), of the Civil Procedure Code.

APPEAL from a decree (6th August 1886), of the High Court, reversing a decree (30th March 1885) of the Subordinate Judge of Mymensingh.

The suit out of which this appeal arose was brought by the appellant's late husband, Rajah Jotendra Narain Roy, who died pending this litigation, through his late mother Maharani Surat Sunderi Debi, who died in 1888. He claimed enhancement of the rent, upon notice duly given, of a taluk within his zemindari, Pukhoria Jainsahi; and the question was whether he was not precluded from enhancing the rent by the effect of a *raffanama* or deed of compromise, entered into in August 1825 between his great-grandmother, Rani Bhubonmoyi Debi, and the defendant's predecessors in estate.

The Court of first instance having held that the compromise barred enhancement, the first Appellate Court held that it did not, inasmuch as it had been entered into, as the Court found, against the interest of the infant in regard to enhancement. But this finding, on a second appeal to the High Court, was not maintained, and the decision of the first Appellate Court was reversed. The question on this appeal was whether this was correct.

The circumstances under which the deed of compromise of 1825 was executed are stated in their Lordships' judgment.

The Divisional Bench of the High Court (MITTER and GRANT, JJ.) reversed the decree of the District Judge, and dismissed the plaintiff's suit, holding that it had been finally decided by the Sudder Court in 1856 in previous litigation between the plaintiff's grandfather, Harendra Narain Roy, who sued after the death of his adoptive mother Rani Bhubanmoyi, to set aside the *raffanama* in question, and the present respondent's predecessors, that Rani Bhubanmoyi had executed it as his guardian, and that the District Judge should not have allowed that question to be re-opened. They concluded as follows:—"We are of opinion that although the dismissal of the suit of Harendra Narain Roy, under section 1, Act XXIX of 1841, did not preclude a fresh suit, still if any such suit be brought, the parties would be bound by the decision of the Sudder Dewani Adawlut so far as it decided any material issue. It was decided by that Court that this *raffanama* was executed by Rani Bhubanmoyi as the guardian of Harendra Narain Roy. That decision is final. The District Judge in this case is in error in re-opening that question.

We must, therefore, take it that the *raffanama* was executed by Rani Bhubanmoyi as the guardian of Harendra Narain Roy. We find, also, that the same rent fixed by the *raffanama* has been received by successive owners of the zemindari for about fifty-seven years. We further find that since the last suit for enhancement was dismissed in 1858, no attempt was made to repediate the *raffanama* till 1882. Under these circumstances, following the principle laid down in the case of *Hunooman Pershad Pandey* v. *Munraj Koonweree* (1), we think that, having regard to the circumstances set forth above, a very heavy onus lies upon the plaintiff to establish that the *raffanama* in the language of the Sudder Dewani Adawlut used in their judgment of the year 1856, was "clearly and unmistakably" to the detriment of Harendra Narain Roy. But this onus has not been discharged by the plaintiff. The District Judge upon this point refers only to the decree of 1851, passed in favour of the owner of the 4-annas share of the zemindari. But that decree, which was passed in 1851, has no bearing upon the question whether the *raffanama* executed in the year 1825 was clearly and unmistakably to the detriment of Harendra Narain Roy. Being, therefore, of opinion that the *raffanama* is binding upon the plaintiff, we reverse the decrees of the Lower Appellate Court in all these cases, and

(1) 6 Moore's I. A., 393; 1 P. C. J., 532.

dismiss the plaintiff's suit with costs in all the Courts."

Mr. *R. V. Doyne* and Mr. *J. D. Mayne*, for the appellant, argued that the *raffanama*, as converting into a permanent lease with rent never to be raised, a tenure which was till then subject to an enhanceable rent, was on the face of it contrary to the interests of the infant Harendra Narain Roy. It deprived him of his statutory right to enhance, and was not binding upon him or upon his successor the present plaintiff. The District Judge's judgment to this effect had regard to the evidence generally. As to the guardian's power they referred to—*Hunooman Pershad Pandey* v. *Munraj Koonweree* (1), *Lalla Bunseedhur* v. *Bindesseree Dutt Sing* (2). As to the right of enhancement, reference was made to *Bamasoonderee Dossee* v. *Radhika Chowdhrain* (3).

Mr. *J. H. A. Branson* and Mr. *W. A. Hunter*, for the respondent, supported the judgment of the High Court. It had not been shown to be beyond the powers of Bhubaneswari as guardian, or to be detrimental to the minor's interests, in the then existing circumstances, for her to have compromised the litigation in 1825. Also the predecessors in title of the appellant, by receiving rent in accordance with the compromise from the time when it was executed down to 1882, showed that they acquiesced in it. That the plaintiff had not discharged the onus upon him had been rightly found.

In regard to the widow's powers as guardian, they referred to *Watson & Co.* v. *Shamlal Mitter* (4), *Hari Saran Moitra* v. *Bhubaneswari Debi* (5). On the right to enhance—*Hurronath Roy* v. *Gobind Chunder Dutt* (6).

Mr. *R. V. Doyne* replied.

Their Lordships' judgment was delivered by :—

THE RIGHT HON. SIR RICHARD COUCH :—

This is an appeal from a decree of the High Court at Calcutta in a suit for enhancement of the rent of a taluk which was instituted in July 1882. The plaintiff is entitled to a 10-annas share of the zemindari on which the taluk was dependant ; and another person is entitled to a 4-annas share.

The only ground of defence which it is necessary now to notice is that a deed of compromise was executed in August 1825, by virtue of which the defendants allege that the rent of the taluk was permanently settled. That deed was executed by Rani Bhubanmoyi Debi, who was the widow of Raja Juggut Narain, to whom the property had belonged, and who had adopted, before the execution of the deed, Harendra Narain Roy, the grandfather of the plaintiff.

The circumstances under which this deed of compromise was executed are these. Some time before March 1823, a suit was brought by Rani Bhubanmoyi Debi and Krishen Indra Narain Rai, the owner of the other 4-annas of the zamindari, for enhancement of the rent of the taluk ; and the defence set up to that suit by the ancestors of the present defendants was that the mouzahs had been granted to them in permanent mokurrari, and that the rent was not liable to be enhanced. The suit was brought in the zillah court, and a decree was made in favour of the plaintiffs, deciding that the rent was liable to be enhanced, and that if the defendants did not pay the rent demanded, the mehals in dispute should be measured according to the *hastbud jarip* stated by the plaintiffs, and the jumma be assessed thereon. An appeal from this decree to the Civil Appellate Court was dismissed on the 11th May 1824. In that state of things the deed

(1) 6 Moore's I. A., 393 ; 1 P. C. J., 552.
(2) 10 Moore's I. A., 454 at p. 459 ; 2 P. C. J., 167.
(3) 13 Moore's I. A., 248 ; 4 B. L. R., P. C., 8 ; 2 P. C. J., 524.
(4) L. R., 14 I. A., 178 ; I. L. R., 15 Calc. 8. *Ante* page 66.
(5) L. R., 15 I. A., 195 ; I. L. R., 16 Calc., 40. *Ante* page 198.
(6) L. R., 2 I. A., 193 ; 15 B. L. R., 120 ; 3 P. C. J., 466.

of compromise was made in August 1825. It was addressed to Joygobind Mozumdar, the ancestor of the defendants, and was executed by Rani Bhubanmoyi; it states that the defendants were paying the annual *istimrari* rent of Rs. 399 odd, with progressive increase added; that, on appeal to the Court of the zillah, and the Provincial Court at Jehangirnuggur, a decree was passed for measurement and ascertainment of gross rents, and that for amicably settling with the defendants for an increase in the rent, the rent was fixed at sicca Rs. 600 including the old rent. The balance payable by the defendants after certain named deductions on account of their share was fixed in perpetuity. The defendants also presented a petition to the Court, saying that they assented to that compromise.

Nothing more appears to have taken place, except that the rent was regularly paid according to the compromise, until about 1854, and then a suit was again brought for enhancement of rent. That passed through various stages of appeal until it reached the Sudder Court. In the judgment of two of the Judges of the Sudder Court (three being present) it is stated that Rani Bhubanmoyi executed a deed of compromise, and from that time up to the period of the adopted son Harendra Narain Roy attaining his majority, the rent was collected according to the deed of compromise, and after that time until the institution of that suit in 1853. They then say:—"Under these circumstances we are of opinion that the Rajah is bound by the act of his mother done in 1232 as his guardian, and acquiesced in by him since he reached his majority, unless he can show that it was done in contravention of her duty to him as his guardian: in other words until he can show with reference to the circumstances under which, and to the then capabilities of the tenure regarding which, the compromise was made, that such compromise was clearly and unmistakably to his detriment." There is a clear finding by the Sudder Court upon the question whether Rani Bhubanmoyi was acting as guardian when she signed this deed of compromise that she was so acting. It must therefore now be taken that she did it as guardian.

The circumstances existing at the time of the compromise must next be considered. The parties were litigating not merely as to whether the rent was of the proper amount, or ought to be enhanced, but the defendants were contending that they had a perpetual tenure at a then fixed rent, and this was a settlement which was to put an end to the litigation, and which would also prevent the expense and delay, and the uncertainty of the result which was dependent upon the investigation that the Court had ordered to decide what the amount of rent, if it were to be enhanced, should be. Apparently it is a compromise which it cannot be said would not be beneficial to the infant, the adopted son, but is one which might fairly and naturally be come to as putting an end to the litigation and deciding once for all the matter which was in dispute between the parties; because it must not be forgotten that although there had been a decree affirmed on appeal that the rent was liable to be enhanced, that was subject to a further appeal, and the case might have been carried further by the defendants if this compromise had not been entered into.

The first Court before which the present suit came held that the compromise was binding and dismissed the suit. It then went by appeal to the District Judge, who reversed that decree and held that the compromise was not binding; it then came before the High Court by what is called a second appeal, or an appeal from an appellate decree, and as the High Court in its judgment states what the judgment of the District Judge was it will be convenient to refer to the judgment of the High Court. They say, "We are of opinion that although the dismissal of the suit of Harendra Narain Roy, under section 1, Act XXIX of 1841" (meaning the dismissal of the suit which was brought in 1854, and which was finally dismissed, after being remanded

to the Lower Courts for further hearing, on account of the non-appearance of both of the parties) "did not preclude a fresh suit, still if any such suit be brought, the parties would be bound by the decision of the Sudder Dewani Adawlut so far as it decided any material issue. The District Judge in this case is in error in re-opening that question. We must therefore take it that the *raffanama* (deed of compromise) was executed by Rani Bhubanmoyi as the guardian of Harendra Narain Roy. We find also that the same rent fixed by the *raffanama* has been received by successive owners of the zemindari for about 57 years. We further find that since the last suit for enhancement was dismissed in 1858, no attempt was made to repudiate the *raffanama* till 1882." Then they speak of the principle laid down in the case of *Hunooman Pershad Pandey* v. *Munraj Koonweree*(1); and go on to say that the District Judge upon the question whether the compromise was beneficial or not to the adopted son "refers only to the decree of 1851 passed in favour of the owner of the 4-annas share of the zemindari. But that decree which was passed in 1851 has no bearing upon the question whether the *raffanama* executed in the year 1825 was clearly and unmistakably to the detriment of Harendra Narain Roy." Now the decree in 1851 was obtained by the Government, after there had been a purchase at a sale for arrears of revenue not paid by the owner of the 4-annas share, and the District Judge appears to have been in error in treating that as a decree passed in favour of the owner of the 4-annas share. The Government was in a different position from that in which the owner of the 4-annas share would be, and there is no evidence in the case upon which the District Judge could found his judgment reversing the decree of the first Court, and deciding that this compromise was not beneficial to the adopted son, an infant at the time it was made. When the judgments come to be looked at, it appears that he has reversed the decree of the first Court in the absence of any evidence—certainly in the absence of any evidence upon which he might reasonably come to the conclusion that the deed of compromise was not for the benefit of the adopted son. This appears to be a case in which under the provision of the law that there is a second appeal where there has been a substantial error or defect in the procedure of the Lower Court, the High Court was right in reversing the decree of the District Judge and leaving, as it did, the decree of the first Court—which held that the deed of compromise was a binding one, and therefore the suit for the enhancement of rent ought to be dismissed—to stand.

Their Lordships will therefore humbly advise Her Majesty to dismiss this appeal, and to affirm the decree of the High Court. The appellant will pay the costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Willson & Co.*

Solicitors for the respondent: Messrs. *Neish & Howell.*

(1) 6 Moore's I. A., 393; 1 P. C. J. 552.

5th, 6th, 7th, 8th March and 1st May, 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

SRIMANTU RAJA YARLAGADDU MALLIKARJUNA* ... } *Defendant,*

and

SRIMANTU RAJA YARLAGADDU DURGA AND ANOTHER ... } *Plaintiff.* ... (*Co-Defendant*).

On appeal from the High Court in Madras.

Impartibility of zamindari shown by evidence—Grant by sanad in 1802 of zamindari without change of rule of succession by primogeniture—Madras Regulation XXV of 1802.

The question whether an estate is impartible and descends by the law of primogeniture, or is subject to the ordinary Hindu law of inheritance, must be decided in each case according to the evidence given in it. The result of the evidence in this suit was to show that before, and in, the year 1802, the zamindar was in possession of the Devarakota zamindari, by right of primogeniture, as an impartible estate; and that he was so regarded by the Government.

On the passing of Madras Regulation XXV of 1802, and the issue to him of a sanad-i-milkiyat-i-istimrari, in accordance with it, he acquired a permanent property in the zamindari lands at a fixed assessment, but they remained heritable as before; the estate remained entire; and there was no evidence of any intention on the part of the Government to alter the nature of the tenure. What was said in the judgment in the *Hansapur case*(1) was applicable here. The estate continued to be impartible, and the rule of succession to it was not altered. It descended by the rule of primogeniture.

APPEAL from a decree (18th August 1885) of the High Court at Madras, reversing a decree (30th September 1882) of the District Judge of Kistna.

The parties to this appeal were the three sons of Raja Ankinidu Garu, the last Zamindar of Devarakota in the Kistna district, who died on the 6th April 1875. The appellant, his eldest son, Mallikarjuna, was the first and principal defendant in the suit, which was brought by his younger brother, Yarlagadda Durga Prasada, claiming that he and another brother, Venkataramalinga, who was joined as a defendant, were each entitled to a one-third share. And the question was whether the zamindari was partible, or impartible, the lower Courts having differed on the point.

Devarakota was one of the zamindaries making up the district of Condapillee, one of the Northern Circars. The history of the latter is given in Grant's Political Survey, which forms one of the appendices to the fifth report of the Select Committee (1812) on the affairs of the East India Company. The Circars originally were part of the dominions of the Hindu Rajas in Southern India. Afterwards they were acquired by the Muhammadans of the dynasty founded by Sultan Kuli Kutub Shah in 1571, called the Kutubshahi. In 1687, when the last of this race was subdued by Aurangzeb, also named Alam Gir, the Northern Circars were taken by him. In 1724 the Nizam-ul-Mulk became the ruler of this district, nominally on account of the Delhi Emperor, but in reality as an independent ruler. His Amildar, Rustum Khan, administered the government of these districts for about seven years from 1732, breaking up the zamindari system which he found established, and bringing in another of his own. After his time the descendants of the former zamindars regained their proprietary rights.

In 1753 the French under Bussy obtained an assignment of the Northern Circars from the Nizam. They suspended the zamindars from their functions as representatives of the sovereign, but left them in the enjoyment of savarams and such other privileges as they possessed in connection with their zamindari estates.

* 17 Cowell's Ind. Ap., 134; 13 Mad., 406.

(1) *Baboo Beer* Pertab Sahee v. *Maharajah Rajender Pertab Sahee*, 12 M. I. A., 1; 2 P. C. J., 348.

Their military duties were also enforced as before. In 1759 the conquest of Masulipatam by the English put an end to the French administration, and for a period of seven years, any authority which existed was exercised in the name of the Nizam, and especially by his Amildar, Hussein Ali Khan. Under his administration the zamindars appear to have resumed their former authority. This state of things was terminated in 1766, when the Nizam, by treaty with Lord Clive, confirmed the grant of these Circars to the East India Company, which had been made by the Mogul Emperor in the previous year. The British continued the zamindari system, which they found in existence, making settlements of the revenue with the zamindars, first from year to year, afterwards for longer periods, until at length the permanent settlement was introduced in 1802 under the Madras Regulation XXV of that year.

In 1766 Clive who had procured a sanad from the Court of Delhi transferring in perpetuity to the Company the sovereignty of the Circars compelled the Nizam to confirm it by treaty. At first the Company was not in a position to undertake the direct collection of the revenue; and a farm of the Circar comprising the Devarakota lands, was granted to Hussein Ali Khan, under the name of the Mustaphanagar Circar. The commercial factory established by the East India Company at Masulipatam was replaced by a chief in Council, by whom the administration was directed until 1794, when Collectors of Revenue were appointed.

The history of the Devarakota Zamindari is given as follows by Mr. Grant: "Devarakota 15 miles south of Masulipatam on the north bank of the Kistna, "adjoining to Divi on the West, fertile in "rice and joary and well managed, Pargan-"na zamindari of Yarlagadda Kodanda-"ram of the Kommawar caste; the "family first settled here as combies or "husbandmen, in the year 1580, are "supposed to have got their first sanads "for desmukhi jurisdiction from Abdullah "Kuttub Shah in 1640, though not con-"stantly confirmed in the possession of it, "by future rulers. In 1726 one of the "family obtained the zamindari of "Guntur and Auchilminar, but in 1732, "being involved in the general proscrip-"tion of Rustum Khan, lost all territorial "jurisdiction, rights and privileges. In "the confusion of future revolutions, "have by some means or other regained "possession and were numbered in the "convention of 1766, paid formerly Rs. "2,19,455, are supposed actually to "collect pagodas 70,000 exclusive of "savarams, &c., but by the Dowle "bundobust only 60,000.

"At that time (about 1761) Hussein "Ali Khan acted in the capacity of "Amildar in the Circars. This man had "in vain instigated the English Govern-"ment to assert its rights; at the same "time he found his authority curtailed "in the exercise of his office by the pro-"tection given to the zamindars. Among "numberless instances of this kind one "Kodandaram, of Devarakota, a small "but compact, fruitful and highly culti-"vated parganna, lying 15 miles south "of Masulipatam on the banks of the "Kistna, had been invariably assessed in "the books of the Circar of Condapillee "for a revenue of rupees two lacs, nineteen "thousand four hundred and fifty-seven "and six annas (2,19,457-6-0); the gross "mofussil receipts exceeded this amount "in the sum of sixty thousand rupees "which defrayed the expense of internal "management, such as sibundy, with the "rusums and savarams of the zamindar "and other lesser officers of Government. "Kodandaram, a sensible, intelligent man, "and at this day, without exception, "the most skilful farmar in any of the "provinces according to popular estima-"tion, availed himself of the prevailing "distraction on re-instatement in the za-"mindari management from which he "had been suspended by the French, to "obtain an annual diminution of his "usual rent on the plea of predatory and "other losses sustained by the inhabit-

"ants of the district, in the period of his "suspension."

A description of the position of Devarakota was given by Mr. Roberts, Collector of Masulipatam, in a letter to the Revenue Board, dated 30th October 1824. In 1860 the Madras Government recorded the following:

"Devarakota was not a newly-created "zamindari, but one of the most ancient "in the Masulipatam district, having "been held by the family under Pad-"shahi grants for upwards of a century "before the permanent settlement." "Whatever may have been the origin or "position of the zamindars, they were "most probably the men of chief local "influence in their districts when they "were selected for the service of Govern-"ment; and in many instances, no doubt "among which it is likely the Devara-"kota family may safely be included, "they really possessed old feudal rights, "of origin long anterior to that of the "Mussulman Government whom they "served."

The order of succession of the Devarakota Zamindars was given in a pedigree table, furnished in 1792 by Venkatramanna, then in possession, to the Chief in Council at Masulipatam, in obedience to orders received from the Board of Revenue. Ankinidu was by this shown to be ninth in descent from Gurva Naidu, the first holder of the zamindari, who possessed it from 1576 to 1607. Kodandaram (1746 to 1791) appeared in the fifth ausht, or generation, from the founder. With one intermediate holder, Naganna, who held for a short time, the succeeding Zamindar Yarlagadda Ankinidu was the one who received the sanad in 1802. Two successive adoptions followed, and in 1835 Ankinidu, the father of the now contending parties, held the zamindari, and continued down to 1875. The sanad which was dated 8th December 1802, and was in the same terms as other sanads issued at that time in conformity with Madras Regulation XXV of 1802, was granted to Yarlagadda Ankinidu. Upon this the plaint, filed 18th April 1880, relied, it having been granted to him, and to his heirs, successors and assigns, without any condition of descent, impartibility, or by primogeniture. And the plaintiff alleged that for some time under British rule, his ancestors "used to rent, temporarily, Devarakota and other estates, on frequently varying terms and for varying amount of rent," and were frequently divested of those rights.

The appellant, by his written statement, averred that for at least 600 years his ancestors had been in uninterrupted enjoyment of the Devarakota Zamindari, and that it was impartible and had always descended by the rule of primogeniture, and been enjoyed by only one member of the family; the other male members of it being entitled to nothing but maintenance.

Of the issues only one was now material, viz., whether the zamindari was impartible and descended to the eldest son, or was partible among all the sons.

The District Judge was of opinion that regard being had to the judgment of the Committee in *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*, the *Hansapur case*(1), *in Rajah Venkata Narasimha Appa Row* v. *The Court of Wards*, the *Nuzvid case*(2), and in *Mutta Vaduganadha Tevar* v. *Dorasinga Tevar*, the *Shivagunga case*(3), the effect of the sanad of 1802 was not to alter the previous law of succession, and that the zamindari, if impartible before that grant, continued to be so after it.

He added that the only effectual mode of dealing with the question of impartibility was to see whether, according to the custom of the family, impartibilty had come to be recognized as its usual incident, and whether there was any well-authenticated instance of a partition of it amongst more than one member. Upon this he said: "In reviewing the history "of the zamindari it will be observed "that on three occasions the Govern-"ment recognized the custom of descent

(1) 12 M. I. A., 1; 2 P. C. J., 348.
(2) L. R., 7 I. A., 38; 4 P. C. J., 81.
(3) L. R., 8 I. A., 99; 4 P. C. J., 239.

"by primogeniture. The first was on the "death of Kodandaram in 1791, when "his second son, Nageswara Naidu, having "attempted to usurp the zamindari, "the Government officers intervened and "bestowed it on his elder brother, Venka-"tramanna, alone, although he had at "that time two brothers living. Second-"ly, in 1792, Nageswara Naidu succeed-"ed alone on the death of his elder bro-"ther, though his other brother, Venka-"tadri, was then alive. Thirdly, in 1798, "Ankinidu was alone appointed in place "of his father, who had been suspended, "although he had a brother named Ganga-"dhara Naidu, and an uncle, Venkata-"dri, living at the time. Ankinidu, after "his accession to the zamindari, had to "pay a certain amount for maintenance "to his brother and uncle, and this fact, "which is fully proved by documentary "evidence is strong evidence of the pre-"valence of such arule of descent amongst "the members of the family.

"There is certainly no well-authenti-"cated instance of a partition amongst "the members of the family, or of the "estate having descended to more than "one person at a time."

The Judge accordingly dismissed the suit, except as to a small parcel of inam lands, and mesne profits in respect thereof, and a sum of Rs. 1,806-15-0, which he considered the plaintiff entitled to in respect of certain personal property.

The plaintiff appealed to the High Court; and the present appellant preferred a cross appeal as to the personal property and certain debts due by his father's estate, which he alleged he had discharged, and was entitled to credit for in the accounts.

The High Court (MUTTUSAMI AYYAR and HUTCHINS, JJ.,) held the zamindari partible. They went through the documentary evidence and traced the connection of this family from the earliest time with Devarakota considering that time to be about A.D. 1640, when desmukh jurisdiction was alleged to have been conferred on the family, under a sanad issued by Abdul Kutub Shah, who was at that time, and before its conquest in 1687 by the Emperor Aurangzeb, the ruler of the district. That sanad was not produced.

The Judges then traced the history of this family, so far as it was possible, under the rule of Aurangzeb and subsequent conquerors, and found them, with interruptions, styled always desmukhs, or, by similar appellations, "all titles of the same office," down to 1732, when they were deprived of "all territorial jurisdiction, rights and privileges," by Rustum Khan, acting on behalf of the First Nizam, who had "proclaimed his independence of the Court of Delhi." Then followed the cession, in 1753, of the country to the French East India Company, who were ousted in 1765-66 by the English East India Company, who obtained, in 1766, a sanad for the district from the Court at Delhi.

The High Court was of opinion, in effect, that when this family is referred to in the documents produced of a date prior to the establishment of British rule it is as revenue officers, or renters of a few villages, and that for some years they "had ceased to have any official connec-"tion with the parganna," and that "prior to the establishment of British "rule we have no evidence of the exist-"ence of any Zamindari of Devarakota." That in 1765 "the fortunes of the family were restored and augmented" by Kodandaram, who, in a letter of Mr. Pybus, "Chief at Masulipatam," dated the 25th June, 1763, to the Governor of Madras in Council, was for the first time styled "Zamindar of Sallapalli" (which seems to have been the name of the fort or principal place of Devarakota); and afterwards, in a letter, dated the 4th April 1765, was styled Zamindar of Devarakota. That in 1769 a cowle or engagement was taken from Kodanda, described in it as Zamindar of Devarakota, for one year, and was followed by other similar engagements for short periods up to 1778.

In reference to the rule of primogeniture the Judges said:

"If the rule attached to no estate ex"cept a zamindari and could not attach "to an estate which had in comparatively "recent times been erected into a zamin-"dari, we should have little difficulty in "disposing of the claim; for there is no "trace of the existence of any estate "known as the Zamindari of Devarakota "prior to the exclusion of the French "from the Northern Circars. Nor have "we evidence that before that period "any member of the Yarlagadda family "laid claim to or was addressed as "Zamindar of Devarakota, or Challapalli, "where the family resided.

"The evidence taken in this suit con-"firms the information collected by Mr. "Grant in his Political Survey of the "Northern Circars, and again by Mr. "Roberts in 1824, that about the year "1640 the Yarlagadda family obtained "the office and jurisdiction of desmukh "in the parganna.

"A full account of the office of des-"mukh and its origin is to be found in "the Political Survey II, Fifth Report, "Madras Edition, 155.

"From about 1640 until the expedition "of Rustum Khan in 1732 we find mem-"bers of the family addressed severally "or jointly as desmukhs and with some "interruptions they enjoyed the office. "Similarly we find members of Yadda-"napudi family addressed sometimes se-"verally and sometimes jointly as des-"pandyas or stalakarnams. The Yarla-"gadda family as desmukhs were collec-"tors of revenue. They themselves rent-"ed at some times a few villages, at "others the whole parganna. So far as "there is evidence before us they did not "always rent the same villages and on "one occasion we find the village from "which they took their name rented by "a stranger. They had doubtless pri-"vate property in the parganna, but no "evidence has been given to show of "what it consisted prior to 1732. There "were savaram lands and rusums attach-"ed to the office, but whether these were "held jointly or severally prior to the "time of Kodamdaram we have no suffi-"cient evidence to show."

Another extract from the judgment is as follows:

"In 1732 the family was deprived of "its desmukh jurisdiction, although it "may have still held property out of "which it may have made inam grants. "We may observe that such grants were "at times made by renters or even by "claimants to revenue officers who had "no property in the soil. However this "may be, we find no evidence of a recog-"nition of their enjoyment of territorial "rights over the parganna until after "1759.

"When Hussein Ali endeavoured to "collect revenue on behalf of Nizam Ali, "he issued sanads to Kodandaram who "was then in possession of the fort of "Challapalli and had troops in his pay. "What may have been the nature of "these sanads we know not. We do "know that he rented the parganna, for, "payment to which he was liable were "assigned for maintenance of the Com-"pany's troops which were assisting Hus-"sein Ali to maintain order. Kodanda-"ram appears to have again assumed the "office of desmukh and possession of ru-"sums and savarams attached to it.

"These savarams and rusums were re-"sumed in 1789, the sanads he had pro-"duced in support of his title to those be-"ing declared invalid. Nevertheless the "title of desmukh continued to be borne "by Kodandaram and his successors up "to the date of the permanent settle-"ment.

"That he was addressed as zamindar "as well as desmukh in the earlier cow-"les issued by the British and that the "payments he was bound to make were "styled tribute, may be accounted for "by the loose way in which the term "was then employed in the case of mere "renters who had some local importance. "We find then that prior to the issue "of these cowles there is no proof that a "zamindari existed; nor is there any "sufficient proof that by a custom of the "family the rule of *primogeniture* at-"tached to any estate possessed by the

"family and invested it with the inci-"dent of impartibility. Kodandaram, "under the style of zamindar, held the "parganna as rented on cowles for short "terms. His eldest son was accepted "as renter on his undertaking to fulfil "the engagements made by his father, "the terms of whose cowle had not ex-"pired on his death. The family had "so long held the position of rent collec-"tors or renters that they no doubt "considered they had a claim to be recog-"nized as zamindars though it was a "claim which was dependent on the "pleasure of the Government."

And the High Court, after examining into what occurred during Kodanda's life-time, and at his death 1791, when the Government appointed as his successor, in the first instance, his second son Naganna, and then, on Naganna proving unfit, resumed the estate in November 1796, and kept it under their own management until April 1798, when the Government appointed Ankanna, son of Naganna, and great-grandfather of these parties, in his place, with whom the perpetual settlement was made by the grant of a sanad in 1802, expressed their conclusion thus:

"It appears to us that whatever "estate the family had in the desmukhi "emoluments came to an end in 1789, "when the Government indicated, as "its reason for resuming those emo-"luments, that the services attached to "the office had long been discontinued "and were no longer required; that "Kodanda obtained the zamindari in "virtue of the possession he held as "renter and that this right which was "regarded terminable at the pleasure "of the Government was eventually "confirmed to his grandson in perpe-"tuity; that the changes of possession "which followed Kodandaram's death "until the first succession after the per-"manent settlement were not regarded "as successions governed by any law or "custom of inheritance, but as acts of "the administration which the other "members of the family could not ques-"tion, or at any rate that they cannot "be regarded as instances of a family "custom, to which the other members "submitted with a consciousness that "they were bound to do so.

"In the view we take, the estate can-"not be said to be the self acquisition "of Ankinidu, though it may have been "so regarded by the members of the "family who were alive in 1832, and "might have contested the brief posses-"sion of the widow.

"We must then hold that the first res-"pondent failed to prove the existence of "a usage over-riding the ordinary law, "and that the zamindari is partible."

The decree reversed so much of that of the First Court as disallowed the plaintiff's claim to a share in 67 villages of which the zamindari consisted, and the kamatam lands and certain houses and buildings lying within the ambit of the zamindari; and directed that partition into three equal shares should be made; and that the plaintiff and second defendant should each recover from the present appellant a one-third share with mesne profits; and that as to the devasthanam, or temples, and the property appertaining thereto, the parties should be entitled to the management in yearly turns; and that a receiver should be appointed to collect the outstandings, which the plaintiff had agreed to take, as amounting to Rs. 31,609-10-1.

The first defendant, Mallikarjuna, preferred this appeal, in which the plaintiff and the second defendant were respondents.

Mr. *J. D. Mayne*, for the appellant, argued that the High Court should have found upon the evidence that the zamindari was ancient, impartible and passed by primogeniture. He referred to Grant's Political Survey (1812), Appendix to Fifth Report, pp. 18 and 155; Gleig's Life of Sir T. Munro, vol. 3, 1831, p. 425; Mill's British India, vol. 7 (Wilson, H. H.), pp. 437, 442; Fifth Report, p. 203, Shore's opinion; Collector of Masulipatam to Board of Revenue, 30th October 1824; Masual of the Kista Dis

trict by Nelson, 1883, p. 325; Fifth Report, p. 22, as showing the state of things at an early date in the Circars.

Although early sanads were absent, grants from 1738 onwards were in evidence; and Kodandaram, who was shown to have been zamindar at the commencement of British rule, was recognized as such; and Devarakota was his zamindari. With him a series of revenue settlements between 1769 and 1783 were made, and he was referred to in documentary evidence as Zamindar of Devarakota, or Sallipalli, the central fort, as well as desmukh of the Muslaphanagar Circar. The cowles were the same in form as those granted to the Zamindar of Nuzvid, to the Rajas of Vizianagram, and others, whose estates were well known to descend by primogeniture; the language of those cowles differing from those granted to mere renters. As with the desmukh, so with the zamindar, the revenue was settled from time to time, that involving no change of the tenure; and down to Kodanda's death in 1791, and during the disputes as to the succession after his death, there was no suggestion that the zamindari could be held by more than one person at a time. It was assumed that primogeniture prevailed. Also, in 1794, when the Government changed the Provincial Chief and Council for Collectors, a proclamation was issued to the zamindars, including the one of Devarakota, stating that their rights and privileges were to be preserved. Previously, in 1791 when Kodanda died, the Chief of Masulipatam had summoned his sons, Venkatramanna, and Naganna, to meet him that the orders of Government might be taken regarding the succession. It was upon this occasion that the pedigree table was produced, and in the subsequent dispute as to the succession, seniority prevailed, the eldest son becoming zamindar. This pedigree was most important. The weight given to such evidence was apparent in *Naragunty Lutchmee Davamah* v. *Vengama Naidoo*(1), and in *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanuwula Boochia Vankondora*(2).

The sanad was granted to Ankinidu in 1802 in the same form that sanads were granted to other zamindars, some of whom held impartible estates, for instance, the Ramnad Zamindar; *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (3). The present appellant's position was exactly parallel to that of the plaintiff in the last Shivagunga case, *Mutta Vaduganadha Tevar* v. *Dorasinga Tevar* (4). One of the principal precedents as to the result of the issue of a sanad in 1802 under the regulation was *Collector of Trichinopoly* v. *Lekkamani*(5) which maintained the judgment of the High Court delivered by Scotland, C.J., reported in *Lekkamani* v. *Srimat Ranga Kristna Muttu Vira Puchaya Naikar*(6). Neither the sanad, nor the Madras Regulation XXV of 1802 gave new rights to the owners of lands, except in respect of the permanency of the assessment, nor did either of them take any rights away, merely vesting in all zamindars the right to have the amount of revenue payable permanently fixed. There was no evidence here that when the Government was granting the sanad of 1802 there was any intention on its part to alter the rule of succession or the impartibility of the zamindari. The Regulation which in Bengal might be said to have indicated such an intention was not applied to Madras where Regulation XX of 1802 could not bear any such construction. The *Shivagunga Case* (7), which this closely resembled, established that where an estate was impartible previously to 1802 it was not altered by the grant of a sanad. The pedigree table showed single ownership. The tenure, originating in an office which must have been

(1) 9 M. I. A. 66, at p. 88; 1 P. C. J., 826.

(2) 13 M. I. A., 333, at p. 339; 2 P. C. J., 546.
(3) 12 M. I. A., 397; 2 P. C. J., 361.
(4) L. R., 8 I. A., 99; I. L. R. 3 Mad., 290; 4 P. C. J., 239.
(5) L. R., 1 I. A., 282; 3 P. C. J., 318.
(6) 6 Mad. H. C. Rep., 208.
(7) L. R., 8 I. A., 99; I. L. R., 3 Mad., 290; 4 P. C. J., 239.

impartible, the holder having exercised civil, criminal, and revenue powers, was also impartible. The whole nature of such estates was properly described by Sir T. Munro as that of "petty principalities" in the Northern Circars.

Mr. *T. H Cowie*, Q.C., and Mr. *R. V. Doyne*, for the respondents, supported the judgment of the High Court. It had not been shown that, at the end of the last century, and at the time of the passing of Madras Regulation XXV of 1802, there was an impartible zamindari in the possession of the plaintiff's ancestors. A distinction prevailed between an estate, hereditary and impartible, in proprietary possession, and an hereditary office. It was to the latter that the pedigree related; and it was not disputed that neither under the Mahommedan rule, nor under the French, nor after the cession of the Diwani to the British, was there any alteration in the position of this family as regards the office of desmukh. But what the appellant had to establish was the impartibility of the Devarakota Zamindari, the presumption being that it was partible. Kodandaram, it was true, obtained cowles for short periods, by which he became responsible for varying amounts of the revenue. But these were no more than temporary settlements for so much revenue to be received from such and such person. There was nothing in them to show an hereditary right in any one member of this family to Devarakota as impartible estate. No such pretension was put forward in 1802, nor was any ancient sanad produced. The High Court had, therefore, rightly inferred that when the family was referred to in documents prior to British rule, it was as revenue Collectors, or assignees of the revenue of a few villages. Impartibility must rest upon tenure, not upon settlement. In the years 1738, 1753, 1760 and 1788 members of the family were desmukhs, but there was no evidence, documentary or other, to show that they had a zamindari title to Devarakota. The title to be zamindari must, then, rest upon the sanad of 1802—as it would according to the principle on which the *Hansapur Case*(1) was decided—the title from those who had the power to grant, or to withhold; and a sanad was granted in accordance with the Regulation XXV of 1802; but in the sanad there was no reference to impartibility, or to any rule of descent by primogeniture. The grant was of the zamindari to Ankinidu, his heirs, successors, and assigns. And this must be according to the ordinary law. Even if the first Court had been right in holding that the office of desmukh was hereditary, and held by one person only, and that person the eldest son, the appellant's contentions that the zamindari was to descend, subject to the like conditions, was not maintainable. Such a custom would not govern the descent of the zamindari after December 1802, and certainly could not be assumed to have done so; it being a point on which evidence was required. Since the grant to Ankinidu, in 1802, down to the death of his grandson, Ankinidu father of these parties, on the 6th April 1875, no previous descent occurred on which the present question could have arisen. Ankinidu, the first grantee, died in 1819, without a son of his body; and was succeeded by an adopted son, Durga Prasoda, who died in 1834; and was succeeded at first by his widow, and then by a son, whom she adopted under a power to her from her husband. This son was Ankinidu, the father of these parties. On his death, in April 1875, the disputes arose leading to the present litigation.

In all the decided cases the question of impartibility was held dependent on continuity from an estate impartible before the Regulation and sanads of 1802. The Regulation did not affect to alter the character of the estate. For these reasons the plaintiff's evidence had failed to establish his claim.

Mr. *J. D. Mayne* replied, relying on the evidence as to the character of the zamindari at the time when the istimrar

(1) 12 M. I. A., 1; 2 P. C. J., 348.

sanad was granted in 1802, and the absence of any intention shown on the part of the Government to alter its impartible character at the time of such grant; the Regulations, also, not authorizing any alteration.

The following cases were referred to on both sides during the argument:

Rawut Urjun Sing v. *Rawut Ghunsiam Sing*(1), *Baboo Gunesh Dutt Singh* v. *Maharaja Moheshur Singh*(2) *Naraganty Lutchmeedavamah* v. *Vengama Naidoo*(3) *Katama Natchiar* v. *The Rajah of Shivagunga*(4), *Collector of Madura* v. *Mootoo Ramalinga Sathupathy*(5), *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Partab Sahee*(6), *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vankondora*(7), *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*(8), *Collector of Trichinopoly* v. *Lekkamani*(9), *Chowdhry Chintamun Singh* v. *Mussamut Nowlokho Konwari* (10), *Rajah Vankata Narasimha Appa Row* v. *The Court of Wards*(11), *Mutta Vaduganadha Tevar* v. *Dorasinga Tevar* (12) *Rani Sartaj Kuari* v. *Rani Deoraj Kuari*(13).

Afterwards, on 1st May 1890, their Lordships' judgment was delivered by

THE RIGHT HON. SIR RICHARD COUCH:—

The question in this appeal is whether a large estate called Devarakota, in the Northern Circars in the Presidency of Madras, is impartible, and descends to the eldest son of the last owner. The parties to the suit are the three sons of Ankinidu, who died possessed of the estate on the 6th April 1875. The appellant is the eldest son, and shortly after his father's death he took possession of the estate, and had remained in possession of it till the bringing of the suit. The respondent, Durga Prasada, is the second son, and on the 16th April 1880 he brought the suit in the District Court of Kistna against his brothers, praying that he and the two defendants might be declared each entitled to a one-third share in the property. Issues were framed, of which only the second is now material. That is, whether the estate called in the issues the Zamindari of Devarakota is an impartible zamindari, and descendible to the eldest as against other sons, or partible. The District Judge held that the estate was impartible, and disallowed that part of the plaintiff's claim. In respect of other matters, which need not now be noticed, his claim was allowed. The High Court of Madras, on appeal, held that the estate was partible, and reversed that part of the decree.

In Mr. Grant's Political Survey of the Northern Circars, submitted to the Governor-General and Council at Calcutta on the 20th December 1784, and inserted in the Appendix to the Fifth Report from the Select Committee of the House of Commons on the affairs of the East India Company, there is a notice of the family in which it is stated that they first settled at Devarakota as combies or husbandmen in 1580, and were supposed to have got their first sanads for desmukhi jurisdiction from Abdullah Kootub Shah in 1640, though not constantly confirmed in the possession of it by future rulers. In 1732, being involved in the general proscription of Rustum Khan, they lost all territorial jurisdiction, rights and privileges, but in the confusion of subsequent revolutions they regained possession, and were numbered in the Convention of 1766, by which the Northern Circars were transferred to the East India Company. Devarakota is stated by Mr. Grant to be in the Circar of Condapillee, and appears from the rental con-

(1) 5 M I A. 169; 1 P. C J., 415.
(2) 6 M I. A., 164; 1 P C J., 521.
(3) 9 M I. A., 66; 1 P C J., 826.
(4) 9 M I. A, 543, 2 P C J., 25.
(5) 12 M I A., 397; 2 P C J., 361.
(6) 12 M I. A, 1; 2 P. C. J, 348.
(7) 13 M I. A., 333; 2 P C J., 546.
(8 14 M I A 570; 3 P. C. J, 108.
(9) L. R, 1 I A, 282; 3 P. C J, 318.
(10) L R, 2 I A., 263; I L. R., 1 Cal., 153, 3 P. C. J., 537.
(11) L. R., 7 I. A., 88; 4 P. C. J., 81.
(12) L R., 8 I. A., 99, I. L. R., 3 Mad. 290; 4 P. C. J., 239.
(13) A L R, 15 I A., 51; I. L. R., 10 All., 272, *Ante* page, 139.

cluded with the ryots to have been one of the largest estates there.

Their Lordships think that, in considering the evidence upon the question of impartibility, it is not necessary to go further back than 1766. At that time one Kodandaram was in possession of the estate. He died on the 20th November 1791, leaving three sons, Venkatramanna, Naganna and Venkatadri. Venkatramanna succeeded to the whole estate, and died after a few months in 1792. On his death the zamindari was claimed by Naganna, and a claim was set up on behalf of his son Ankanna, then a boy of 13 or 14 years old, on the ground of his having been adopted by Venkatramanna. The adoption was denied by Naganna. The Government, which appears at that time to have been the only authority which had power to decide the question, there being no Civil Court competent to do so, resolved that the right of succession was in Naganna, and ordered him to be put in possession. In November 1796 Naganna was dispossessed of the estate by the Collector of Masulipatam, who, in his letter to the Board of Revenue assigning his reasons for doing so, said, "It appears that the "zamindar has failed in the payment "of the customary tribute due by him "to the Company on account of that "zamindary." And in a letter from "the Board of Revenue to the Gov-"ernor in Council, dated the 22nd "March 1798, they say, "The conduct "of Nageswaram Naidu (another name "for Naganna), although it ought to dis-"qualify him from being longer entrust-"ed with the care of a zamindari, cer-"tainly has not been such as to set aside "for ever the rights of his son, who, "it appears by the report of the Chief "and Council of the 12th March 1792, "contested the succession with his father, "under the plea of having been adopted "by his uncle Venkataramayya, the late "Kodandaram's eldest son, who died "without issue soon-after his father. We, "therefore, in consideration of this right, "not as giving a preference to zamindari "management, concur in Mr. Oakes' "(the Collector) recommendation in his "favour."

The Governor in Council, in a letter to the Board of Revenue of the 4th April 1798, said as to this recommenda-"tion, "We owe it to the rights of the "young Zamindar Ankanna, as well as "to considerations which arise from the "late Collector's administration, to con-"cur in the recommendation of Mr. "Oakes and your Board for the restora-"tion of this zamindari to Ankanna.' The words "rights of the young zamindar" are opposed to the view of the High Court that the changes of possession were simply acts of administration. At this time Ankanna had a younger brother named Gungadhara, and there is evidence of allowances for maintenance being made to him and to Venkatadri, the youngest son of Kodandaram. In a letter from the Secretary of the Board of Revenue to the Collector in February 1800 the Board approves of his making an allowance out of the revenue of Devarakota to Ankanna (there called Ankinidu) of 100 pagodas per month during the period his zamindari is under assumption, and directs him to continue the allowances granted to Nagesha Naidoo (Naganna and the uncle of Ankanna (Venkatadri).

On the 28th February 1801 the Collector wrote to Ankanna by the name of Ankinidu as follows: "It is surprising "that you have written to say that you "will pay 10 pagodas per mensem to "your younger brother, Gungadhara "Naidu, though the responsibility of "maintaining him rests to a great extent "with you. I think that at least 15 pa-"godas per mensem should be given him. "If you do not do so how will you ac-"quire our good will?" It is apparent from this that Ankanna had before this time been restored to the zamindari, though it does not appear in the proceedings when this took place.

Their Lordships think that the result of the evidence in the suit is that at this time Ankanna was in possession of the

estate by right of primogeniture as an impartible estate, and was so regarded by the Government.

Regulation XXV of 1802 (Madras) was passed on the 13th July. It recites that the public assessment of the land revenue had never been fixed, and that the Government had resolved to grant to zamindars and other landholders, their heirs and successors, a permanent property in their land in all time to come, and to fix for ever a moderate assessment of public revenue on such land, the amount of which should never be liable to be increased under any circumstances. On the 8th December 1802 an istimrar sanad was granted by Lord Clive, then Governor in Council of Fort St. George, to Ankinidu, otherwise Ankana, fixing the assessment of the zamindari at the annual sum of 29,340 star pagodas, and declaring it to be permanent. Ankinidu thus acquired a permanent property in the land at a fixed assessment but there was no grant of the land, and the rule of succession to it was not altered. The estate remained entire, and there is no evidence of any intention of the Government to alter the nature of the tenure. What is said by this Board in the judgment in the *Hansapur Case*(1) is applicable to the present case. The estate continued to be impartible, and the rule of succession to it was not altered.

There is evidence of a later date which is some proof in support of this. Ankanna adopted Durga Prasada, the son of Gungadhara, and after his death in 1833 his widow adopted Ankinidu, the father of the appellant and respondents. Venkatadri left a son Karkotaka, and in 1866 his mother and guardian brought a suit on his behalf against Ankinidu for a monthly maintenance of Rs. 161-11.2, which had been paid to her late husband Venkatadri from the estate of Devarakota Zamindari, and for arrears from the 1st May 1856 to the 1st August 1866. The defendant pleaded that the maintenance was for Venkatadri's life only, and did not descend to his son. In the judgment of the Principal Sadr Amin it is said, "The parties have "agreed that the zamindari descended to "the eldest son," and the decision "that "the defendant be held liable to the payment of Rs. 50 per mensem to the "plaintiff's minor son during the period "of his minority" is founded upon the assumption that Venkatadri was by usage excluded from inheritance. No objection appears to have been made to this judgment being admitted in evidence, if it could have been made successfully.

The question whether an estate is subject to the ordinary Hindu law of succession, or descends according to the rule of primogeniture, must be decided in each case according to the evidence given in it. In this it appears that the claim of the plaintiff under the ordinary Hindu law has been answered, and that the decree of the District Court disallowing the claim ought not to have been reversed. Their Lordships will, therefore, humbly advise Her Majesty to reverse the decree of the High Court, and to affirm the decree of the District Court, with the addition of the costs of the appeal to the High Court.

The respondents will pay the costs of this appeal.

Solicitor for the appellant—Mr. *R. T. Tasker.*

Solicitors for the respondents—Messrs. *Lawford, Waterhouse, and Lawford.*

(1) 12 M. I. A., 35; 2 P. C. J., 348.

11th March 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

BHAGWAN SAHAI * ... *Defendant,*

and

BHAGWAN DIN AND OTHERS *Plaintiffs.*

On appeal from the High Court for the North-Western Provinces.

* 17 Cowell's Ind. Ap., 98; 12 All. 387.

422 & 387

Sale, with right reserved of repurchase within a period, distinguished from mortgage—Construction of documents of sale and of agreement for re-sale.

A document purporting to be one of sale, though it is accompanied by a contract reserving to the vendor a right to purchase the property sold, on repaying the purchase-money within a certain time, is not on that account to be construed as if it were a mortgage, *Alderson* v. *White*(1) referred to and followed, the law of India and of England being the same on this point.

APPEAL from a decree (16th November 1886) of the High Court(2) affirming a decree (20) August 1885) of the Subordinate Judge of Cawnpore.

The question here was whether the parties were in the relation of mortgagor and mortgagee, so that a right to redeem could subsist.

The suit was brought by the respondents to redeem a mouza, Harbaspur, alleged to have been transferred in 1835 by way of conditional sale, by the plaintiffs' predecessors in title, to the predecessor of the defendant who was now appellant.

The plaint stated transfers both in, and subsequently to, 1835, alleging that the purchase-money had been repaid as the result of the defendant, and those through whom he claimed, having realized the profits of Harbaspur. A declaration of the plaintiffs' right to redeem, mesne profits, and an account, were demanded. The written statement, contained among other defences, that the transaction of 1835 was an absolute sale from the first, and not a mortgage.

The Subordinate Judge decided that the property was redeemable by the plaintiffs, and decreed the claim, subject to the condition that the plaintiffs should repay the purchase-money, *viz.*, Rs. 4,000. This was paid into Court on 29th August 1885, and a decree was thereupon made for redemption.

An appeal from this decree was dismissed by the High Court. In the judgment are the words—" the plaintiffs contended that the sale was a conditional sale, or mortgage by conditional sale. The correctness of this was admitted on behalf of the defendant." The judgment is reported in I. L. R., 9 All. 98.

Mr. *J. D. Mayne*, for the appellant, argued that the transaction of 1835 was an absolute sale, with the reservation of a right of repurchase by the vendor, which had not been exercised within the time limited by the agreement in that behalf; a right which had, therefore, ceased to have effect. There was, therefore, not existing here any conditional sale or mortgage, within the Regulation XVII of 1806, which could support a right to redeem. It was a question of whether the relation of mortgagee and mortgagor subsisted between the parties, not merely a question of limitation. It was submitted that the English case (to which LORD MACNAGHTEN referred), *Alderson* v. *White*,(1), was conclusive as to the law, identical on this point in both countries.

Mr. *C. W. Arathoon*, for the respondent, argued that there had been a mortgage by conditional sale, as in *Radhanath Dass* v. *Gisborne & Co.*(2). This case, however, their Lordships distinguished. He also referred to Macpherson on the Law of Mortgage (ed. 1868) p. 10, and to Bengal Regulation XVII of 1806.

Mr. *J D. Mayne* was not called upon to reply.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

This case depends upon the construction of two documents dated February 20th, 1835. By the first document Alum Singh and others, who professed to be the proprietors of the property therein mentioned, declared that they had of their own accord absolutely sold the entire property to Ganga Din "in lieu of

(1) 2 De. Gex. and J., 105.
(2) I. L. R., 9 All., 97.

(1) De. Gex. and J., 105.
(2) 14 Moo. I. A. 1; 2 P. C. J., 636.

Rs. 4,000 of the current coin." That was an absolute sale by Alum Singh to Ganga Din. Then on the same day another document was executed, by which Ganga Din, reciting the deed, says that he has purchased the property for the Rs. 4,000, and adds:—"However, I have as a matter of favour, mercy, kindness, and indulgence, executed this deed, and do hereby stipulate that if all these vendors will within a period of ten years from the date of this deed pay in a lump sum, and without interest, the whole amount specified above, I shall accept the same, and cancel this valid sale. During the aforesaid term I shall remain in possession, collect the rent, enjoy the profits, and be liable for loss; the vendors shall have no concern whatever. I shall not claim interest from the vendors, nor will they demand profits from me after the expiry of the term. In case the whole of the principal is not paid"—and their Lordships think that the construction of that is—"In case the whole of the principal is not paid according to the terms of this document,"—"the vendors shall not be able to cancel the sale by payment of the principal."

Those documents having been executed in 1835, in the year 1884—nearly 50 years afterwards—a suit is commenced by the plaintiffs, representing the vendors, claiming to redeem the property upon payment of the Rs. 4,000. The defendant in his writen statement says:—"An absolute sale-deed was executed in respect of the property in suit in favour of Ganga Din, whose proprietary interests were then afterwards purchased at auction by Sukh Din Bajpai." Then he says—"Under the deed of agreement alleged by the plaintiffs they have no right of redemption by law," and in the last two lines of paragraph 9 he says—"The two parties neither stood, nor do now anyhow stand, in the relation of mortgagor and mortgagee."

The first Court having held that the parties did stand in the relation of mortgagor and mortgagee, and having decreed that the plaintiffs were entitled to redeem, an appeal was preferred to the High Court, and the third ground of appeal is thus stated:—"Because under the terms of the agreement the plaintiffs cannot now sue to redeem the property in suit." The High Court upon the hearing of the appeal affirmed the decision of the lower Court, and held that the parties stood in the relation to each other of mortgagor and mortgagee, and not in the relation of one being an absolute vendee with a right given to the vendors to repurchase within a period of ten years upon repayment of the full amount of the purchase-money. It does seem contrary to all principles of equity and good conscience that when it was stipulated that the money should be repaid within the period of term years from 1835, the representatives of the vendors could lie by until the year 1884 and then claim that they had a right which was not barred by limitation to redeem that which they call a mortgage at any time within the period of 60 years. That this was not a mortgage, at any rate according to English law, seems clear from the decision of Lord Chancellor Cranworth in the case of *Alderson* v. *White*(1), In giving judgment the Lord Chancellor says this—"These deeds taken together do not on the face of them constitute a mortgage; and the only question is whether, assuming the transaction to be a legal one, it has been shown to be in truth such as in the view of a Court of Equity ought to be treated as a mortgage transaction. The rule of law on this subject is one dictated by common sense; that *primâ facie* an absolute conveyance containing nothing to show that the relation of debtor and creditor is to exist between the parties does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase." In this case the vendors did not stipulate that they shuold have a right to repurchase, but the vendee, as a matter of

(1) 2 De. Dex. and J. 105.

grace and kindness, stipulated that they should have that right. The Lord Chancellor proceeded—"In every such case the question is, what upon a fair construction is the meaning of the instruments? Here the first instrument was on the face of it an absolute conveyance; the second gave a right to repurchase on payment not of what should be due but of the full amount of the purchase-money of 4,739*l*" —exactly corresponding to the terms of the two documents in the present case, whereby the vendee gave the right to the vendors to take back the property if within the period of ten years they should pay the same amount, "namely, Rs. 4,000— "Was that, if taken according to its terms, a lawful contract? Clearly so. What, then, is there to show that it was intended to be a mere mortgage? I think that the Court after a lapse of thirty years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be; and I see but little evidence to that effect here." That passage was approved of in a case in the House of Lords, reported in the 13 Law Reports, Appeal cases, page 568—*The Manchester, Sheffield and Lincolnshire Railway Company* v. *The North Central Waggon Company.* It is clear that this case was not one of mortgagor mortgagee, but one of an absolute sale with a right to repurchase within a period of ten years.

Under these circumstances their Lordships think that the decision of the High Court ought to be reversed, and that their Lordships ought to give the judgment which the High Court ought to have given, namely to reverse the decision of the first Court and to dismiss the suit with costs in both Courts.

Their Lordships will humbly advise Her Majesty to that effect.

The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Barrow* and *Rogers.*

Solicitors for the respondents: Messrs. *T. L. Wilson* and *Co.*

391 & 23

11th March and 25th April 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon Lord Macnaghten, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Richard Couch.

DURGA CHOWDHRANI* ... *Plaintiff,*
and
JEWAHIR SINGH CHOWDHRI ... } *Defendant*

On Appeal from the High Court of the Judicial Commissioner of the Central Provinces.

Second appeal—Civil Procedure Code, s. 584—*Grounds of second appeal.*

Under the Code no second appeal will lie, except on the grounds specified in section 584. There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding. *Ananga-manjari Chowdhrani* v. *Tripura Sundari Chowdhrani*(1) and *Pertab Chunder Ghose* v. *Mohendra Purkait*(2) referred to and followed. *Futtehma Begum* v. *Mohamed Ausur*(3) and *Nivath Singh* v. *Bhikki Singh*(4) overruled.

APPEAL from a decree (30th July 1886) of the Judicial Commissioner, passed on second appeal, and affirming a decree (1st May 1886) of the Commissioner of the Nerbudda Division, who had reversed a decree (28th September 1885) of the Assistant Commissioner of Nursingpur.

This appeal involved a question as to the right construction of section 584, Civil Procedure Code. The suit was brought to establish the appellant's right in some villages which had belonged to

* 17 Cowell's Ind. Ap., 122; 18 Calc., 23.

(1) L. R., 14, I. A., 101; I. L. R., 14 Calc., 740; *Ante* page, 45.

(2) L. R., 16 I. A., 233; I. L. R., 17 Calc., 291; *Ante* page, 444.

(3) I. L. R., 9 Calc., 309.

(4) I. L. R., 7 All., 649.

her late husband, but were now in the possession of his brother, the respondent. The widow's right depended on her establishing that a partition of the family property had taken place. This question was decided in favour of the appellant by the Assistant Commissioner, who found that there was a partition in Sambat 1914, corresponding to 1857, and that separate possession of the shares commenced in that year. Finding that the plaintiff was in possession, he made a declaratory decree as to her right.

The Commissioner on appeal reversed this decree. He found that the plaintiff was out of possession; also that partition had not been made out; and held that she was not entitled to a declaratory decree.

On a second appeal the Judicial Commissioner considered whether there was any evidence upon which the Commissioner might have come to the conclusion that no partition had taken place. He was of opinion that there was evidence in support of the finding of the Appellate Court below, and that only a question of fact had been raised before him. He dismissed the appeal on grounds expressed as follows :—

"The lower Appellate Court decides that there was no partition, but it does not give fully the grounds on which this decision is based. However, I do not consider, after hearing the careful argument of the learned Advocate for the appellant, that this finding is open to second appeal. It is a finding of fact, and if there is evidence to support it, I do not think that it is open to a Court of Second Appeal to rehear the case and reconsider the evidence. I might perhaps come to a different conclusion from that arrived at by the Court of First Appeal, but that clearly would not justify my interference with the finding."

On the application under section 602, the Judicial Commissioner said :—

"Under the circumstances I have felt considerable doubt as to whether I should give the certificate asked for. There is, I think, great weight in the respondent's contention that the appeal does not involve a question of law. By the words 'the appeal must involve some substantial question of law,' I understand that by the appeal the Appellate Court must be asked to decide a question of law which substantially or materially affects the decision in the case. In the present case it may be said that the appeal does not so involve a question of law. It does not appear to allege that the decree of this Court is based on an error of law, but it assumes the existence of certain facts on which the judgment of this Court does not proceed, and and on this assumption contends that the judgment is wrong.

"On the other hand, however, it may be said that the grounds of appeal amount to this that, considering the judgment of the Court of First Appeal this Court was wrong in holding that it was bound by the findings of fact arrived at by that Court. Viewed in this light the appeal does involve a question of law, namely, whether this Court was right in holding that the findings of fact had been legally arrived at by the Court of First Appeal, and were binding on the Court of Second Appeal. It is to be observed also that there are not concurrent findings of facts by two Courts. The two Courts which had to decide the facts of the case disagreed. I think, therefore though with some hesitation, that I may grant the certificate that the case is a fit one for appeal to Her Majesty in Council.

Mr. *T. H. Cowie, Q.C.*, and Mr. *J. D. Mayne*, for the appellant, contended that it was open to the Judicial Commissioner to consider the question of partition, as "error or defect in the decision of the case upon the merits" had taken place following upon what might be termed "substantial error or defect in the procedure." The case might be brought within sub-section (*c*) of section 584. They referred to *Luchman Singh* v. *Puna* (1), *Nivath Singh* v. *Bhikki Singh* (2), *Futtehma Begum* v. *Mohamed Ausur* (3). *Assanullah* v. *Hafiz Mahomed Ali* (4), [SIR R. COUCH referred to *Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrani*(5).

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon*, for the respondent, were not called upon.

Their Lordships' judgment was delivered on 25th April by—

THE RIGHT HON. LORD MACNAGHTEN.—

This is an appeal against a decree of the Judicial Commissioner of the Central

(1) L. R., 16 I. A., 125 ; I. L. R., 16 Calc., 753; *Ante* page, 370.
(2) I. L. R., 7 All., 649.
(3) I. L. R., 9 Calc., 309.
(4) I. L. R., 10 Calc., 932.
(5) L. R., 14 I. A., 101 ; I. L. R., 14 Calc., 740; *Ante* page, 45.

Provinces, passed on second appeal, affirming a decree of the Commissioner of the Nerbudda Division, which had reversed a decree of the Assistant Commissioner of Nursingpur.

The appeal comes before this Board with the usual certificate from the Judicial Commissioner to the effect that it involves a substantial question of law.

The Judicial Commissioner on second appeal had no jurisdiction to rehear the case on the merits. The only grounds on which a second appeal can be brought are stated in section 584 of the Civil Procedure Code, Act XIV of 1882. They are these :—

"(*a*) The decision being contrary to some specified law, or usage having the force of law.

"(*b*) The decision having failed to determine some material issue of law, or usage having the force of law.

"(*c*) A substantial error or defect in the procedure as prescribed by this Code or any other law, which may possibly have produced error or defect in the decision of the case upon the merits."

In sub-section (*a*) the word "specified" obviously means specified in the memorandum or grounds of appeal.

At the outset of the argument their Lordships were informed that, according to Indian authorities, the appeal might be supported under sub-section (*c*), if it did not fall within sub-section (*a*), but they were told that it was impossible to state the point intended to be raised without going into the facts of the case.

The facts are few and simple. The appellant, who was plaintiff in the lower Court, is the widow of the younger son of one Beni Singh, who died in 1878. The suit was brought to establish her right to certain villages which had been in her husband's possession and registered in his name, but which after his death in 1883 were registered in the name of his elder brother, the respondent Jewahir Singh. The appellant's right as heiress to her husband depended upon her establishing that a partition of the family property had taken place in the year 1857. It was not disputed that Beni Singh did make a division of the family property in 1857 between himself and his two sons. The appellant contended that this division was an absolute partition. The respondent maintained that it was merely a convenient arrangement for the purposes of management.

In support of the appellant's case witnesses were produced who deposed to conversations alleged to have taken place at the time of the division of the property. A copy of a petition was put in, purporting to proceed from Beni Singh, but not signed by him, which was filed in the Revenue Court in October 1864, and which contained this sentence,—"It is now five or six years since I divided the villages between my sons." Moreover, it was proved that the father and the two sons kept separate accounts with the same native banker, and lived separately.

On the other hand, it appeared that in 1864, at a settlement, when the investigation into proprietary rights was made, neither the respondent nor the appellant's husband set up any claim to any part of the property. Beni Singh claimed to be solely entitled, and the Settlement Officer awarded to him, and to him alone, proprietary rights in the whole estate. From 1864 to 1878, when Beni Singh died, the estate was entered in the Collector's register as Beni Singh's property.

The Assistant Commmissioner found in favour of the appellant that the property was partitioned in 1857. From this finding the respondent appealed, relying mainly upon the following grounds of appeal :—

"3. That the property being ancestral, and there being no deed of partition to prove that a partition was effected in Sambat 1914, *i.e.*, about 1857, A.D., the Court ought to have held that no partition was effected.

"4. That the oral evidence produced by the plaintiff to prove partition is utterly worthless and unreliable.

"5. That the entry of Beni Singh's name as sole proprietor of the villages in the settlement records, and his name appearing in the jammabandis till his death, conclusively disprove the statement of the plaintiff that a complete partition of the villages was effected in Sambat 1914.

"6. That Beni Singh not having mentioned anything about the partition alleged by the plaintiff at the time of the settlement, and his subsequently bringing rent suits in his own name and signing the rent receipts of the tenant, disproved the partition alleged by the plaintiff.

"7. That the lower Court ought to have rejected the copy of a petition, dated the 12th of October 1864, filed by the plaintiff, and alleged by her to have been presented to the Settlement Superintendent as being not proved, and therefore not admissible in evidence.

* * * *

"10. That the lower Court was wrong in holding that the defendant, living separately and having separate dealing, established partition."

The judgment of the Commissioner, so far as material for the present purpose, was as follows:—

"The facts of the case are stated in the lower Court's judgment. On the pleas, which were very fully argued on both sides, I find as follows—

* * * *

"*Plea* 3.—This plea also is, I think, sound. I agree with appellant's pleader that the burden of proving partition fell on plaintiff, and that plaintiff quite failed to prove it. The settlement proceedings alone, in my opinion, disprove it, while oral evidence as to an event 29 years old is of little weight, and there is absolutely no documentary evidence.

"This disposes of pleas 4, 5, 6.

"*Plea* 7.—I agree in this plea. The document was not trustworthy, and there was no trustworthy evidence about it.

* * * *

"*Plea* 10.—This plea is also sound, and in accordance with common custom."

Having stated the facts of which a summary has been given, and having read the Commissioner's judgment, the learned Counsel for the appellant proceeded to argue that it was open to the Judicial Commissioner, and therefore open to their Lordships, to review the Commissioner's finding, on the ground that his decision involved or amounted to a substantial error or defect in procedure.

In support of this view Counsel referred to several authorities in India, of which the most important are *Futtehma Begum* v. *Mahomed Ausur*(1) and *Nivath Singh* v. *Bhikki Singh*(2). In the former case the judgment of the Court contains the follwing passage:—

"It is not the ordinary course of procedure for this Court to interfere in second appeal with any findings of fact which have been arrived at by the lower Appellate Court; but we are well within the scope of the authorities in holding that where the lower Appellate Court has clearly misapprehended what the evidence before it was, and has thus been led to discard or not give sufficient weight to important evidence, and to give weight to other evidence to which it is not entitled, and has thus been led not into any mere accidental mistake, but totally to misconceive the case, this Court may interfere."

These observations were cited with approval in the Allahabad case, where the Full Bench (*diss.* PETHERAM, C.J.,) apparently came to the conclusion that an erroneous finding of fact under similar circumstances might be treated as an error or defect in procedure within the meaning of section 584.

The learned Counsel for the appellant contended that these rulings covered the present case. The lower Appellate Court, it was said, had clearly misapprehended the effect of the settlement proceedings in 1864; undue weight had been attached to the registration in Beni

(1) I. L. R., 9 Calc., 309.
(2) I. L. R., 7 All., 649.

Singh's sole name; the oral evidence had been wholly discarded; sufficient weight had not been given to the important statement in Beni Singh's petition, or to the separate dealings of his two sons; the Court had thus been led to misconceive the case entirely, and to find for the defendant when the finding should have been for the plaintiff.

It would be an unprofitable task to inquire how far this contention is well founded, because their Lordships cannot accept the rulings of the High Courts of Calcutta and Allahabad as a correct statement of the law. Nothing can be clearer than the declaration in the Civil Procedure Code than no second appeal will lie except on the grounds specified in section 584. No Court in India or elsewhere has power to add to or enlarge those grounds. It is always dangerous to paraphrase an enactment, and not the less so if the enactment is perhaps not altogether happily expressed. Their Lordships therefore will not attempt to translate into other words the language of section 584. It is enough in the present case to say that an erroneous finding of fact is a different thing from an error or defect in procedure, and that there is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding: *Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrani*(1), *Pertab Chunder Ghose* v. *Mohendra Purkait*(2).

Their Lordships are unable to dispose of the case without expressing their regret that the Commissioner should have dealt with the matters before him in so meagre fashion. They have no reason to doubt that all the evidence was fully and duly considered by him, but they cannot help thinking that a judgment more carefully expressed might have prevented an idle appeal.

Their Lordships must also express regret that the Judicial Commissioner having rightly treated the case as one depending entirely on issues of fact which he had no jurisdiction to review, should yet have felt himself constrained by authority to give a certificate to the effect that a substantial question of law was involved in the appeal.

Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed.

The appellant will pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Watkins & Lattey.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

(1) L. R., 14 I. A., 101; I. L. R., 14 Calc., 740. *Ante* page, 45.

(2) L. R., 16 I. A., 233; I. L. R., 17 Calc. 291. *Ante* page, 444.

12th March and 25th April 1890.

PRESENT:

Members of the *Judicial Committee*—The Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

LUCHMESWAR SINGH * ... *Plaintiff,*

and

CHAIRMAN OF THE DARBHANGA MUNICIPALITY ... } *Defendant.*

On Appeal from the High Court in Bengal.

Minor—Guardian, Powers of, to deal with minor's estate—Application of the Land Acquisition Act, 1870, *to the land of a minor—Insufficiency of compliance*

* 17 Cowell's Ind. Ap., 90; 18 Calc., 99.

with the other requirements of the Act, without actual compensation to the minor's estate—Recovery of land by minor on coming of age.

The guardian of a minor's estate has no power to waive a right to compensation for part of the estate taken under the Land Acquisition Act, 1870; although the owner, had he been of full age, might have waived it.

Although the Court of Wards had no power to alienate the land of a minor of whose estate it had charge, yet possession might have been lawfully taken of the land for a public purpose, under and in conformity with the Land Acquisition Act, 1870, if there had been due compliance with the provisions of the Act, as regards compensation to the minor's estate.

Where, however, compensation had not been given, and a merely nominal consideration had passed, the Collector not having acted, as the representative of the Court of Wards, so as to protect the interests of the minor, *held*, that no valid title to the land was established as against the ward, and that on his attaining full age he could recover it with mesne profits.

APPEAL from a decree (24th February 1888), reversing a decree (1st September 1886) of the District Judge of Mozufferpore, and dismissing the appellant's suit with costs.

The appellant, the Maharaja of Darbhanga, when the proceedings which afterwards gave rise to this suit took place, was a minor whose estates were under the charge of the Court of Wards (Bengal Act IV of 1870), and he so remained until the 24th September 1879. That Court, for Darbhanga, consisted of the Commissioner of the Patna Division, acting under the orders of the Board of Revenue, and the representative of the Commissioner and Agent of the Court of Wards was the Collector of the district. There was also a manager of the estates of the Raj Darbhanga appointed by the Government. The transaction which occasioned this suit, between the latter and the Collector, in his capacity of *ex-officio* Chairman of the Municipality of Darbhanga, and in another capacity acting under the Commissioner's authority, is stated in their Lordships' judgment.

The suit was brought to recover possession of about 18 cottahs of land on the bank of the river Baghmati in the town of Darbhanga, which had been taken for a public purpose by proceedings nominally in pursuance of the Land Acquisition Act, 1870, and made over to the municipality, during the minority of the Maharaja. The Court of Wards had waived the minor's right to substantial compensation, therein acting in excess of its powers. But the High Court had held that a reference having been formally made under section 15 of the above Act, although only on the passing of a nominal consideration, and the other forms having been complied with, the result had been to establish in the municipality a good title to the land—a decision which this appeal questioned. But no question was raised as to the plaintiff's liability to reimburse the municipality for money spent on the land, he being willing to pay it.

The principal issue was whether the notification under section 6 followed by merely nominal compensation, and a reference to the Civil Court under sections 15 and 18, with the order to take possession issued under section 16 of the Land Acquisition Act, 1870, conferred a legal title.

The District Judge, in reference to this, found that the transaction was really a gift, and a gift by a guardian of his ward's property, which the guardian was unable, legally, to make. He concluded that the arrangement was illusory and void from its commencement. He therefore decided the issue in the plaintiff's favour, decreeing possession and mesne profits.

On appeal the High Court (WILSON and O'KINEALY, JJ.,) also regarded the transaction as merely a gift which the Court of Wards had no power to make. But it was of opinion that the operation of the Land Acquisition Act, 1870, was not reversible, and that it had operated. All the forms had been complied with, and there was nothing to prevent the Government from taking the land when the proper notices were issued. "The proceedings were, both in substance and form, proceedings under the Land Ac-

quisition Act, and all that was done by the guardian was to accept nominal compensation when he had a right to insist on substantial compensation." The Court then examined the proceedings in detail, and expressed its opinion that everything had been done under sections 6, 9 and 15 to entitle the Collector to take possession; and that his action in doing so could not be reversed. "The question is not before us whether the Maharajah was or is entitled to claim compensation, or whether he was or is bound to accept nominal compensation. The question is one which was open to the District Judge on the reference, and, for ought we know, it may be open now." Finally, the Court held that the municipality was justified in using the land for any purpose for which the statute authorised its use, although not the purpose for which it was professedly taken, it having been taken for a bathing ghât, but afterwards, in part, used for a market.

On this appeal,

Mr. *T. H. Cowie, Q.C.*, and Mr. *J. H. A. Branson*, for the appellant, argued that the proceedings taken did not constitute either an award or a reference under the Land Acquisition Act, 1870, and did not operate to extinguish the plaintiff's title. The land had been, in fact, given to the municipality at the suggestion, and by the sanction, of those who were the guardians of the appellant, and the trustees of his estate. Such a transaction was invalid, and inoperative against the appellant, who was then a minor.

Mr. *W. F. Robinson, Q.C.*, and Mr. *J. D. Mayne*, for the respondent, argued that the High Court had been right in deciding that the land had vested in the municipality by the effect of the Land Acquisition Act, 1870.

If the appellant had any claim in respect of the inadequacy of the compensation, still no suit would have lain against this respondent, nor was this suit framed to assert such a right. No appeal had been preferred against the decision of the District Judge, to whom reference had been made under the Act, and, consequently, the whole proceeding had become final. They referred to sections 35 and 38 of Act X of 1870.

Mr. *T. H. Cowie, Q.C.*, replied.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR RICHARD COUCH :—

The question in this appeal is whether a piece of land, which was the property of the appellant and is now in the possession of the Darbhanga Municipality, represented in the suit by their Chairman the respondent, has been validly acquired by the municipality under the provisions of The Land Acquisition Act, 1870. On the 26th of August and 2nd and 9th of September 1874, a declaration was published in the *Calcutta Gazette*, in accordance with section 6 of the Act, that the land in question was required to be taken by Government, at the expense of the Darbhanga Municipality, for a public purpose, viz., construction of a public ghât or landing place in the town of Darbhanga. At this time the appellant was a minor, under the care of the Court of Wards of the Province of Bengal, and he remained a minor until the 25th of September 1879. The Court of Wards for the district of Darbhanga was the Commissioner of Patna, and the representative of the Commissioner in Darbhanga was the Collector for the time being of Darbhanga, who was also *ex-officio* Chairman of the Darbhanga Municipality. The Court of Wards has power to appoint a manager of the estate of a minor who is under its care, and at this time the manager appointed was Colonel J. Burn.

On the 10th May 1875 the Officiating Collector of Darbhanga wrote to the manager a letter, in which, after refering to a petition which had been presented by the manager's mookhtar, claiming rent for the land at the rate of Rs. 16-5-3 pie per annum, he says—"Permit me to invite your attention to the last

clause of section 3 of the Act. From this it appears that you, as far as acquisition of land under this Act is concerned, are as competent to act for the minor Maharaja as he himself would be were he of age. This being so, I trust you will favour me with the expression of your consent to the sale of the land. The object in view is to benefit the town, and I am confident that this object will have weight with you in making your claim for compensation." The clause referred to says, under the description of persons deemed entitled to act, "the guardians of minors and the committees of lunatics or idiots shall be deemed respectively the persons so entitled to act to the same extent as the minors, lunatics, or idiots themselves, if free from disability, could have acted." These words must be read with reference to the obligations and duties of guardians and committees, which appear to have been entirely overlooked in this and his subsequent proceedings by the Officiating Collector, who was the representative of the Court of Wards, the guardian of the minor. On the 12th May 1875, the manager wrote to the Collector:—" Sir,—With reference to your letter No. 49 of 10th instant, I have the honour to represent that, from the tenor of section 68 of Bengal Act IV of 1870, yau will perceive that the Court of Wards has not power to alienate raj land except for the purposes mentioned in that section; but I beg the matter be submitted to the Court of Wards for orders. I have no objection to present the land in question to the town, but doubt my power to do so." The Collector appears to have written to the Commissioner of Patna, who represented the Court of Wards, on the 19th of May. This letter is not in the proceedings, but its contents may be inferred from the notice of it in the reply of the Commissioner on the 2nd June. That is, "Sir,—I have the honour to acknowledge the receipt of your letter No. 62, dated the 19th ultimo, regarding the land belonging to the Darbhanga raj made over to the municipality, free of cost, for the construction of a bathing ghât. In reply, I beg to state that Act X of 1870 came into force on the 1st June 1870, while Bengal Act IV of 1870, though it purports to have come into force on the same date, does not appear have been sanctioned until the 17th June 1870. As regards the procedure to be observed in the case, you should offer the manager one rupee compensation, and allow the manager to refer the point to the Board of Revenue, with whose sanction the award can undoubtedly be accepted, and acceptance of the award will act as a valid conveyance." The words "made over to the municipality free of cost," in their Lordships' opinion, show that the matter submitted to the Commissioner was the presenting the land to the town, which was in accordance with the manager's letter of the 12th May. Their Lordships feel compelled to state their opinion that the directien or suggestion to offer one rupee compensation was a colourable way of doing indirectly what it was seen could not be done directly, viz., the guardian making a present to the town of the land of his ward.

The procedure referred to is contained in sections 11 and 13 of the Land Acquisition Act. On a day fixed the Collector, who, after the declaration, is by section 7 to take order for the acquisition of the land, is to proceed to inquire summarily into the value of the land, and to determine the amount of compensation which, in his opinion, should be allowed for it, and to tender such amount to the persons interested. And in determining the amount of compensation, he is ordered to take into consideration the matters mentioned in section 24 one of which is the market value, at the time of awarding compensation, of the land. It is obvious that the offer of one rupee compensation was not in accordance with the duty of the Collector under these sections, and it would be altogether wrong to treat one rupee as the amount of compensation determined under section 13. Section 14 says that if the Collector

and the persons interested agree as to the amount of compensation to be allowed, the Collector shall make an award under his hand for the same. This was never done. On the 14th July 1875 the Collector wrote to the manager enclosing a copy of the Commissioner's letter, and saying, "I hereby offer you one rupee as compensation for the land in question, and request you to refer the point to the Court of Wards, with a view to obtaining sanction for the acceptance of the offer." Upon which, on the 16th July, the manager wrote back to the Collector asking him to obtain the authority of the Board of Revenue to accept the one rupee as compensation. This letter appears to have been sent by the Collector to the Commissioner of Patna, and by him to the Board of Revenue. On the 4th August 1875 the Officiating Secretary of the Board of Revenue wrote to the Commissioner that the Member in charge had no objection to the manager of Darbhanga estate accepting the compensation of one rupee which had been awarded by the Collector of Darbhanga for the land belonging to the estate which had been taken up by the Darbhanga Municipality for the construction of a ghât on the Bagmati river. On the 19th August 1875 the rupee was paid by the Collector, and the manager gave a receipt for it, describing it as a nominal compensation for the raj land taken up by the Darbhanga Municipality. The land was thereupon taken possession of by the municipality, a bathing ghât was erected upon a portion of it, and the rest has been used by the municipality as a market.

On the 11th February 1886 the Maharaja brought a suit to recover possession of the land, and for mesne profits and damages. The District Judge of Mozufferpore on the 1st September 1886 made a decree in his favour, which has been reversed by the High Court, and the suit has been dismissed. Although the Court of Wards had not power to alienate the land for the purpose for which it was required, possession might have been lawfully taken of it if the provisions of the Land Acquisition Act had been complied with. But they were not. The Collector made no inquiry into the value of the land. He was the Chairman of the municipality, and his sole object appears to have been to benefit the town, forgetting that, as the representative of the Court of Wards, it was his duty to protect the interests of the minor, and to see that the provisions of the Act were complied with. It is not true, as the High Court seems to have thought, that, as the Maharaja, if he were of age, might waive the right to compensation, his guardian might do so. The Maharaja, if of age, might have made a present of the land to the town, and probably, if it was only to be used for a bathing ghât, would have done so, but it was known by all parties that the manager had no power to do this. The offer and acceptance of the rupee was a colourable attempt to obtain a title under the Land Acquisition Act without paying for the land, and their Lordships have felt some surprise at the direction which originated it having come from the Commissioner. It is, however, to be observed that the letter of the 2nd June is signed by a subordinate officer.

The 16th section of the Act says that when the Collector has made an award under section 14 or a reference to the Court under section 15, he may take possession of the land, and it has been argued that there was a reference which authorized him to take possession, although he had not made any award. This appears to have been the view of the High Court. Section 15 says that if the Collector consider that further inquiry as to the nature of the claim should be made by the Court, or if he is unable to agree with the persons interested as to the amount of compensation to be allowed, he shall refer the matter to the determination of the Court in manner after appearing. A reference to the Civil Court was made by the Collector on the 7th February 1876, months after the rupee had been paid and accepted. That acceptance as compensation is stated in

the reference, and it is also stated that all the claimants for compensation except four had agreed to the Collector's award and accepted the compensation tendered to them. Then facts are set forth as to the four claimants and the amounts of compensation tendered to them. The document then concludes,—"As they have refused to accept this compensation, and as it appears to the Officiating Collector that their claims are preposterously high and there is no chance of their coming to terms, the matter is referred to the District Judge for decision under sections 15 and 18 of the Land Acquisition Act." This cannot be held to be a reference of a claim to compensation by the manager of the Darbhanga estate, his claim being treated as settled.

The claims of the four who had refused to accept the compensation tendered to them are the matter referred, and their Lordships can see no ground for the opinion of the High Court that on this reference the whole matter was open to the District Judge, and that "he could inquire, and possibly he did inquire, whether or not the consent was binding on the minor." The Collector had not said that an inquiry ought to be made, and there is no trace in the proceedings of the District Judge having made such an inquiry. Their Lordships are clearly of opinion that the reference had not the effect which has been given to it by the High Court, and that the decree reversing the decree of the District Judge cannot be supported. But the latter decree must be modified. The District Judge, in allowing mesne profits, has taken the income for the three years 1883 to 1885, and has set that off against the Rs. 5,000 which it was admitted by the plaintiff he was bound to pay to the defendant for the money expended on the land. This income was received by the municipality after the expenditure of a considerable sum of money on the land. It is not the measure of the damages sustained by the Maharaja by being out of possession. The rent which could have been obtained for the land if the Maharaja had been in possession during those years is the fair measure of the mesne profits. And it appears from the Collector's letter of the 10th May that the manager had claimed rent for the land at the rate of Rs. 16-5-3 per annum. Their Lordships therefore think that Rs. 50 will be a proper sum to allow for mesne profits for the three years. That sum only must be deducted from the Rs. 5,000.

Their Lordships will therefore humbly advise Her Majesty to reverse the decrees of the High Court and the District Judge, and to make a decree that, on payment to the defendant of Rs. 4,950, the plaintiff recover possession of the land claimed in the plaint, and that he recover the costs of the suit in both the lower Courts. The respondent will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Barrow & Rogers.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

13th March 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

PIRTHI PAL KUNWAR* ... *Plaintiff,*

and

GUMAN KUNWAR AND ANOTHER ... } *Defendants.*

On appeal from the Court of the Judicial Commissioner of Oudh.

Declaratory decree, Suit for—Declaratory decree not obtainable by absolute right—Discretion of Court.

* 17 Cowell's Ind. Ap., 107; 17 Calc., 933.

It is discretionary with a Conrt to grant or to refuse a declaratory decree with regard to the circumstances—*Sreenarain Mitter* v. *Kishen Soondery Dassee*(1) referred to and followed.

A talukdar died, leaving a widow; also a son who, having succeeded as talukdar, died childless. This son's widow, being in possession, sued for a declaration that an adoption by the father's widow, to the father, was void and ineffectual. The ground of suit was that, at some time or other after the death of the plaintiff, the person alleging himself to have been adopted might obtain the talukdari, unless his adoption should now be negatived.

With regard to all the circumstances, the refusal of such a declaration was approved by their Lordships. If the person alleged to have been adopted should sue hereafter, the question would be decided whether he was validly adopted or not.

APPEAL from a decree (27th July 1885) of the Judicial Commissioner of Oudh, reversing a decree (17th December 1884) of the District Judge of Sitapur.

The question on this appeal was whether the Appellate Court below had rightly reversed a decree declaring that the adoption of the second defendant by the first was invalid, and whether the appellant was entitled to have such a declaration made. Ratan Singh, talukdar of Katesar, in the Sitapur district and tehsil, died in 1837, leaving a son, Raja Sheo Baksh, and a widow, Rani Guman Kunwar, now the first defendant. Raja Sheo Baksh died in 1869, having, as alleged, made provision for the maintenance of the first defendant, and leaving a widow, the plaintiff.

On the 14th December 1883 Rani Guman Kunwar executed a document, registered the next day. This recited that Raja Ratan Singh had by will directed Guman to adopt a son to him, which she had accordingly done by adopting Maneshwar Baksh, to whom she bequeathed all her property.

On the 25th December 1884 Pirthi Pal brought this suit against Rani Guman Kunwar and Maneshwar Baksh to have it declared that this adoption was void. She obtained from the District Judge a declaration that, after the plaintiff's death, the succession would take place as if no such document as that of 14th December 1883 and no adoption had been made. The Judge refused to deal with any question as to the inheritance to Pirthi Pal's own property.

On appeal the Judicial Commissioner reversed the above decree and dismissed the suit with costs, giving judgment as follows:—

"The first question which I have in this appeal to decide is whether I should be exercising a wise discretion in allowing the decree to stand. And I think that I should not. The District Judge writes:—'It is an open question as to who will succeed to the property or the estate of the defendant No. 1 upon her demise. It would be difficult, if not impossible, to ascertain with any degree of accuracy at the present moment what would constitute the estate of the defendant No. 1 when she dies. How are we to know and how could we determine the question? It would be equally difficult to determine who is the next reversioner. Such a question could not be determined now.' And again:—'The defendant denies any intention to prejudice the plaintiff's interests, the object which the defendant has in view being merely, it is said, to provide an heir and successor to her own property. The will is somewhat ambiguous in its terms, and may admit of different interpretations being placed upon it.' The plaint is not drawn distinctly either under section 39, or under section 42 of 'The Specific Relief Act, 1877,' and Counsel for the plaintiff admits his inability to confine himself to either section of the Act. The plaintiff could obtain no immediate relief under her decree and her rights will be in no way prejudiced by delay.

"In these circumstances, the remarks of their Lordships in *Sreenarain Mitter* v. *Kishen Soondery Dassee*(1), although made with reference to the law which

(1) 11 B. L. R., 171, at p. 190; L. R., I. A., Sup. Vol. 149.

(1) 11 B. L. R., 171, at p. 190; L. R. I. A., Sup. Vol., 149.

preceded Act III of 1877, appear to me to be of force."

The Judicial Commissioner then quoted the passage that he given in the judgment below.

On this appeal.

Mr. *J. D. Mayne*, for the appellant, argued that the decision of the Judicial Committee referred to by the Appellate Court below did not support his conclusion in the present cases. The facts here were sufficient to show that the Court of first instance had exercised a sound judicial discretion in granting a declaratory decree.

He referred to *Thayammal* v. *Venkatara Aiyan*(1); *Jagadamba Chowdhrani* v. *Dakhina Mohun*(2); *Sreenarain Mitter* v. *Kishen Soondery Dassee*(3).

The respondents did not appear.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

The circumstances of this case are very fully stated by the Judicial Commissioner in his judgment, and their Lordships have very few remarks to make beyond those which the Judicial Commissioner made when he delivered that judgment. He referred to the case of *Sreenarain Mitter* v. *Kishen Soondery Dassee*(3), and read the remarks which had been made by the Judicial Committee in that case. Amongst those remarks it was said: "It is not the matter of absolute right to obtain a declaratory decree. It is discretionary with the Court to grant it or not, and in every case the Court must exercise a sound judgment as to whether it is reasonable or not, under the circumstances of the case, to grant the relief prayed for. There is so much more danger than here of harassing and vexatious litigation that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation."

The Judicial Commissioner, in exercising that judgment which the Judicial Committee had suggested ought to be adopted by the Courts in India, thought that this was not a case in which, in the exercise of a sound judicial discretion, he ought to grant a declaratory decree, or that a declaratory decree ought to have been granted by the Court of first instance, and he therefore reversed the decision of that Court and refused a declaratory decree. It appears to their Lordships that the Judicial Commissioner exercised a very sound judgment in what he did. All that is suggested by the learned Council on the part of the appellant in support of a declaratory decree is this—that, at some time or another after the death of the present plaintiff, the person who according to the plaintiff's contention is not an adopted son may by some means, either by an act of the Government or otherwise, obtain possession as an adopted son. The only object, therefore, of having a declaratory decree is to prevent him being put into possession. Their Lordships cannot assume that the Government, if petitioned to put the person claiming to be an adopted son into possession, would do so unless they saw that he had a right to that possession. The officers of Government would in ordinary course, if their were any doubt as to the title, refer the parties to the Civil Court.

If the person claiming to have been adopted brings an action to enforce his title, the question will be investigated whether he was validly adopted or not.

Under this circumstances, their Lordships think that there was no ground for this appeal and they will humbly advise Her Majesty that the judgment of the Judicial Commissioner be affirmed.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

(1) L. R., 14 I. A., 67; I. L. R., 10 Mad. 205.
(2) L. R., 13 I. A., 84; 1. L. R., 13 Calc 308.
(3) 11 B. L. R., 171, at p. 190; L. R. I. A., Sup. Vol., 149.

12th and 13th March 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

RAM LAL * ... *Plaintiff,*

and

MEHDI HUSAIN AND OTHERS *Defendants.*

On Appeal from the Court of the Judicial Commissioner of Oudh.

Privy Council, practice of—Findings of fact—Concurrent findings by two Courts.

The usual course of not disturbing concurrent findings of fact may be followed, notwithstanding that a part of the evidence in the suit has not been considered by the Lower Court, when both Courts, have arrived at the same result(1).

In this case, however, the whole of the evidence having been brought to their notice, the Judicial Committee expressed their opinion that the appellate Court below could not have decided otherwise than as it had decided.

APPEAL from two decrees (13th April 1886) of the Judicial Commissioner varying, upon cross appeals, a decree (18th March 1885) of the District Judge of Lucknow.

This suit was brougt by the appellant to obtain a decree against the first respondent, Ram Lal, and the second respondent, theNawab Kulsuman Nissa Begum, deceased, pending these proceedings, and now represented on this record by Ashgar Husain and by Aga Jani, a minor under the guardianship of the latter. The claim was for Rs. 41,043, made up, in part, of principal Rs. 25,000, and interest due on a bond dated 13th September 1883, (alleged to have beed advanced for the Begum to her agent Saiyid Mehdi Husain), and in part of a sum of Rs. 9,020 consisting of advances alleged to have been made at different times between 25th September 1883 and 25th December 1883. Part of the evidence relating to the latter sum, to which alone this appeal related, was a receipt said to have been signed by the Saiyid on 26th December 1883. The Judical Commissioner made a decree against both the defendants for Rs. 25,734.

Mr. *J. D. Mayne* for the appellant.

Mr. *R. V. Doyne* and Mr. *A. J. David* for the respondent, Saiyid Mehdi Husain.

Mr. *T. H. Cowie, Q.C.*, and Mr. *J. H. A. Branson* for the respondents, Ashgar Husain and Aga Jani.

For the appellant it was argued that upon the evidence the decree should have been for the amount claimed.

For the respondents, both the agent and the representatives of the principal, Counsel argued in support of the judgment of the Appellate Court below.

Mr. *J. D. Mayne* was heard in reply.

Their Lordships' judgment was delivered by:—

THE RIGHT HON. LORD MACNAGHTEN:—

The suit inwhich this appeal is brought was instituted by the appellant, Ram Lal, as plaintiff, to recover moneys alleged to have been advanced by him to the first respondent, Saiyid Mehdi Husain, as agent for a lady who has died during the progress of the litigation, and who is now represented by the last two respondents. A sum of about Rs. 30,000 was claimed as due on a bond dated the 13th and registered on the 19th September 1883. A further sum of about Rs. 9,000 was claimed as having been advanced in various amounts between the 20th September 1883 and the 25th December in that year.

The lower Court allowed the whole amount claimed as due on the bond. The Judicial Commissioner disallowed Rs. 4,000. That disallowance forms one of the grounds of appeal.

In support of his claim to the Rs. 9,000 the appellant relied, first, on oral evi-

* 17 Cowell's Ind. Ap., 70; 17 Calc., 882.

(1) As to the rule regarding such a concurrence, *see Krishnan* v. *Sridevi*, I. L. R., 12 Mad., 512.

dence of a promise to repay the amount; both Courts rejected this evidence. Secondly, he relied on certain accounts which he produced; both Courts rejected those accounts. Thirdly, he relied on an alleged receipt purporting to be signed by Mehdi Husain, and to be dated the 26th December 1883. The respondent on oath denied that the signature was his. The lower Court rejected this receipt for want of a stamp. The Judicial Commissioner remanded the case for further evidence as to the genuineness of the document. When the case came back he rejected the alleged receipt on the merits. And so the claim failed in both Courts.

It was contended by the learned Counsel for the appellant that the case as regards the Rs. 9,000 does not fall within the ordinary rule applicable to two concurrent findings of fact, because the lower Court had not an opportunity of considering, and did not consider, the evidence as to the genuineness of the receipt of the 26th December 1883. Their Lordships are not prepared to hold, either in this particular case or as a general rule, that the mere fact that a part of the evidence in the suit has not been considered by the lower Court, prevents the ordinary rule from applying when both Courts have arrived at the same result. In the presnt case, however, as the whole of the evidence has been brought to their Lordships' notice, they think it right to add that in their opinion the Judicial Commissioner could not have come to any other conclusion.

When the case was remanded the appellant did not think proper or was unable to produce any evidence as to the genuineness of the receipt on which he relied; but for some reason or other the respondent, Mehdi Husain, called the appellant, and in cross-examination by his own pleader the appellant said that the receipt was signed by Mehdi Husain. There was no corroborative evidence on the point. The appellant, in regard to other statements of his, was held to be a person on whose uncorroborated testimony the Court could not safely depend. Under the circumstances, though it would have been more satisfactory if the Judicial Commissioner had referred to the appellant's assertion, their Lordships cannot say he was wrong in treating it as unworthy of notice."

As regards the Rs. 4,000, there are not two concurrent findings of fact. Here the position of the parties is reversed. The respondent, Mehdi Husain, relies on an acknowledgment or *rukka* which the appellant says is not genuine. The Judge of the lower Court decided against Mehdi Husain principally on two grounds. One was that the *rukka*, if genuine, ought to have been mentioned to the Registrar when the bond was registered; the other was that the respondent in another suit had made a statement with regard to the advance of the money which the learned Judge considered, "if not false, certainly to be misleading." Their Lordships cannot attach any significance either to the fact that the *rukka* was not mentioned to the Registrar, or to the statement in the other suit which appears to their Lordships not to be inconsistent with the respondent's present case.

Having listened to the evidence, their Lordships find themselves unable to dissent from the finding of the Judicial Commissioner. There is very great difficulty in determining, if it is possible to determine, on which side the truth lies in this part of the case; and the learned Counsel for the appellant has not satisfied them that the Judicial Commissioner was wrong.

In the result their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed; the appellant will pay the costs of the appeal, but there will be only one set of costs between the respondents.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Barrow and Rogers.*

Solicitors for the respondent, Saiyid Mehdi Husain: Messrs. *T. L. Wilson and Co.*

Solicitors for the respondents, Ashgar Husain and Aga Jani: Messrs. *Hore & Pattison.*

14th March 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

JIBUN NISSA AND OTHERS * *Defendants,*

and

ASGAR ALI AND OTHERS ... *Plaintiffs.*

On appeal from the High Court in Bengal.

Deed, Construction of—Deeds not intended to operate according to their tenor—Nullity of transaction apart from fraud.

Documents, principally a potta and a kobala, executed between a Mahomedan pardanashin lady and one of her relations purported to represent, the one a putni lease from her of her lands, and the other a sale of her house, and ground, from the date of the execution. That she received the consideration was not proved, but had it passed it would have been distributed between the two deeds, which formed part of one and the same transaction. From the acts of the parties it was established that her intent was to deprive her heirs, not herself, and that she had no intention to part with the property *inpræsenti*, as the deeds represented that she did. *Held*, that, the latter not being intended to operate according to their tenor, the whole transaction was a nullity.

APPEAL from a decree (16th August 1886) of the High Court reversing a decree (16th July 1886) of a Division Bench, affirming a decree (22nd April 1885) of the Second Subordinate Judge of the 24-Pergunnahs District.

The plaintiffs, now respondents were the nephews of Delrus Banu Begum deceased on 16th January 1883, and were her heirs by Shiah law. The question raised was whether she had defeated the plaintiffs' title by transferring the property belonging to her, and in her possession, consisting of three parcels of revenue-paying land in the 24-Pergunnahs, and of a dwelling-house, to her grandnephew Nawab Mahomed Mehdi, who died on the 28th April 1879, and whose heirs the defendants were. The latter, when sued by the right heirs of Delrus, who was of advanced age, set up the following title. They alleged that Delrus, having long been in litigation with the plaintiffs, especially in the suit *Delrus Banu Begum* v. *Nawab Saiyad Ashgar Ali Khan*(1), for the expenses of which suit she wanted money, was desirous that they should inherit her estate, but that it should go to Mahomed Mehdi: that, accordingly, on the 3rd August 1876, in consideration of a payment of Rs. 6,000, and a yearly rent of Rs. 647, she executed a putni potta of the three parcels of revenue-paying land in favour of Mahomed Mehdi, receiving from him a corresponding kabuliyat: and that on the next day, the 4th August 1876, she executed to Mahomed Mehdi, for a consideration of Rs. 6,000, a kobala of the dwelling-house, with ground adjoining; taking from him a lease for her life, at an annual rent of Rs. 2,647 of the three parcels granted in putni, and also a lease of the house and ground for her life at a monthly rent of Rs. 25. There was no question as to the making of these instruments, which were all registered; but the plaint alleged that in August 1876 Delrus was incapable of attending to business, and that, if the consideration did pass, which was doubtful, the execution was obtained by undue influence. The plaintiffs also alleged that Delrus did not understand the nature of the transactions, never intending that there

* I. L. R., 17 Calc., 937.

(1) 15 B. L. R., 167; and on appeal to the Privy Council, *Ashgur Ali* v. *Delrus Banu Begum*, I. L. R., 3 Calc., 324.

should be an actual transfer. They alleged that possession continued as before, and that the rents reserved were never paid.

The Subordinate Judge was of opinion that the consideration was inadequate; yet that, as the act of the owner, to carry out her own objects, the attempted transfer of the putni interest in the land was good against the heirs of Delrus. As to the alleged sale of the house, he held that the want of consideration for the deed of sale was against its operating. He therefore made a decree that the plaintiffs were entitled to obtain possession of the house and ground appurtenant, but not of the lands granted in putni to Mahomed Mehdi. On the appeal of both parties, heard by a Division Bench (PETHERAM, C.J., and GHOSE, J.), the Chief Justice expressed an opinion, at which also, on a further appeal under the 15th section of the Letters Patent, the High Court (PRINSEP, WILSON and BEVERLEY, JJ.) arrived; his colleague on the Division Bench differing.

On the appeal under the Letters Patent the High Court's judgment was delivered by Prinsep, J., who was of opinion that the putni transaction was not separable from the matter of the kobala, and who, after going through the evidence, gave this decision :—

"The conclusion at which we arrive is, that the old lady, Delrus Banu Begum, executed the putni without knowing or being told the correct nature of the transaction, the manner in which it affected her rights, or the sacrifice which she was making; but that the knowledge which she should have acquired was kept from her by Mehdi and his dependants; that she never actually received the full amount of the consideration; that it is not proved that she relinquished any portion of it; that as the primary object of the transaction was to obtain at least Rs. 12,000, there is every reason to believe that if she had known that the full consideration had not been paid, she would not have executed the deeds; and consequently that the putni was executed under undue influence and in fraud. But this transaction may also be regarded from another point of view, viz., that no effect was given, or intended to be given, to the transaction, that it was a mere sham and therefore inoperative."

Wilson, J., concurring and also doubting whether any consideration had been proved to have passed, added :—

"What, then, is the consequence? I have already shown that, in my opinion, apart from any actual fraud, from the nature of the relation between the parties, the inadequacy of the price and the absence of any independent advice, the transaction cannot stand. Further, I think that if this transaction were really intended to be what it is represented to be on paper, there was, in addition, a gross actual fraud. Of the consideration of Rs. 12,000 which the old lady is alleged to have received, certainly half she never got, and very probably nothing.

"On the other hand, it is equally possible that things may not have been at all so bad as they look from that point of view. I think they were not so, and my reason is this. I do not think there was ever any intention on the part of any party to that transaction that it should have any such operation as the deeds represent. As I have said, I think the lady intended to deprive her nephews of their inheritance if she could, and she wanted money. I cannot see anywhere any satisfactory evidence that she intended to deprive herself then and there of her house absolutely, and of the whole almost of her valuable interests in the zemindari properties, in favour of Medhi. A very important piece of evidence on that subject is the deposition of Gunga Churn. He tells us what was her intention at the time. He says, 'I know the plaintiffs in this case. She was on terms of enmity with them since the wakf case, and she told me repeatedly, "They are my *jain mokhalef* (bitter enemies)."' Further on, 'I asked her, that having regard to the income of the property, I see the putni is granted for a very low

amount. On this she said, "I have two reasons for granting this putni. First, I require funds for the Privy Council case, and no one wants to purchase the property on account of the pendency of that suit, and they have all along been my enemies. They are my heirs after my death, and it is my intention that they may not get my estate. Mahomed Medhi is my grandson, and I like him, and it is for this reason also that I make the grant for a reduced value." At the time of the execution of that deed there was a decree in execution against Delrus Banu Begum. At that time she required money to pay off that debt also.' That shows an intention to deprive her heirs, not an intention to deprive herself. Then, when we compare this with what happened afterwards, and find that this deed was never in any part of it acted upon, but that all subsequent transactions proceeded on the footing of the property being hers, and not on the footing of what appeared on the face of the document, I think the proper inference is, that the lady never had any real intention to part in *præsenti* with the property in the manner the defendants represent, just as I think that there is no satisfactory evidence to show that she ever received any proper consideration. It follows, therefore, that the whole transaction must be regarded as a nullity.

"But another view of the case has been put before us by Baboo Mohesh Chunder Chowdhry. He contended, that even if it be held that the transaction was not intended to have present operation in the full sense of the term, it was at least clear that the lady had a strong desire to benefit Medhi after her death, and so we were asked to give effect to the transaction as one by which she was to retain the whole benefit for her life, and Medhi was to take it after her death. Now, in order to give effect to this contention, it must be held, that although, under the terms of the deeds, Medhi was to have a vested interest from the dates of their execution, in fact he was not to have it till after the death of Delrus. There are several objections to this view: First, it would directly contradict the deeds; secondly, it would conflict with the case put forward by the defendants themselves in their pleadings and evidence; and thirdly, under the authority of the decisions of the Privy Council on this subject, it would seem that there are very strong reasons for saying that it would conflict with the rules of Mahomedan law(1). I therefore concur in the conclusion arrived at by my learned colleague."

Mr. *R. V. Doyne*, for the appellant, argued that as to the putni grant, and the consideration for it, the first Court was right in dealing with it as separate from the questions arising as to the sale of the house. There was no reason on the evidence for supposing that Delrus did not execute all the documents with full knowledge of their effect; or that she was deceived. She wished to benefit Mahomed Medhi. No particulars of fraud were either proved, or alleged, and in the absence of fraud, the inadequacy of the consideration would not invalidate the transaction, so far as to prevent its being carried out, according to the intention of Delrus upon her death in 1879. This, at all events, applied to the putni. Mr. *J. D. Mayne*, and Mr. *C. W. Arathoon*, for the respondents, were not called upon.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR RICHARD COUCH:—

The respondents in this appeal brought a suit against the appellants, in which they alleged that Delrus Banu Begum died possessed of considerable property, and that they were, according to the Shiah law, of which sect the family were members, her heirs, and as such were entitled to the estate left by her. The defence depended upon a transaction which took place on the 3rd and 4th of August 1876.

In order to explain that transaction it may be stated that Mahomed Medhi, the

(1) *Abdul Wahid Khan* v. *Nuran Bibi* L. R., 12 I. A., 91; also reported in I. L. R., 11 Calc., 597, and see cases cited at p. 602 of that report.

principal party to it, was the grandson of a brother of Delrus Begum. The nature of it was that Delrus Begum, who was said to be wishing to raise money, sent for Mehdi, and on his coming an agreement was made by which he was to pay her Rs. 12,000, and to receive in return a putni of her estate, with the exception of the house in which she lived, and about 20 bighas of land. He was also to have a kobala or deed of sale of the house and premises, and the Rs. 12,000 were equally distributed between the putni and the kobala. It is apparent from the evidence that this was one transaction. The putni was executed on the 3rd of August 1876, and the kobala on the following day. The putni states that out of 268 bighas of land in holding No. 186, Delrus Begum had her dwelling-house and 20 bighas of land; and that she had issued a notification for letting out in putni the 248 bighas, and that Mehdi, having applied to take the land in putni, she granted him a putni on receipt of a bonus of Rs. 6,000 at a determined and fixed annual rental of Rs. 647-14-10 gundahs in respect of her proprietary right in the 248 bighas. It provides that out of that rental he is to pay the annual Government revenue of Rs. 347-14-10 gundahs, and to pay to her Rs. 300 per annum as profits for her proprietary right.

By the kobala Delrus Begum sold to Mehdi for Rs. 6,000 her rights in about 20 bighas of land belonging to her dwelling-house, together with the pucca buildings and garden with trees, &c.

On the same date, the 4th August, Mehdi executed an ijara by which he granted to Delrus Begum all his rights in the land included in the putni and kobala, at a rent of Rs. 2,647 14 annas 10 pie. This is the amount of rent Delrus Begum was to receive under the putni, with Rs. 2,000 in addition, and it provided that if Delrus Begum failed to pay the rent due on account of any instalment on the first day of the succeeding month, she should be liable to pay interest for the overdue instalment at the rate of 1 per cent. per mensem, and if she failed to pay the rents due on account of three successive instalments, her ijara rights were to cease on the first of the fourth month, and she says:—"I shall not make any default in the payment of any instalment; and if any land be taken by Government, I will not get the compensation thereof—that is, any portion of the value of it."

There were two questions raised by the defence—first as to the putni, and next as to the kobala. The case has been before five Judges of the High Court, and the Judge of the 24-Pergunnahs, and all those Judges came to the conclusion, with regard to the kobala, that it was not intended to be a real transaction. It has not been contested by Mr. Doyne, who has argued the case with great care and ability, and has called their Lordships' attention to every portion of the evidence which might assist the case of his clients, that this is a true finding.

That is very important with reference to the putni, because it was evidently one transaction, and it would be very difficult, if not impossible, to come to the conclusion that if that part of the transaction was altogether an unreal one, and that it was never intended that it should operate as a sale, the other part, that is the putni, was intended to be a real transaction. The consideration is said to have been Rs. 12,000; but it is obvious that at least Rs. 6,000 were never paid, and were not intended to be paid, or to have any effect as purchasing the property. With regard to the putni, the case was presented in the High Court as being a case of a fraud practised upon Delrus Begum; and it seems to have been treated in that way by some of the learned Judges. Their Lordships see no ground for thinking that any fraud was practised upon the lady. The defect in the transaction is that the intention on her part was not that which is apparent on the face of the deeds—in fact, that the deeds do not represent really what was intended. The evidence has been very fully examined,

and it is not necessary to say more than that their Lordships, after the full argument which has been addressed to them on behalf of the appellants, have come to the conclusion that, as regards the result of the case, they agree in the judgment which has been given by the learned Judges of the High Court on the appeal from the two Judges who differed in opinion. They agree in that result for the reasons which were given by Mr. Justice Wilson towards the conclusion of his judgment, namely, that the deeds were not intended to operate according to their tenor.

Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court of the 16th August 1886, and to dismiss the appeal; and the appellants will pay the costs of it.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Barrow & Rogers.*

Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*

18th March, and 25th April, 1890.

PRESENT.

Members of the *Judicial Committee*—The Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

SHRI KALYANRAIJI AND ANOTHER,* ... } *Plaintiffs,*

and

THE MOFUSSIL COMPANY, LIMITED, BY THEIR MANAGER, B. ROBB, } *Defendants.*

On appeal from the High Court of Bombay.

Construction of Act XIX of 1844, abolishing cesses on trades.

On a question whether a cess of two annas per candy on all cotton bought in, and exported from, Broach, paid by the buyer, according to usage from time immemorial, to a temple in that town, was abolished by Act XIX of 1844:—

Held, that it was a cess of a mixed kind, local and indirect, upon the trade of a cotton buyer, carried on in Broach, attaching when he bought cotton in that town for exportation, and that it fell within the meaning of that Act, so that the right to claim it had been thereby abolished.

CONSOLIDATED appeals from two decrees (28th April, 1884,) of the High Court, affirming two decrees (23rd October, 1882,) of the Senior Assistant Judge of Broach reversing two decrees (29th June, 1880, and 21st November, 1881), one of the Subordinate Judge of Broach and the other of the Subordinate Judge of Surat.

In 1877 a suit was brought by the late manager and proprietor of a Vallabhacharya temple in Broach, Gosvami Shri Purushotamji Maharaj, now represented by the appellants, against the Mofussil Company by their Broach agent, Mr. B. Robb, to recover a sum of Rs. 4,455. Another suit was brought by the same plaintiff against Messrs. Greaves & Co. by their agent, Mr. J. R. Greaves, on a similar cause of action, *viz.*, that the temple was entitled to a *lago*, or cess, on all purchases of cotton made by the defendants for export, which cess had not been paid for the years 1875, 1876 and 1877, three years before suit brought. The first of these suits was transferred to the Court of Surat, the second remained in Broach. The proceedings in both are reported in *Gosvami Shri Purushotamji Maharaj* v. *B. Robb*(1) where the judgments of the High Court (Kemball and Birdwood, JJ.,) on second appeal, are given.

The Subordinate Judge found that the payment had been made from time immemorial on all cotton sold in Broach. In the first suit Rs. 1,242 were decreed; in the second, Rs. 1,907.

It appeared at the hearing that, by the usage in Broach, the seller of cotton allowed a sum of one rupee per candy to

* 17 Cowell's Ind. Ap., 103; 14 Bom. 401.

(1) I. L. R., 8 Bom., 398.

remain in the hands of the purchaser which was called the "*walthar*." In fact, while a sum was named as the price of each candy, the vendor accepted a sum less by one rupee, without anything being said to the purchaser as to the appropriation of the latter. The effect of this formed a secondary question on this appeal; the primary one being whether the cess fell within, and was abolished by Act XIX of 1844.

In each case there was an appeal and cross-appeal to the Assistant Judge at Broach, who found as follows:—"The plaintiff has for one hundred years claimed and received a *lágo* or cess of 4 annas per candy on all cotton bought in and exported from Broach, and this cess has been paid by all castes and creeds alike." He dismissed both suits on the same ground, *viz.*, that the cess had been abolished under Act XIX of 1844; holding that the right claimed was neither more nor less than to levy a fee, or cess, on every trade transaction in Broach by which cotton was bought for export. As regards the effect of the allowing "*walthar*" to the defendant at the sale, as to which plaintiff, in his cross-appeals, insisted that the claims should not be limited to cases where "*walthar*" had been paid, the Appellate Court was of opinion that Act XIX of 1844 would have been an answer to the claim, even if rested on the ground of the purchasers having been entrusted with the money; and no trust for the temple had been accepted.

The plaintiff appealed from both decisions, on the ground that the cess had been abolished; and he also relied on the "*walthar*" as supporting his claim. The High Court, whose judgment is reported at length in the report above referred to, affirmed the decision of the lower Appellate Court.

On this appeal, Mr. *J. B. Finlay Q. C.*, and Mr. *C. W. Arathoon* appeared for the appellant.

Mr. *R. V. Doyne* and Mr. *J. D. Mayne* for the respondent.

For the appellant, it was argued that, the main question being as to the effect of Act XIX of 1844, passed "for abolishing town duties and mookauts, and all taxes upon trades and professions, within the Presidency of Bombay," it was questionable whether purchasing cotton for export was such an act of trading as fell within the scope of the Act. The cess claimed was not a tax upon a trade, nor was it a "town duty." It was a sum payable by custom to a local institution. Reference was made to a notification of Government of 7th September, 1844, which was as follows:

"Whereas Act XVI of 1844, which raises the tax on salt within the Presidency of Bombay from eight annas to one rupee per Indian maund, has in view the abolition of town duties and other cesses, which from unavoidable circumstances was not promulgated simultaneously with the said Act; and whereas the delay in this abolition renders the subjects of this Government at present liable to the payment of both the increased tax on salt, and the said town duties and cesses, the Honourable the Governor in Council is pleased, in order to afford relief from this double taxation, to suspend, pending the decision of the Government of India, the collection of all town duties, kusabveeras, mohoturfa, bulota and all other taxes on trades and professions, which form a part of the general revenue of the State, and are not appropriated by law or custom to municipal purposes."

And to another of 27th January, 1848:—

"In conformity with the provisions of section III of Act XX of 1839, notice is hereby given, that on Act XIX of 1844 becoming law, the levy was prohibited of all haks, fees and shares of every description derivable from the items of revenue thereby abolished."

A cess like this affecting indirectly a trade could not be held to be a cess upon a trade, within the meaning of the Act. *Nasaruanji Pestanji* v. *The Deputy Com-*

missioner of Customs, Salt and Opium(1) was distinguishable, the right there claimed having originated in the ruling authority. The allowance, by the seller, of the rupee to the purchaser was sufficient, under the circumstances, to show that the purchaser acted upon the understanding that the allowance was for the temple dues. In connection with this, reference was made to *Umedsangji* v. *The Collector of Surat*(2), where the fact was that the *haks* forming the subject of suit had been collected; and they were, therefore, held payable.

Counsel for the respondents were called upon only as to the construction of Act XIX of 1844. They contended that the words of the Act were wide enough to include the cess in question.

In reply, Mr. *J. B. Finlay. Q. C*, gave the meaning of the special terms used in the Act, and in the notification of 1844, referring to H. H. Wilson's Glossary; and contending that these words showed the kind of cesses at which the Act XIX of 1844 was aimed. And inasmuch as the present one was not precisely analogous to any of them, while the scope of the general words was applicable to similar cesses, the Act did not, upon its strict construction, include it.

On a subsequent day, 25th April, 1890, their Lordships' judgment was delivered by

THE RIGHT HON. LORD MACNAGHTEN :—

The late appellant, who was plaintiff in the two suits which have been consolidated, was the managing proprietor of a temple in Broach, known as the Shriji Mandir. In that capacity he claimed to be entitled to a *lágo*, or perquisite, or tax, of 2 annas per bale on all cotton bought in and exported from Broach. The present appellants are his representatives.

It must be taken for the purpose of this case that from time immemorial, before and up to the year 1844, this *lágo* was claimed and received as of right by the managing proprietor of the temple for the time being, and it may be assumed that the claim had a legal origin, and that, but for an Act of the Legislature passed in 1844, it would still be enforceable in a Court of law.

The Act on which the question turns is Act XIX of 1844. It is in these terms :—

"It is hereby enacted that from the 1st day of October, 1844, all town duties, kusab veeras, mohturfas, ballootie taxes and cesses of every kind on trades or professions under whatsoever name levied within the Presidency of Bombay, and not forming a part of the land revenue, shall be abolished.

Their was an earlier Act, No. XX of 1839, to which reference was made during the argument. It empowered the Governor in Council of Bombay to issue orders prohibiting the levy of *haks* and fees of every description, and customs, whether by land or sea, enjoyed by holders of rent-free lands or other persons. Orders so issued were not to be questioned, and persons levying any prohibited *haks* or fees were to be punishable for undue exaction as if they had been revenue officers guilty of extortion. No order, however, under this Act affecting the question raised in the present case was issued, at any rate before the passing of the Act of 1844. The Act of 1839 was referred to mainly for the purpose of showing that the abolition of *haks* and fees without compensation was not inconsistent with the course of legislation in India at that time.

In dealing with the Act of 1844 it was contended by Mr. Finlay that the *lágo* now in question does not come under the head of "town duties". In this their Lordships are disposed to agree, although it seems clear that the expression is not to be confined to duties "appropriated by law or custom to municipal purposes" (to use the words of a Government proclamation of the 7th of September, 1844, which was referred to during the argu-

(1) 2 Bom., H. C. Rep., 75.
(2) 7 Bom. H. C. Rep., 50, A. J. C

ment), but extends to duties or cesses on goods brought into or carried out of a town, although levied by private persons. The learned counsel for the appellants then proceeded to point out that the expression "*kusab veera*" or *kasab vero* is explained in Wilson's Glossary to be "a tax on occupations and crafts," and that, according to the same authority, "*mohturfa*" seems to be a poll-tax, while a "*balootie* tax" or a "*balutepatti*" is defined to be "a cess or tax upon the shares or claims of village servants"; and he argued that the expression "cesses on trades and professions," having regard to the expressions found in the immediate context, ought to be confined to cesses in the nature of license duties for carrying on trades or professions.

Owing to its brevity the Act is not free from obscurity. But their Lordships think that there is no sufficient reason for giving the expression "cesses on trades and professions" the restricted meaning to which the appellants desire to confine it. The Act abolishes cesses "of very kind" on trades "under whatever name levied". The appellants would limit the abolition to one kind, and one kind only. Is this *lágo* a cess or tax on a trade? Mr. Finlay argued that though it was a tax affecting trade, it could not fairly be described as a cess upon a trade. Their Lordships, however, think that it properly comes within that description. It is a cess of a mixed kind, local and indirect, upon a particular trade—the trade of a cotton buyer carried on in Broach—attaching when the article of merchandise in which the trader deals is bought in Broach and exported from Broach.

Upon the main point, therefore, their Lordships are of opinion that the appeal fails.

It was then said that, although the Act of 1844 may have done away with the *lágo* as an impost capable of being enforced in a Court of law, yet such a payment was not thereby made illegal, and it was urged that, by virtue of some thing loosely described as "an understanding," the buyers of cotton in Broach had come under some sort of obligation in the nature of a trust which made them liable as trustees or agents to the claim of the plaintiff.

It seems to have been the practice for the native cultivators selling cotton in Broach to allow a *walthar* or rebate of one rupee for every candy or two bales. There can be no doubt that this *walthar* was originally intended to meet or cover certain charges or allowances, of which the *mandir's lágo* was one; and it was said on behalf of the appellants that the native cultivators would naturally be disposed to take this burthen on themselves, because they were interested in maintaining the worships of Shriji. From these premises it was argued that the plaintiff was entitled to enforce his claim directly against the cotton buyers as his trustees, or as having received moneys for his use for which they were accountable to him. The Subordinate Judge accepted this view. The District Judge of Broach and the Division Bench at Bombay rejected it, but apparently upon the ground that payment of the *lágo* was prohibited by the Act of 1844, and therefore illegal, and that the Court would not be instrumental in carrying out a contract designed to defeat the intention of the Legislature. The Act, however, simply abolished cesses on trades. If the parties who before the Act were legally liable to the payment had chosen to continue it afterwards as a voluntary contribution, they would have been quite at liberty to do so. The real answer to this part of the argument is that there is nothing whatever in the nature of a trust to be found in the transaction or to be inferred from the course of business. There is not the slightest evidence that the respondents accepted the position of trustees for the plaintiff, or consented to receive moneys for his use. The cotton sellers may or may not have a valid claim against the cotton buyers in respect of so much of the *walthar* as may appear to be attributable to, or connected with, the *lágo*; but such claim, if valid,

cannot give any right to the representatives of the plaintiff against persons who undertook no obligation towards the plaintiff.

Their Lordships, therefore, will humbly advise Her Majesty that these appeals ought to be dismissed.

The appellants will pay the cost of the appeals.

Solicitors for the appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondents: Messrs. *Payne and Lalley.*

25th April 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

RADHA PERSAD SINGH*... (*Decree-holder,*)

and

TORAB ALI AND OTHERS... *Defendants.*

On Appeal from the High Court in Bengal

Decree—Construction of decree—Construction in execution of an order in Council.

An order of Her Majesty in Council was that a decree-holder should recover what was demarcated by "the thakbust map and proceedings of 1839." *Held*, on the construction of the order, that the latter words meant the proceedings relating to the thakbust map, and did not include a survey map which differed from it.

APPEAL from a decree (2nd May 1887) of the High Court, affirming a decree (15th April 1886) of the Subordinate Judge of Shahabad.

This appeal arose out of proceedings in execution of an order of Her Majesty in Council of 17th May 1879, and the matter in dispute is stated in their Lordship's judgment.

On two occasions in the Court of the Subordinate Judge, first on 30th June 1881, and again on 15th April 1886, it was found that the amin deputed to the spot, and directed to report, had taken into consideration the survey map instead of confining himself to the thakbust. An appeal from the order of the latter date was preferred to the High Court, whereupon a Division Bench (TOTTENHAM and NORIS, JJ.) was of opinion that the Subordinate Judge had been right in limiting the decree-holder to the thakbust, and that he had, as a matter of construction of the order in Council, strictly adhered to its terms, correctly declining to give it a wider scope.

Mr. *R. V. Doyne* and Mr. *J. D. Mayne* appeared for the appellant.

Mr. *C. W. Arathoon* for the respondents.

For the appellant it was argued that he was entitled to lands appearing by the survey proceedings of 1839, in other words, by the thakbust, as corrected by the subsequent proceedings, and the scientific survey maps, to lie to the north of the northern bank of the true channel of the Ganges in 1839. Reference was made to Wilson's Glossary, 501, for the definition of thakbust.

Counsel for the respondent was not called upon.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR RICHARD COUCH:—

This is an appeal from a decree of the High-Court of Calcutta affirming an order of the Subordinate Judge made in the execution of an order in Council of the 17th May 1879. The judgment of this Board upon which that order in Council was made was given on the 22nd March 1879. It referred to and adopted a judgment which was given on the same day in another case of a similar nature. In that judgment their Lordships said that the Board, when the matter was previously before them, came to the conclusion that the Maharaja, the

* I. L. R., 18 Calc. 108.

present appellant, had had adverse possession of all the land that was above the Northern bank of the river Ganges in 1839, and from that time to 1857, and had therefore established a title to that portion of the land in dispute, but to no more, and that a map of the amin which was made in a great measure from the thakbust proceedings of 1839 which had been referred to was at that time assumed by the Board to be correct, but that their attention having been called to a statement of the amin, showing that this map was not a correct map, they "thought it better and safer in this case to take the thakbust map of 1839." That being so, they came to the conclusion that the Maharaja was entitled to recover "so much, if any, of the land claimed by him in this suit as was demarcated by the thakbust map and proceedings of 1839, as then lying to the north of the northern bank of the river Ganges." Her Majesty's order in Council was made in the same terms.

Now the present contention of the appellant is fairly stated in the appellant's case, and it is this:—"In the present case it has appeared on the proceedings in execution of Her Majesty's Order in Council that the professional survey made in the same year as the thakbust, 1839, differed materially from the latter, and would give this appellant a much larger area as lying to the north of the northern bank of the Ganges, and that the thakbust map was unscientific and untrustworthy. This appellant contended"—that is before the lower Courts—"and now submits that his contention was well founded, that the intention of their Lordships' judgment and report was to give him all the land which in fact lay to the north of the true river bed of 1839, and that such true river bed is that shown by the survey map of 1839." In the reasons of the appellant's case it is said that "it should have been held that this appellant was, on a due construction of the judgment of the Judicial Committee of the 22nd March 1879, and the order of Her Majesty in Council of the 17th May 1879, entitled to whatever lands should by the survey proceedings of 1839, *i. e.*, the thakbust map as corrected by the subsequent proceedings, and scientific survey map, appear to have lain to the north of the northern bank of the true bed of the river Ganges in 1839." So that in fact what the appellant contended for in the lower Courts and now contends for here is that the survey map is to be taken as the map showing the demarcation of the land, correcting the thakbust map, where it differs from it; in fact that the survey map should be substituted for the thakbust map

Now, whatever may be the merits of the one map or the other, about which it is not necessary to say anything, because their Lordships have not the materials before them to enable them to say whether the survey map is the map which ought to have been used by the Judicial Committee when this judgment was given, the words of the judgment and of the order in Council are not in any way ambiguous. There is no difficulty in interpreting them. They say distinctly that the Maharaja is to recover what was demarcated by the thakbust map and proceedings of 1839, and it appears from the judgment to be obvious that the proceedings in 1839 meant the proceedings relating to the thakbust map. It could hardly be that their Lordships, when they gave that judgment, intended by the words "proceedings of 1839" to include a survey map which it is now said differs from the thakbust map and is sought to be used to correct it. The lower Courts in the execution of this order in Council appear to have taken the right view, and their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed and the decree of the High Court be affirmed. The appellant will pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Burton, Yeates, Hart & Burton.*

Solicitors for the respondents: Messrs. *T. L. Wilson & Co.*

24th April 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

Ex parte, RANI MATHUSRI JIJAI AMBA, AND OTHERS, PETITIONERS.*

On Appeal from the High Court at Madras.

Discretionary refusal to remove a Receiver and Manager of the Estate of Hindu widows.

Rights and proceedings rendering a Court's order, refusing to remove an appointed Receiver and Manager of the estate, of which the widowed Ranis of the late Maharaja of Tanjore had become possessed by grant from the Government, entirely a matter for the discretion of the Court, which had exercised its discretion soundly.

APPEAL from an order (17th February 1888) of the High Court, affirming an order (13th September 1887) of the District Judge of Tanjore.

A Divisional Bench of the High Court (Collins, C.J., and Parker, J.) made the above order on the petition filed in the Original Court on 24th August 1887, by the surviving widows of the last Maharaja of Tanjore, they having been parties to a decree in *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba* (1). That decree (8th May 1868) declared "that the permanent appointment of a Receiver "and Manager of the property was "necessary;" and directed "that the "Collector, if possible, should be continued "as Receiver and Manager;" that, if such was not practicable, the Civil Court of Tanjore should appoint a Receiver and Manager after taking proper security, and "from time to time make fresh "appointments during the lives of the "widows and the survivors or survivor "of them, or until it shall be considered "by the Civil Court that a Receiver and Manager is no longer necessary."

The reason given in the order from which this appeal was preferred was thus given:—"The decree clearly contemplates "that the Receiver shall be permanent "during the lives of the widows, and the "survivors, or survivor, of them; and "having regard to the history of the liti-"gation, the nature of the property, and "the circumstances of the family, we are "clearly of opinion that the District "Judge exercised a right discretion in 'refusing this application."

All the parties having joined in applying for a certificate under section 602, Civil Procedure, the same Judges recorded their reasons, more fully, as follows:—

"As the surviving Ranis are the only persons at present entitled to participative enjoyment of the estate, and as all have united in this application, we think that there is a substantial question of law which will admit of an appeal to the Privy Council within the meaning of section 596 of the Civil Procedure Code, but we think it right to place on record our reasons for holding that the District Judge exercised a sound discretion in refusing to grant the prayer for the removal of the Receiver.

"The circumstances of the litigation which led to the appointment of a Receiver are fully reported in the third volume of the Madras High Court Reports, pp. 424–455. The property in question was seized by Government at the annexation of the Tanjore State, not under color of any legal title, but by the forcible exercise of Sovereign power. It was afterwards transferred to the senior widow by order of Government, dated 21st August 1862, as a matter of grace and favor. The order after making over the management and control to Her Highness went on to state:—'It will be 'her duty to provide in a suitable manner 'for the participative enjoyment of the 'estate in question by the other widows

* I. L. R., 13 Mad. 390.

(1) 3 Mad. H. C. Rep., 424. The estate of the last Maharaja of Tanjore came into the possession of the E. I. Company by an act of State in 1856. *Secretary of State in Council of India* v. *Kamachee Boye Sahaba*, 7 M.I.A., 476.

'her co-heirs. On the death of the last 'surviving widow, the daughter of the 'late Raja or, failing her, the next heirs 'of the late Raja, if any, will inherit 'the property.'

"Within four years of the transfer of this estate to the senior widow this suit was brought by two of the Junior Ranis. They complained of various acts done by the senior widow in detriment of their rights and more especially that she had, without their consent, adopted a boy as the son of the late Raja, to whose possession she had transferred or was about to transfer the whole property. That son was included as the fourteenth defendant, and the first defendant alleged that she herself and all the other Ranis were entitled only to receive maintenance from him.

"The Court held that the evidence as to the senior widow's management of the estate since it had been under her charge showed 'reckless dealing with the property and the lavish expenditure of large 'sums for purposes of which the accounts 'afford no satisfactory explanation. Not 'only has the large sum of ready money 'received from the Government and the 'whole proceeds of the immoveable property been dissipated, but a considerable 'portion of the moveable property itself 'has been got rid of and debts to a 'considerable amount been left unpaid. 'We are at the same time of opinion 'that it would be most imprudent to 'entrust the management of the property 'to the second defendant or to either of 'the other junior widows. Little, if 'anything, we are sure, would be gained 'as respects the care and preservation of 'the property, and there would very soon 'be violent disputes and further litigation. It appears to us to be absolutely 'necessary that the estate should remain 'in the custody and under the control 'and direction of a competent Receiver 'and Manager appointed from time to 'time by the Civil Court and invested 'with general powers for the management 'and regulation of the property and its 'enjoyment, and the application of the 'rents and profits. The Collector is at 'present the appointed Receiver, and 'there is no doubt that it is of the very 'greatest advantage to the estate and 'the parties interested that he should 'continue to act as Receiver and Manager, as we trust he will be able to do. 'The continuance of his appointment 'will therefore be decreed; but should it 'be necessary, the Civil Judge must appoint a fit and proper person in the 'Collector's place, taking sufficient security for the discharge of his duties and 'fixing a fair and reasonable remuneration for his services.'

"The High Court in the view that it took of the case found it unnecessary to raise an issue as to the validity of the alleged adoption of the fourteenth defendant, observing that 'if found to be 'valid (a result at present very problematic), his present claim by right of 'adoption being as lineal heir of the 'Raja in preference to the widows would 'not be maintainable. To that claim the 'absolute ownership of the Government 'in the interval between the death of the 'Raja until the act of State by which 'the transfer was made to the widows 'and daughter is, we think, fatal,' see 3 Mad. H.C. Rep., p. 455.

"More than twenty years have passed since that decree, and we are of opinion that the same reasons which in 1868 made the appointment of a Receiver imperatively necessary still exist in all their force. Old age and twenty years more of that seclution which is the lot of ladies of exalted rank in this country can hardly have made their Highnesses better fitted for the management of an estate whose annual income is more than 1½ lakhs of rupees and which was valued in 1868 as worth about 68 lakhs of rupees (the moveable property in jewels and cash alone being worth nearly 20 lakhs). If given back at all, the chief management would, under the terms of the Government order, vest in the senior widow,—a lady now over 70 years of age and who twenty-four years ago, on 5th January 1864, intimated to the then Civil Judge of Tanjore that she

had formed the resolution 'of withdrawing from all worldly transactions and transient pleasures and resolved from that moment to lead a life of seclusion, &c.,' see 3 Mad. H.C. Rep., p. 437.

"For more than twenty years this decree has secured the estate and these ladies immunity from litigation,—but, at the death of the last surviving widow, the Government order vests the estate in the daughter of the late Raja, or failing her, in the next heirs of the late Raja if any."

The Judges concluded by adverting to the probability of future litigation if the management of the property should be restored to the widows.

On this appeal,

Mr. *J. D. Mayne* appeared for the appellants.

His argument was that under the Proceedings of the Madras Government of 21st August 1862, printed in the report of *Jijoyiamba Bayi Saiba* v. *Kamakshi Bayi Saiba*(1), and the construction put upon it in the judgment in the latter suit, the property vested in the Ranis for the estates of Hindu widows. They, thereby, became full owners, and represented the estate, subject to the legal restrictions upon their disposing of the property. One of the incidents of a widow's estate was a right to management. Of this she could only be deprived on the objection of some one interested in the good management of the property; but no such objection was made here. The present applicaion was supported by all who had a vested interest in the estate. The Receiver had been appointed in consequence of the proceedings in a suit which had come to an end.

Their Lordships' judgment was delivered by

The Right Hon. Sir Barnes Peacock:—

Their Lordships are of opinion that it was entirely a matter of discretion with the Court as to the removal of the Receiver, and, looking to the case, their Lordships think that the Court have exercised a very sound discretion in not removing him. They will therefore humbly advise Her Majesty to dismiss this appeal.

Solicitors for the Appellants: Messrs. Lawford, Waterhouse, and Lawford.

(1) 3 Mad. H.C. Rep., 428.

25th April and 25th June 1890.

Present:

Members of the *Judicial Committee*.—The Right Hon. Lord Watson, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

Madho Pershad * ... *Plaintiff*,

and

Mehrban Singh ... *Defendant*.

On Appeal from the Court of the Judicial Commissioner of Oudh.

Hindu Law—Joint family—Ancestral estate held jointly by family under the Mitakshara—Sale attempted by one member of his share—Effect of partition—On death of vendor, right by survivorship of other members—Equity of purschaser to have a lien against survivor.

As to ancestral estate under the Mitakshara, so long as the estate is undivided and the share of a member of the family is indefinite, he cannot dispose of it without the consent of his co-parceners. *Held*, that, in a joint family, a nephew, having taken by survivorship the undivided share of an uncle deceased, was entitled to recover that share from a purchaser, to whom the uncle in his lifetime had sold it without the consent of his co-parceners, and without necessity; *held*, also, that the purchaser could have no lien on the share for return of the purchase-money.

As soon as partition is made;—actual partition not being in all cases essential, as for instance where the family has agreed to hold their estate in definite shares, or a member's undivided share,

* 17 Cowell's Ind. Ap., 194; 18 Calc., 157.

in execution of his creditor's decree, has been attached ;—that will be regarded as sufficient to support the alienation of a member's interest, as if it had been his acquired property.

As regards members of a family living at the time when their alienation was set aside at the instance of another member, the Court, in *Mahabeer Persad* v. *Ramyad Singh* (1), justly ordered that the property should be thenceforth possessed in defined shares, and that the shares of the members who had joined in the sale should be subject to a lien for the return of the purchase-money. But that case must be distinguished from the present. Here, the accrued right of survivorship precluded any such course. The nephew not being responsible for the personal debts and obligations of his uncle, what might have been an enforcible equity against the interest of the latter, while it existed, could not affect the interest which had passed to a surviving co-parcener.

APPEAL from a decree (26th January 1888) of the Judicial Commissioner, affirming a decree (23rd November 1886) of the District Judge of Lucknow, reversing a decree (28th Semtember 1886) of the Subordinate Judge of Unao.

The question now raised was whether the sale by a deceased member of a joint family of his share in ancestral estate, which the Courts below had set aside at the instance of a minor suing by his guardian, should not have been on the terms of this appellant, the purchaser, having a lien on the interest sold for the return of the purchase-money.

Ancestral shares in three zemindari villages, Parthiawan, Salehnainpur, and Aziznagar, in the Unao district, were jointly held by an undivided family to which belonged Sobha Sing, father of Mehrban Sing, plaintiff and respondent and Zalim Sing, brother of Sobha. Madho Pershad, defendant, appellant, after the death of Sobha bought from Zalim his share in each of the above villages, receiving from him (and from Mussamat Chitta, described as his wife) three registered deeds of sale, dated 9th January 1885. These deeds stated that a share consisting of 1 anna 9 pies 33½, "out of the entire 20 biswas, or 16 annas of the zemindari hakkiat" of each of the three villages were sold, then being in the joint possession of Zalim Sing, and Mehrban Sing, a minor, the latter holding an equal share with Zalim, as shown by the khewat of regular settlement. The purchase-money for the share in the first was Rs. 6,000, and for the two other shares Rs. 2,000 each.

Zalim died on the 16th January 1885. This suit was brought on the 2nd January 1886, by his nephew, Mehrban Sing, through his mother and guardian, against Madho Pershad and Chitta, for cancellation of the deeds of 9th January 1885, and for possession, by right of suvivorship, of, Zalim's share.

Madho Parshad's defence was that Zalim and the plaintiff were separate in estate, and the former had a right to transfer his share.

The Subordinate Judge's decree was in favour of the defendant. Zalim in his opinion had been separate from Sobha. He found that the village administration papers permitted transfers by co-sharers of their shares, subject to pre-emption by other co-sharers.

This decree was reversed by the District Judge, who found that Zalim Sing and Mehrban Sing had been joint in estate. Under the Mitakshara which governed the parties, one joint-owner could not sell his share, and the administration papers did not control this, not referring to unpartitioned estate, or shares in it.

The Judicial Commissioner affirmed this judgment, finding no evidence that partition had ever taken place between Sobha and Zalim, who held in equal rights according to entries in the khewat of settlement, the total share inherited by them from their father Newal Sing; and that a sharer in an undivided estate could not sell his share without the consent of his co-parceners.

Mr. *J. D. Mayne* for the appellant, after referring to other points in the case, argued that, although the plaintiff might be entitled, by survivorship, to the share which Zalim had purported to transfer, the purshaser might, upon an equitable view, nevertheless receive a

(1) 12 B. L. R., 90.

charge for the amount of the purchase-money which he had paid upon the share. He cited *Mahabeer Pershad* v. *Ramyad Singh*(1). Reference was also made to *Deendyal Lal* v. *Jugdeep Narain Singh* (2), and *Suraj Bansi Koer* v. *Sheo Pershad Singh*(3).

The respondents did not appear.

On a subsequent day, June 25th' their Lordships' judgment was delivered by

THE RIGHT HON. LORD WATSON :—

In this case, which was heard *ex parte*, the appellant did not impugn the findings of fact upon which the judgments he complains of are based; and his argument was addressed to a single question of law.

The respondent, plaintiff in the suit, and his paternal uncle Zalim Singh, were the members of an undivided Hindu family, and, as such, were co-sharers of land in three villages situated in the district of Unao in Oudh. Zalim died childless in January 1885. Seven days before his death he and Mussamat Chitta, therein described as his wife, executed and delivered three deeds of sale to the appellant of his undivided share and interest in each of these villages, at prices amounting in all to Rs. 10,000, which were duly paid by the appellant. These sales were made by the deceased for his own personal benefit, without the consent of the respondent, and without legal necessity.

The suit was brought by the respondent in January 1886, for cancellation of these three deeds of sale, with an alternative conclusion for pre-emption in the event of their validity being sustained. The Subordinate Judge held that they were valid, upon the ground, now admitted to be untenable, that by a village custom each co-sharer was entitled to sell or mortgage his undivided interests; and, on payment by the respondent to the appellant of Rs. 10,000 within a time limited, he decreed pre-emption and possession, otherwise the suit to stand dismissed. On appeal, the District Judge reversed his decision and decreed cancellation of the sale deeds, holding that the alienation by Zalim was void, according to the law of the Mitakshara. The decree of the District Judge was affirmed, for the same reasons, by the Judicial Commissioner.

The appellant conceded in argument that the rules of the Mitakshara law which prevail in the Courts of Bengal are applicable in Oudh to the alienation of interests in a joint family estate. He likewise conceded that the sales by Zalim Singh, being without the consent of his co-parcener, and not justified by legal necessity, were according to that law invalid; but he maintained that the transactions being real, and the prices actually paid, the respondent could only recover the shares sold, subject to an equitable charge in his favour for the Rs. 10,000 which were received by Zalim.

The second point ruled by a Full Bench of the High Court at Calcutta, in *Sodabart Prasad Sahu* v. *Foolbash Koer* (1), arose in circumstances somewhat resembling those of the present case. The facts stated were that a member of a joint family had executed an ordinary mortgage in respect of his undivided share of a portion of the family property, in order to raise money for himself, and not for the benefit of the family; and the point submitted for decision was, whether, after the death of the mortgagor, a surviving member of the joint family could recover possession from the mortgagee without redeeming. Sir Barnes Peacock, who delivered the judgment of the Bench, after a full examination of the authorities bearing upon the question, held that, according to Mitakshara law, the mortgagor "had no authority, without the consent of the co-sharers, to mortgage his undivided share in a portion of the joint-family property, in order to raise money on his own account and not for

(1) 12 B. L. R., 90.
(2) L. R., 4 I. A., 247; I. L. R., 3 Calc., 198.
(3) I. L. R., 5 Calc., 148; L. R., 6 I. A., 88.

(1) 3 B. L. R. F. B., 31.

the benefit of the family;" but that the facts were not sufficiently stated to enable the Court to say whether the mortgaged interest could be recovered without redemption.

The appellant referred to three subsequent decisions as illustrating and supplementing the doctrine laid down by the Full Bench in *Sadabart's* case. In dealing with these authorities, which appear to their Lordships to be perfectly consistent with that doctrine, it is necessary to keep the following considerations in view. Any one of several members of a joint family is entitled to require partition of ancestral property, and his demand to that effect, if it be not complied with, can be enforced by legal process. So long as his interest is indefinite, he is not in a position to dispose of it at his own hand, and for his own purposes; but, as soon as partition is made, he becomes the sole owner of his share, and has the same powers of disposal as if it had been his acquired property. Actual partition is not in all cases essential. An agreement by the members of an undivided family to hold the joint property individually in definite shares, or the attachment of a member's undivided share in execution of a decree at the instance of his creditor, will be regarded as sufficient to support the alienation of a member's interest in the estate or a sale under the execution.

Two of the cases referred to were decided by this Board. In *Deendyal Lal* v. *Jugdeep Narain Singh* (1), a judgment-debtor of the father of a joint Hindu family under an attachment of his title and share exposed the whole family property to judicial sale, at which it was knocked down to a purchaser who obtained possession and the usual certificate of title. The son of the judgment-debtor then brought a suit for recovery of the estate thus sold against the purchaser, joining his father as a defendant. Their Lordships, distinguishing between the cases of purchase by private bargain and at an execution sale, held that the son was not entitled to recover that portion of the estate which represented the undivided share of the father, and declared that the purchaser had the right to take such proceedings as he might be advised for having the judgment-debtor's share and interest ascertained by actual partition. In *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (1), the circumstances in so far as these related to the interest of the judgment-debtor were the same, with this important exception, that the latter died before the sale of his undivided share took place. It was pleaded for his minor sons that, at the time of the sale, the interest of the deceased had passed to them by survivorship; but their Lordships affirmed the right of the purchaser on the ground that, before their father's death, the execution proceedings had gone so far as to constitute, in favor of the judgment-creditor, a valid charge upon the joint estate, to the extent of the undivided interest of the deceased, which could not be defeated by that event. At the same time, their Lordships held it to be clear upon the authorities that, if no proceedings had been taken to enforce the debt in their father's lifetime, "his interest in the property would have survived on his death to his sons, so that it could not afterwards be reached by the creditor in their hands."

These two decisions lend no assistance to the argument of the appellant. He has not taken, and cannot now take, any proceedings against Zalim Sing, whose undivided interest, according to the law expressly laid down in the second of these decisions, passed on his death to the respondent, free from any claim at the instance of personal creditors of Zalim.

The appellant hardly disputed that the interest of Zalim passed by survivorship to the respondent; but he relied on the case of *Mahabeer Persad* v. *Ramyad Singh* (2), decided by the High Court of

(1) L. R., 4 I. A., 247; I. L. R., 3 Calc., 198.

(1) L. R., 6 I. A., 88; I. L. R., 5 Calc., 148.
(2) 12 B. L. R., 90.

Calcutta in 1873, as an authority for the proposition that the prices paid by him ought to form an equitable charge upon that interest, in a question with the respondent. In that case, the father of a Hindu family, with the knowledge and acquiescence of his elder son, mortgaged the joint property, without legal necessity, and without consent of a minor son, who was the other co-parcener. The mortgagees obtained a decree on their bond, in execution of which they, notwithstanding the objections of the minor co-parcener and his brother, caused the property to be sold, and themselves became the purchasers. In a suit against them at the instance of the two sons, the Court in the interest of the minor set aside the alienation, but directed that, on recovery of the property, it should be held and enjoyed in defined shares, and that the shares of the father and his elder son should be jointly and severally subject to the lien thereon of the mortgagees for the sum advanced by them with interest until repayment. The reasons assigned by Phear and Ainslie, JJ., for ordering partition, and making the loan an equitable charge upon the shares other than that of the minor, were shortly these, that a decree, without such qualification, would have had the effect of restoring their property to the father and son, and leaving them at the same time in possession of the money which they had borrowed on its security, a result which the learned Judges justly considered would be contrary to equity and good conscience.

Their Lordships are unable to see that any analogy exists between that case and the present. It is unnecessary to decide whether, if Zalim Singh had been still alive, and so entitled to resume his undivided share on cancellation of the sale deeds, it would have been possible to order partition and to charge Zalim's divided share with the Rs. 10,000 paid to him by the appellant. That course is rendered impossible by his death. It might have been quite consistent with equitable principles to refuse to Zalim restitution of the interest which he sold except on condition of its being made at once available for repayment of the price which he received. But the respondent is not affected by any equity of that kind. He took in his own right by survivorship, and is not liable for the personal debts and obligations of his uncle Zalim; and it appears to their Lordships, that an equity which might have been enforced against Zalim's interest whilst it existed cannot be made to affect that interest when it has passed to a surviving co-parcener, except by repealing the rule of the Mitakshara law.

Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be dismissed.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Young, Jackson, & Beard.*

29th and 30th April 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Richard Couch.

RAN BIJAI BAHADUR SINGH... *Defendant,*

and

JAGATPAL SINGH * ... *Plaintiff.*

AND A CROSS-APPEAL.

BISHESHAR BAKSH SINGH... *Plaintiff,*

and

RAN BIJAI BAHADUR SINGH AND ANOTHER ... } *Defendants.*

On appeal from the Court of the Judicial Commissioner of Oudh.

Oudh Estates Act, I of 1869, ss.8 and 22, and sub-section 11 *of s. 22—Descent of*

17 Cowell's Ind. Ap., 173; 18 Calc., 111.

taluk—Disqualification of insane person to inherit by Hindu law—Insanity not proved.

A talukh, entered in the lists 1 and 2, prepared in conformity with section 8 of the Oudh Estates Act, 1869, descends, according to the rules pointed out in section 22, as an impartible estate to the single heir determined by the Hindu law of inheritance. *Brij Indar Bahadur Singh* v. *Jankee Koer* (1) followed. Exclusion, under the Hindu law, of a claimant from the inheritance on the ground of insanity could not be inferred merely from his being described in the plaint as insane, or from his suing by a guardian certified under Act XXXV of 1858. Although he might be incompetent to commence the suit, or to proceed with it except by a guardian, this did not establish that he was excluded when the succession opened.

APPEAL from a decree (1st November 1886) of the Judicial Commissioner modifying a decree (19th January 1885) of the District Judge of Rae Bareli.

This suit was instituted in 1882 on behalf of Rae Jagmohun Singh, deceased during the proceedings and succeeded by his son Rae Jagatpal Singh, the respondent, a minor, by his mother and guardian. With Rae Jagmohun, his brother, Rae Bisheshar Baksh Singh, also sued, and was the appellant in the second of these appeals. They claimed possession, by right of inheritance, of nineteen villages forming the talukh of Das ratpur in the Pertabgurh district, and also of a one-third share in four villages alleged to have been purchased out of the profits of the talukh. They made title as the nearest male heirs of the last talukhdar, Rudr Narain Singh, who died without issue in May 1869, and was succeeded by his mother, who died in 1879. The talukh was then held by his stepmother Saghu Nath, on whose death in 1881 possession was obtained by the defendant Diwan Ram Bijai Singh, a descendant from an ancestor common to him and the plaintiffs, named Hirde Sah.

The questions now were whether the talukh descended as an impartible estate, and whether, if Jagmohun was the heir, he had not been excluded from the inheritance by reason of his having been of unsound mind.

In the plaint Jagmohun was described as insane; and as therefore suing through his wife, Thakurain Sultan Kunwar, who had been appointed his guardian under the provisions of Act XXXV of 1858, by reason of his unsoundness of mind.

Diwan Ran Bijai, by his written statement, alleged that the plaintiffs were not the nearest male heirs of Rudr Narain, and claimed that he, as the nearest male heir of the elder branch of Hirde Sah's descendants, had the best right of succession.

Issues were fixed on these points, and also on the question, raised in the course of the proceedings, as to Jagmohun's disqualification. The suit was, after two remands by the Judicial Commissioner, dismissed by the District Judge, on the ground that the plaintiffs were not shown to be the nearest heirs of Rudr Narain Singh. On the appeal and cross-appeal of the parties, the suit was a third time remanded by the Appellate Court, for the trial of new issues relating to Jagmohun's mental condition and his alleged exclusion on that account. The return of Muhammad Samiulla Khan (who had succeeded the District Judge whose judgment was under appeal) was to the effect that, although Jagmohun was weak, the evidence had not shown that, from any defined period, he had been in a state of mental unsoundness, such as would, in the Judge's opinion, have excluded him from inheriting.

After this Jagmohun died, and by order of the Appellate Court, dated 22nd June 1886, Jagatpal, his minor son, suing by a guardian *ad litem*, Thakurain Sultan Kunwar, was entered on the record.

The Judicial Commissioner's finding reversed the above as to Jagmohun's state of mind; and, in effect, was that he (at that time deceased) had been of unsound mind, and thereby had been disqualified from inheriting, at the date of

(1) L. R., 5, I. A., 1.

the death of the last talukhdar's mother in 1879. However, he held that the present respondent, Rae Jagatpal, his minor son, was entitled at that time to inherit, and had inherited the talukh upon his father's exclusion; and that he alone was entitled, without Rae Bisheshar Baksh Singh having any interest in the talukh or any right to sue jointly or alone, by reason of the talukh being impartible, and descending according to the custom of primogeniture upon Rae Jagatpal. But the latter was not in his opinion entitled to a share of the four villages.

From that judgment the present three appeals were preferred—the first, by the defendant Diwan Ran Bijai; the second, a cross-appeal, by Rae Jagatpal as to the four villages; and the third was preferred by Rae Bisheshar Baksh. The first two of these appeals, by an order in Council of the 3rd April 1889, were directed to be consolidated, and heard on one case on each side; and Rae Jagatpal was allowed to refer to his printed case in them, for his case in the third also.

Mr. *T. H. Cowie, Q. C.*, and Mr. *J. H. A. Branson*, for the appellant, Diwan Ran Bijai, argued that the lower Appellate Court had been wrong in reversing the decree of the the District Judge, which dismissed the suit. That dismissal was right, and it should have been held, affirming the decree of the first Court, that Diwan Ran Bijai was rightly in possession The respondent Jagatpal, having been brought on to the record as representing his father Jagmohun, was not entitled to a decree on the basis of any supposed rights of his own, superior to those of his father, whom he represented. As to the devolution of the inheritance according to Act I of 1869, section 22, they referred to *Brij Indar Bahadur Singh* v. *Jankee Koer* (1).

Mr. *J. Rigby Q. C.*, and Mr *R. V. Doyne*, for Jagatpal, argued that the jugdment of the Judicial Commissioner, though wrong as to the exclusion of Jagmohun, on the ground of his insanity, was correct in holding that this respondent was entitled to inherit. This they maintained against the appellants in the first and third appeal; and in the cross-appeal they argued that the four villages should be treated as an increment to the talukhdari estate, devolving, like that estate, upon Jagatpal.

Mr. *J. D. Mayne*, for Rae Bisheshar Baksh, maintained his right to claim, and that there should be no decree against him carrying costs.

Mr. *R. V. Doyne* replied.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

These appeals relate principally to a talukh called Dasratpur, which was created by a sanad by the Governor-General after Lord Canning's proclamation, and as to which it was stated that it was a condition of the grant that it should descend to the nearest male heir under the rule of primogeniture. The estate was entered in the lists No. 1 and No. 2 established by section 8 of Act I of 1869; and consequently, according to a former decision of this Board, it descended according to the rules pointed out in section 22 of that Act. The last male owner of the estate was Rudr Narain Singh, who died in the year 1869; and according to clause 11 of Section 22 it descended to the heir according to Hindu law. He died a minor without having been married, and his mother, Kharaj Kunwar, became his heir, and took a mother's interest in the estate, which is not an estate for life, but a woman's estate by inheritance. A mutation of names was made in which her name was entered together with that of Saghu Nath Kunwar, who was the stepmother of the last owner of the talukh, and who had no interest as an heiress. Kharaj Kunwar, the mother, died in the year 1879, but the stepmother, Saghu Nath, remained in possession up to the time of her death on the 21st of November 1881.

(1) L. R., 5, I. A., 1.

Upon her death Ran Bijai Singh took possession of the estate.

A question might arise upon the construction of clause 11 of section 22 whether the estate descended as an impartible estate. Their Lordships are of opinion, looking to the provisions of Act I of 1869, list 2, section 8, and section 22, that it was the intention of the Legislature that the estate should descend as an impartible estate.

The action out of which these appeals arise was brought by Jagmohun, who was the eldest son, and Bisheshur, who was the third son, of Pirthipal, against Ran Bijai for the recovery of the estate of which he had held possession. They were the nearest relatives entitled to succeed but for Drigbijai Singh, who was the second son of Pirthipal. Drigbijai was not made a party to the suit, though he was living at the time when it was commenced. He never claimed the estate. According to the construction which their Lordships put, and which seems to have been put in the Courts below, upon section 22, the estate descended as an impartible estate, and consequently Jagmohun and Bisheshar could not take jointly. Regarding the question which of those two should take, it was rightly decided that Jagmohun was the proper heir if he was not excluded from inheritance in consequence of insanity. The question of Jagmohun's sanity or insanity appears, so far as the talukh is concerned, to be the main question now before their Lordships. In the plaint he is described as insane, and he sued through his wife as his guardian. But the plaint, nevertheless, claimed that the estate had descended to him, and although he might be incompetent to commence the suit, or to proceed therein except by a guardian, it is no evidence, nor does it lead to any inference, that he was not the heir-at-law, and that he was excluded from inheritance on the ground of insanity; the plaint, in which Bisheshur joined, goes on to state that "the plaintiffs are sapindas, being the sixth in descent from Hirde Sah, and under the ordinary rules of the Hindu law the plaintiffs are the nearest male heirs and collaterals." Jagmohun could not have been an heir if he was excluded from inheritance. The plaint shows that Jagmohun was considered competent to inherit, and that he was not excluded by reason of insanity at the time when the succession opened, although he might have been insane at the time of the filing of the plaint.

Upon the question of his sanity many witnesses were called, and especially two medical men, Dr. Bond and Dr. Mc Reddie. Their evidence varied, and the Judge of the first Court found that Jagmohun was not so insane as to exclude him from the right of inheritance. The learned Judge states:—"I am of opinion that, from the evidence on record, the fact of Rae Jagmohun Singh's being insane so as to be declared disqualified to inherit the property in suit is not proved." Again he says, "In this case the important evidence is that of two respectable surgeons, one of whom has been produced by defendant, and the other by plaintiff. The evidence of Dr. McReddie is for defendant, and that of Dr. Bond for plaintiff. Both these gentlemen are civil surgeons, but withal their evidence is so conflicting that the conclusion to be arrived at therefrom can in no way be identical. Dr. McReddie has distinctly deposed that Rae Jagmohun Singh is insane, while Dr. Bond's evidence clearly indicates that Rae Jagmohun Singh is by no means insane; he is weak and idiotic" (he gives a native word for idotic, which probably is not accurately translated), "and does not speak, but his body and mind are all right. In order to decide the case one way or the other, it is necessary to give preference to the evidence of one party over that of the other. I have read the evidence of both these gentlemen twice over, and after a careful consideration I am of opinion that preference should be given to the evidence of Dr. Bond."

Their Lordships have carefully considered the evidence of these gentlemen, and they concur in the view expressed

by the Judge of first instance, that the preference ought to be given to that of Dr. Bond, and that Jagmohun was not so insane as to be incapable of inheriting.

Dr. Bond states that he examined Jagmohun. He says, "I have seen Rae Jagmohun Singh three or four times within the last 18 or 19 months. I do not remember the period of intervals between each visit, but my visits were not paid successively. There are no symptoms of paralysis now. It is possible he might have been struck with paralysis on a previous occasion, because his tongue is clogged. It happens in paralysis and from other causes. I did not examine him to ascertain why he lost his power of speech." Therefore Dr. Bond rather attributes his incapacity to speak to an attack which he may have had of paralysis than to insanity. On the other hand, Dr. McReddie speaks of his not replying to questions as one of the symptoms which induced him to believe that the gentleman was insane. He says, "I went to examine Rae Jagmohun Singh to Birapur a second time, as requested by the Court, on 6th June 1882, but could not see him, as he was not at Birapur then. When I saw Rae Jagmohun Singh on 29th April 1882 he was quite insane; from his appearance he had been insane probably for a long time. His age being between 60 and 70, it was very probable that he would never recover from his insanity. I could not say exactly how many years he had been insane, but probably for many years. I could not say with any certainty if he ever had any lucid intervals. He could make no difference between right and wrong, and could not manage his affairs." Their Lordships, in the course of the argument, called attention to the view of Dr. McReddie as to his not being able to distinguish between right and wrong. It appears that he gave no answers to the questions. It did not follow that he was not capable of distinguishing between right and wrong from his being incapable of answering the questions. He says, on cross-examination, "I judged his insanity from the appearance of his face and from his not replying to or understanding questions put to him, and from my experience of insane people." Then, again, to defendant's vakil he says, "When I saw Rae Jagmohun his insanity seemed to be congenital but with a healthy woman a sane child might be born." This no doubt had reference to the fact of Jagmohun's having a son then living who was sane. Looking to the evidence of those two gentlemen, their Lordships agree with the first Judge that the evidence of Dr. Bond is more reliable than that of Dr. McReddie.

Many other witnesses were called, and conflicting evidence was given on the subject of this gentleman's state of mind. Some say that he was insane; that he could not speak; that he pointed; and that if he wanted the revenue paid, he made a pointing with his hand in some way; and so he did with reference to his servants; but it did not follow from that that he was insane; he was exercising his mind upon the subject: although he did not express his thought by words, he expressed them by signs. If he was incapable of speaking, this expression of his ideas by signs did not necessarily show that he was insane, if the orders which he gave by signs as to the payment of revenue or as to other matters were not those of an insane man.

A very important matter in considering his state of mind is the manner in which he was treated by his own family. None of his family, prior to the application for a certificate of insanity, long after the right to the succession had attached, ever treated him as insane. The priests allowed him to perform all his religious duties. He performed the oblations to his father, which, according to to the religion of the Hindus, would have no beneficial effect, and ought not to have been performed by him, if he had been in a state of insanity. One of the principal reasons why according to the Hindu law insanity excludes from the right of inheritance, is, that an insane person is

incapable of performing religious duties, and because he is incapable of providing for the marriage of daughters, and other matters of that sort. But in this case this gentleman performed them all. His family never objeced ; the priests never objected. He is stated to have been present at the marriage of his daughter, although there is conflicting evidence upon that point. He himself was allowed to marry ; he was married three times to ladies whose fathers would in all probability have refused to allow their daughters to marry an insane man, and by one of them he had a son who was not insane. All these circumstances, with reference to the mode in which he was treated by his family appear to their Lordships to have considerable weight and considerable importance in deciding the question of his sanity.

The first Judge having found that he was not insano, the Judicial Commissioner upon considering the evidence came to a contrary conclusion. One point to which the Judicial Commissioner attached very great importance was the will of his father, Pirthipal, in which the father stated that he was insane. The mere statement by the father in his will that his son was insane was no evidence upon which the Court could properly act in determining the question as to the son's exclusion from the right of inheritance upon the ground of insanity.

Looking to the evidence on both sides, their Lordships arrive at the conclusion that there were no sufficient grounds for the Judicial Commissioner reversing the finding of the first Court. Drigbijai, who was the next heir, has never claimed the estate. Why, we are not told. If he believed that Jagmohun was insane, and excluded from inheritance, the estate would have belonged to him. Bisheshar, the co-plaintiff and younger brother of Jagmohun never claimed the estate upon the ground that Jagmohun was excluded from inheritance, for he joined him in the suit, and stated that he was one of the heirs. He made a mistake at the time in considering that the estate went to two sons, whereas it was impartible ; but he treated Jagmohun as a man who was competent to succeed by way of inheritance, and not as one who was excluded from inheritance, by reason of the state of his mind. Ran Bijai, the defendant sets up the insanity of Jagmohun, not at showing that he himself had a title, in consequence of the insanity, but as a technical objection. His case is "Jagmohun is insane, and not competent to inherit, and therefore I have a right to remain in possession until the right person sues me"—that is, until the sons of Drigbijai, who was the heir if Jagmohun is excluded, come forward and assert their right. But they do not come forward, nor do they claim the estate. It is therefore to be inferred that they do not consider Jagmohun to be excluded from the right to inherit.

That appears to their Lordships to dispose of the case so far as the talukh is concerned. But another question was raised with regard to some villages. It appears that some villages were purchased by Saghu Nath before her death and whilst she was in possession of the talukh, and that she had left those villages by her will to Ran Bijai, who took possession of them. Both Courts have concurred in finding that those villages were not purchased by Saghu Nath out of the profits of the estate, but that they were purchased by Ran Bijai in her name, and that he provided the money for their purchase. But even if this had not been so, Saghu Nath was merely a trespasser upon the estate, and if she trespassed upon the estate and received the mesne profits, it is not clear that a Court of Equity would earmark those mesne profits, and say that because the mesne profits must have been expended in the purchase of the villages they necessarily passed with the estate. It is not the case of a widow inheriting and purchasing property out of the assets of the estate which she takes as widow, for those have been considered by law as an augmentation of the estate ; but this is the case of a stepmother who was not entitled to succeed to the estate, and who,

if she disposed of any portion of the rents and profits, was disposing of them as profits which she had received as a trespasser.

Under these circumstances their Lordships think that Ran Bijai is entitled to the villages.

In the course of the proceedings Jagmohun died, and Jagatpal, as the eldest and, their Lordships understand, his only son, was admitted to represent him in the appeal. But the Judicial Commissioner has awarded the estate to him as if he was the plaintiff in the suit, whereas he ought to have awarded it to him as the heir and representative of his father, Jagmohun. In that respect their Lordships think that the decree of the Judicial Commissioner ought to be modified.

As regards the moveable property mentioned in the Judicial Commissioner's decree, their Lordships at the commencement of the argument asked what property was the subject of appeal, and it was stated by the learned counsel that the moveable property was not a subject-matter of the appeal. The Judicial Commissioner has awarded certain moveable property to the substituted appellant, but it is not a subject of the appeal.

Their Lordships, upon the whole, will therefore humbly advise Her Majesty that the decree of the Judicial Commissioner be varied by describing Jagatpal as the "substituted appellant, as representative of his father, Jagmohun," instead of describing him as "the minor plaintiff," and, subject to such variation, that the decree be affirmed.

The appellant, Diwan Ran Bijai, must pay the costs of his appeal.

In the appeal of Bisheshar their Lordships will humbly advise Her Majesty that that appeal be dismissed. The appellant must pay the costs of both the respondents.

Appeals dismissed.

Solicitors for the appellant Diwan Ran Bijai : Messrs. *Watkins & Lattey.*

Solicitors for the appellant Rae Bishéshar Baksh : Messrs. *Barrow & Rogers.*

Solicitors for the respondent and cross-appellant, Rai Jagatpal: Messrs. *Young, Jackson & Beard.*

1st May 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

JOGENDRO BHUPATI HURROCHUNDRA MAHAPATRA, A MINOR UNDER GUARDIANSHIP, AND OTHERS * ... *Defendants,*

and

NITYANAND MAN SING ... *Plaintiffs.*

On Appeal from the High Court in Bengal.

Hindu Law—Inheritance—Impartible Estate—Mitakshara Law—Right of illegitimate son, among Sudras—Survivorship.

For determining who is to be heir to an impartibe estate, the same rules apply which also govern the succesion to partible estates though the estate can be held by only one member of the family at a time.

Under the Mitakshara, among Sudras, where a father left a son by a wedded wife, and a illegitimate son, the ordinary rule of survivorship incidental to a family co-parcenary was held to apply ; and the illegitimate son having survived the legitimate, was held entitled by survivorship to succeed to the family estate, which was impartible and appertained to a raj, on the death of his brother without male issue.

Sadu v. *Baiza*(1) referred to, and approved.

APPEAL from a decree (2nd June 1885) of the High Court, affirming a

* 17 Cowell's Ind. Ap., 128 ; 18 Calc., 151.
(1) I. L. R., 4 Bom., 37.

decree (29th March 1883) of the Subordinate Judge of Cuttack.

The suit was brought for a declaration of the plaintiff's title to the raj and impartible zemindari of Killa Sukinda in the Cuttack district, the plaintiff claiming as the surviving son of the last Raja but one, by a lawfully married though inferior wife, married according to what was known in the district as the "phulbibahi" form of marriage (2).

Both the Courts below found that the plaintiff was an illegimate son; and the the question now raised was, whether among brothers of a Sudra family a "dasiputra," or illegitimate son by a female servant, as both the Courts found the plaintiff to be, would be a coparcener with his legitimate brother in the ancestral estate, and would take by survivorship.

The zemindari of Sukinda was one of several estates, known as killajat zemindaris, the owners occupying forts. By Regulation X of 1800 these estates were excepted from the operation of Regulation II of 1793, and it was declared that where a custom of impartibility was shown to have existed, they should continue to descend to a single heir without division. The impartibilty of Sukinda was not in dispute and the zemindari was not one of those similar estates which were by the 13th section of Regulation XIII of 1805 excepted from the operation of that Regulation, and placed under "the Superintendent of the Tributary Mehals in zilla Cuttack." The plaintiff claimed that a precept requiring possession of the zemindari to be delivered to him should be issued to the Collector, who had attached the raj and zemindari under Regulation V of 1799, section 5, and Regulation V of 1827, on the death of the last Raja without male issue.

The defendants were at first the three widows of the last Raja who died on the 5th March 1878, leaving only a daughter. The three widows set up the defence that Jogendra Bhupati having been adopted by the late Raja on the 18th April 1887 was the rightful successor. He accordingly was made a defendant (as also was Abhin Roy Singh, another illegitimate son of the former Raja), and he now, by Rani Komola Patmadei, one of the three Ranis, was appellant. The defendants also alleged the illegitimacy of the plaintiff, he having been born to the last Raja but one, of what was termed a dasi or female servant, so that according to their case, even if the adoption were not proved, the heirs would be the widows and daughter of the deceased, and not the plaintiff.

Issues having been fixed on the above allegation, the Subordinate Judge of Cuttack decreed in favour of the plaintiff. As to the law, he gave his opinion thus:—

"Under the Hindu law, both brothers were on the death of their father, jointly entitled to the disputed property, and that they did not then so succeed was owing only to a special custom, in the family, under which the succession was restricted to one. The possession, under the circumstances, of the legitimate brother could not possibly make what was joint his separate property, nor could it extinguish the title of the plaintiff. The plaintiff's title was, I hold, simply in abeyance during the period of such possession, and as the legitimate brother is now dead, there is nothing, as far as I can see, to prevent the plaintiff from asserting that title and claiming the property as his on the ground of survivorship, and I would accordingly so find.

"Subject, of course, to my finding on the next issue, the plaintiff certainly has that right; for the Mitakshara, I observe, gives one in his position preference over all but the immediate male descendants of the deceased co-parcener."

The next issue was as to the adoption, which was negatived.

The judgment of the High Court (GARTH, C. J., and BEVERLEY, J.,), which is reported in the Indian Law Reports, 11 Calc., at page 703, affirmed the decision of the Court below. The Judges held that the plaintiff was so far a co-

(2) See the third note at page 61 of Macnaghten's Hindu Law, Chap. V.

parcener with his legitimate mother in the joint impartible estate, as to be entitled, on his death without male issue, to succeed in virtue of survivorship.

On this appeal

Mr. *C. W. Arathoon*, for the appellant, argued that the High Court was wrong in deciding that an illegitimate son was entitled to take by survivorship under the Mitakshara, which, he contended, left such a son to take a share only by the father's permission. Thus the illegitimate son acquired at birth no right to a share as a legitimate son did : Mitakshara, chapter 1, section 12. The plaintiff had also failed to prove the allegation made in his plaint that he lived jointly with his brother, the late Raja, till his death. Indeed, as found by the Subordinate Judge they lived apart, and by the Hindu law the plaintiff would never have been entitled jointly with the late Raja to the family estate, even if it had not been impartible. There was no sufficient authority for holding that an illegitimate son could take by survivorship. He referred to *Krishnayyan* v. *Muttusami* (1) as showing that the conception of co parcenership pre-supposed sapinda relationships and a legal marriage. He also referred to *Nissar Murtojah* v. *Dhunwant Roy* (2), *Sartaj Kuari* v. *Deoraj Kuari* (3), *Sadu* v. *Baiza* (4), *Ranoji* v. *Kandoji* (5), and to Dattaka Chandrika, chapter 5, section 31.

MR. *T. H. Cowie, Q. C.*, Mr *R. V. Doyne*, Mr. *J. D. Mayne*, for the respondent Nityanand, were not called upon.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR R. COUCH :—

The plaintiff in this case sued to established his title to the raj and zemindari of Killa Sukinda in the district of Cuttack. The plaintiff's father, Raja Upendra Bhupati, died on the 23rd October 1857, leaving a son, Nundokishore, by his Rani Nilmoni ; a son by a woman called Rambha, the plaintiff ; and a third son, Abhin Roy Singh, by woman called Asin. He was succeeded in the raj by his legitimate son Nundkishore. Nundkisore died on the 5th March 1878, leaving no son, but leaving three widows—Ranis—and a daughter by one of them. The plaintiff claimed to succeed to Nundkishore on the allegation that his mother was the lawful phulbibahi wife of Upendra. It has been found by the Subordinte Judge and by the High Court that his mother Rambha was not the lawful wife as alleged by the plaintiff, and that the plaintiff must be treated as the illegitimate son of Upendra. It has also been found that raja Upendra and his family were Sudras.

On these facts the question which has been urged before their Lordships arises, viz., whether according to the rules of Hindu law, having regard to the fact, which was admitted, that the law of the Mitakshara is applicable, the plaintiff is entiled by right of survivorship to succeed to the raj upon the death of his half-brother Nundkishore, the letigimate son.

Now it may be well first to dispose of a point arising out of the fact that this is an impartible raj, which it is admitted to be. According to the decision in the *Shivagunga* case (6), which, as their Lordships understand, is not now disputed, the fact of the raj being impartible does not affect the rule of succession. In considering who is to succeed on the death of the Raja, the rules which govern the succession to a partible estate are to be looked at, and therefore the question in this case is, what would be the right of succession, supposing instead of being an impartible estate it were a partible one ?

The case was decided in the plaintiffs' favour by the Subordinate Judge, and

(1) I. L. R., 7 Mad., 407.
(2) Marshal, 609.
(3) L. R., 15 I. A., 51 ; I. L. R., 10 All, 272.
(4) I. L. R, 4 Bom., 37.
(5) I. L. R., 8 Mad, 557.
(6) 9 Moore's I. A., 539.

there was an appeal to the High Court, in which the learned Judges of the High Court, after noticing certain decisions that had been quoted, held, on the authority of the case of *Sadu* v. *Baiza* (1) decided by the Bombay High Court, that the plaintiff was entitled to succeed to the Raj.

The case in the Bombay High Court appears to have been very similar to the present. There the two sons, the legitimate and the illegitimate, survived the father, and upon the death of the legitimate son the question was whether the illegitimate son was entitled to succeed to the whole of the estate. The Mitakshara in Chapter I, section 12, deals with the rights of a son by a female slave in the case of Sudras, which is the present case and the first verse is :—"Even a son begotten by a Sudra on a female slave may take a share by the father's choice. But if the father be dead, the brethren should make him partaker of the moiety of a share, and one who has no brothers, may inherit the whole property in default of daughter's sons." The second verse is :—"The son begotten by a Sudra on a female slave obtains a share by the father's choice, or at his pleasure. But after [the demise of] the father, if there be son of a wedded wife, let these brothers allow the son of the female slave to participate for half a share ; that is, let them give him half (as much as is the amount of one brother's) allotment. However, should there be no sons of a wedded wife, the son of the female slave takes the whole estate, provided there be no daughters of a wife, nor sons of daughters. But if there be such, the son of the female slave participates for half a share only." Now it is observable that the first verse shows that during the life-time of the father, the law leaves the son to take a share by his father's choice, and it cannot be said that at his birth he acquires any right to share in the estate in the same way as a legitimate son would do. But the language there is very distinct, that "if the father be dead the brethren should make him partaker of the moiety of a share." So in the second verse the words are that the brothers are to allow him "to participate for half a share," and later on there is the same expression :—"The son of the female slave participates for half a share only." The learned Chief Justice of the Bombay High Court notices these passages, and after observing that the Mitakshara makes no special provision for the case of the death either of the legitimate or of the illegitimate son after the death of their father and before partition, he says :—"But the effect of what he has said "being, as we think, to create a co-parcenary between the son of the wedded wife and the son of the female slave, we understand him as tacitly leaving such a case to the ordinary rule of survivorship incidental to a co-parcenary, and that accordingly the survivor would take the whole if the other died without leaving male issue." It appears that in the course of the argument the question was put to the learned Counsel by the Chief Justice as to what would be the case if, instead of the legitimate son being the one who had died, the illegitimate son had died, and the legitimate son survived, and it was apparently admitted that in such a case the legitimate son would take the share of the illegitimate son by survivorship. If that be so, their Lordships cannot see any reason for holding that the illegitimate son would not take by survivorship in the case of the death of the legitimate son. It cannot be a different right—in the one case a right by survivorship, and in the other, no right by survivorship. There is not only the judgment of the Chief Justice and two other Judges of the High Court of Bombay, but the case came before them by appeal, there being a difference of opinion between the two Judges before whom it came in the first instance, and one of those learned Judges was a Hindu, Mr. Justice Nanabhai Haridas, who carefully examined the authorities, and came to the same conclusion. It is not necessary

(1) I. L. R., 4 Bom., 37.

to quote more of his judgment than this passage :—"I would therefore hold that the plaintiff and Mahadu, being male members of an undivided Hindu family governed by the Mitakshara law, the former"—that is the illegitimate son—"upon Mahadu's death without male issue, became entitled to the whole of the immoveable property of that family, there being no question about any moveable property in this special appeal." Therefore their Lordships have before them the well-considered judgment of the High Court of Bombay upon this question, as well as that of the High Court at Calcutta, and it appears to them that the learned Judges of those Courts put a right construction upon the law as stated in the Mitakshara.

Their Lordships are of opinion in the present case that the plaintiff was entitled to succeed to the raj by virtue of survivorship, and that the judgment of both the lower courts should be affirmed. They will therefore humbly advise Her Majesty to dismiss the appeal. The appellants will pay the costs of it.

Appeal dismissed.

Solicitors for the appellant : Messrs. *Wrentmore & Swinhoe.*

Solicitors for the respondent : Messrs. *T. L. Wilson & Co.*

12th July 1890.

PRESENT :

Members of the *Judicial Committee.*—The Right Hon Lord Watson, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

RADHA PRASAD SINGH * ... *Defendant,*

and

LAL SAHAB RAI AND OTHERS *Plaintiffs.*

On appeal from the High Court for the North-Western Provinces.

* 17 Cowell's Ind. Ap., 150 ; 13 All. 53.

Civil Procedure Code, ss. 13, 43—Res judicata—ascertainment of a defendant's liability by an operative decree after the declaration of his general liability in a prior decree—His death in the interval between such decrees, and effect, in execution, of his representatives not being parties to the operative one—Mesne profits—Parties—Non-joinder.

The dismissal of a suit to have set aside an order made in one district, for the sale of the plaintiff's interest in property therein, is not a bar under ss. 13 and 43, Civil Procedure, to another suit to obtain relief against an order in another district for the sale of property therein belonging to the same plaintiff, or of other property not included in the order or sale against which the dismissed suit was directed.

An operative decree, obtained after the death of a defendant, ascertaining for the first time, the extent and quality of his liability, the latter having been already declared in general terms in a prior decree, cannot bind the representatives of the deceased, unless they were made parties to the suit in which such ascertainment was pronounced.

The question of the amount of mesne profits due, they having been decreed together with the possession of land in 1856, against a body of village proprietors, was not decided till 1877. In that year an operative decree was made against the village proprietors whose names appeared as defendants in the suit of 1856, and in 1881 execution proceedings were taken against the present plaintiffs, attributing to them the character of heirs the original judgment-debtors.

Held, that the right to execute for mesne profits was not wholly dependent upon whether or not the ancestor of the present plaintiffs had been a party to the decree of 1856, which did not ascertain the amount of the profits, or determine whether the then defendants were liable jointly or severally, in respect of the wrongful possession.

Before the issue of a money decree which was capable of being put into execution, the alleged ancestor of the present plaintiffs was dead, and the latter, not having been parties to that decree, were not liable under it (1).

CONSOLIDATED appeal from two decrees (4th May 1887) of the High Court, one

(1) S. 255 of Act X of 1877) enacted that if the decree be for mesne profits, or any other matter the amount of which in money is to be subsequently determined, the property of the judgment debtor may, before the amount due from him under the decree has been ascertained, be attached as in the case of an ordinary decree for money.

of which reversed a decree 21st July 1885) of the Subordinate Judge of Gházipur and decreed the claim of the present respondent. The other dismissed a cross appeal preferred by this appellant to the High Court.

The plaintiffs, in the suit out of which this appeal arose, and their predecessors in estate, were pattidárs of village Narhi, in the Ghàzipur district, their village having originally comprised mauza Umarpur, which, about the year 1840, was cut away from Narhi by the river Ganges, reappearing some years after as diyara, or alluvial land, on the opposite, or Shahabad, side of the river. The defendant was the Mahárája Radha Prasad Singh, the proprietor of taluk Majharia, in the Shahabad district. The litigation which took place about Umarpur diyara, between the defendant's father and the proprietors of Narhi, 264 in number, is stated in the judgment of the Sadar Diwani Adalat of 29th November 1859, reported in the S. D. A. reports for that year. The result was a decree in favour of the Mahárája, for the possession, with mesne profits, of about 1,589 bighas, and he obtained possession in 1874. Meantime, an order of the Government had placed Umarpur diyara within the juris diction of the Shahabad district. On the 1st March 1877 a decree was made by the Shahabad Court fixing the amount of mesne profits and costs at Rs. 10,69,667, to satisfy which, an order was made in June 1878, also by the Shahabad Court for the attachment of the interest of the decree debtors in Umarpur. On the 23rd June 1880, the present respondents filed their plaint against this appellant (who had succeeded his father as talúkdár) in in the Court of the Subordinate Judge of Shahabad to have set aside the sale of their share in Umarpur, on the ground that neither they, nor any of their ancestors, were judgment-debtors in the decree held by the Mahárája. On the 21st July 1881, the Subordinate Judge dismissed that suit, with costs on grounds which he stated thus :—

"The case having come on to-day, an application has been made that the plaintiffs being residents of another district on the other side of the river could not attend, for what reason it was not known, and it prayed for one month's time, and for the appointment of another date. This is not a sufficient cause. Two weeks have passed since the framing of the issues and the plaintiffs have done nothing towards the conduct of their case. Now one month's time cannot be allowed. The case should be dismissed for want of evidence."

The case having thus terminated in Shababad, afterwards, on the 10th March 1881, the District Judge of Gházipur made an order, on the application of the Mahárája, for execution of the decree of 1877, by attachment of lands in Narhi. Objections having been disallowed, the plaintiffs in this suit, describing themselves as "sons of Jaiparkash," who, in fact, was the son of Jhanguri, brought this suit on 3rd March 1882. They claimed to be entitled as village shareholders to shares in Narhi, asli and dákhili, valued at Rs. 74,888, alleging that neither they nor their ancestors were liable for the mesne profits. The Mahárája's defence was that they were. Execution proceedings had all along been taken against Jhanguri Rai, son of Achraj, as well as other proprietors; and it was contended that it was Jhanguri's son, Jaiparkash, whom the plaintiffs represented. The defence also relied on the dismissal of the suit which had been brought in 1882 in the Shahabad Court, as barring this suit; and on this latter ground the suit was, in the first instance, dismissed by the Subordinate Judge of Gházipur, whose decree, however, was on appeal reversed by the High Court, the suit being remanded for hearing on the merits.

On that remand the first Court held that the respondents' "ancestor" or grandfather, Jhanguri, had been a defendant in the suit in which this appellant's decree had been obtained, and that, therefore, his share of one moiety of the properties in suit was liable to be sold in execution of that decree, but that the

other half, which under Hindu law belonged to the respondents as grandsons of Jhanguri, was not so liable; and the first Court, accordingly, gave the respondents a decree for the latter half, and declared the other half liable to sale in execution of this appellant's decree.

Against that decree an appeal and cross appeal were preferred, on which the High Court remanded the suit for the determination and report of the first Court on three issues which were sent down for the purpose of ascertaining more perfectly whether Jhanguri the respondents' grandfather, was a defendant in the suit and whether process was served on him, and whether he or his son, Jaiparkash, the respondents' father, or the respondents were parties, at any time, and when, to the execution proceedings prior to the 12th July 1874, the date on which possession was obtained by this appellant of the decreed lands in respect of which the mesne profits were demanded.

On this remand, the first Court took further evidence, and reported that it was shown that Jhanguri, the respondents' grandfather, was at the time of the institution of the suit in which this appellant's decree was obtained, a coparcener, and in possession of the lands decreed; but that this appellant, on whom the High Court had cast the burden of proof, had not satisfactorily shown that any process issued to Jhanguri in that suit, or that any proceedings in execution had been taken against the respondents, or their ancestor, before the 1st of March 1881.

Objections and cross objections were taken to this report, which was returned to the High Court, and the case was reargued.

The Judgment of the High Court, delivered by STRAIGHT, J., concluded thus:—

"To sum the matter up, it comes to this, that the defendant says because there was a mention of the name of Jhanguri, who had a share in this particular village in the year 1856, and because all the co-sharers must be presumed to have been cited in that suit, and becaus a Jhanguri appears in the decree and in the subsequent execution proceedings, therefore it must be presumed that that Jhanguri is the grandfather of the present plaintiffs. On the other side, the plaintiffs say, and I think with justice, that it is by no means clear that Jhanguri was in existence in the year 1856; there is no proof that he was served with process in that suit before the decree was passed, or that he was subsequently made a party to any proceedings in execution of the decree: and in this respect the contention is supported more or less by the absence from the decree of any parentage of Jhanguri, and the same remark applies to the execution proceedings, so that under these circumstances it does seem to me to be asking us to take a leap in the dark to come to the conclusion upon such materials that this particular Jhanguri whose name appeared in that decree must necessarily be the Jhanguri the grandfather of the plaintiffs in the present suit. It was urged for the defendant that by the name of Jhanguri appearing in or being mixed up with the names of the other members of the family who were cited in this suit, it must follow that he was the Jhanguri the ancestor of the plaintiffs. I confess it would be going a great deal too far, where there are so many Jhanguris appearing in the decree, and so many repetitions of other names, to come to the conclusion that he was the person the defendant says he was. I think I have said sufficient to explain why I think that there is no clear, satisfactory, or convincing proof which would warrant me in allowing the defendant to proceed with the execution of the decree against the property which is now in the possession of the present plaintiffs."

The decree of the High Court was accordingly in favour of the plaintiffs.

Mr. *R. V. Doyne*, and Mr. *J. D. Mayne*, for the appellant, referred to the decision of the Subordinate Judge of Shahabad of 21st July 1881, dismissing the plaintiffs' suit in that Court; and they referred to ss. 13, explanation 4, and 43 of the Civil

Procedure. They also adverted to the evidence relating to Jhanguri having been a party to the decree of 14th April 1856. They contended that he had remained a pattidar and coparcener of Narhi, and that the entire interest of the plaintiffs in their ancestral lands was liable to attachment in execution of the decree.

Mr. *J. Graham*, Q. C., and Mr. *H. Cowell* for the respondents, argued that they were not affected by the decree of 1856 or bound by any of the proceedings taken under it. The proceedings taken by the defendant on the 1st March 1881 were not preceded by any judicial finding that the present plaintiff represented the real judgment-debtors. The decision of the Shahabad Court had determined none of the issues in the present case and did not constitute *res judicata*.

Mr. *R. V. Doyne* replied.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD WATSON :—

The suit in which these consolidated appeals are taken was instituted by Lal Sahab Rai and others, the respondents, before the Subordinate Judge of Ghazipur in March 1882, for the purpose of obtaining relief against the attachment and sale, at the instance of the Maharaja Radha Prasad Singh, the appellant, of certain shares of immoveable estate in taluka Narhi and elsewhere, in satisfaction of a judgment debt alleged to be due from their ancestor Jhanguri Rai. The respondents are the six sons of Jaiparkash, the only son of Jhanguri, who was one of the five sons of Achraj Rai, a pattidar of Narhi ; and the shares sold in execution by the appellant were the ancestral property of the respondents, being one-fifth of the interest which belonged to their great-grandfather, Achraj Rai.

In order to appreciate the relative position of the litigants and the merits of the controversy raised by these appeals, it is necessary to revert to the legal proceedings in which the decrees were obtained which formed the warrant for the attachment and sale against which relief is sought.

Taluk Majharya, now belonging to the appellant, and taluk Narhi, already mentioned, are situated on opposite banks of the Ganges, Majharya being on the Shahabad and Narhi on the Ghazipur side of the river. Disputes arose between the proprietors of these two taluks with respect to the ownership of 1,589 bighas of alluvial land which had been deposited by the action of the river on its Shahabad side, the proprietors of Narhi, who appear to have been in possession, alleging that the disputed land was a reformation upon a denuded area which originally formed part of their taluk. Consequently the Maharaja Bukhsh Singh, father and immediate predecessor of the appellant, brought, in 1855, an action against 264 defendants pattidars of Narhi before the Civil Court of Ghazipur for recovery of the disputed bighas and for mesne profits. The judicial record of that action perished in the Mutiny, but copies of the written statement lodged for 57 pattidars who appeared to defend, of their petition for leave to file documents, and of the ultimate decree passed by the Civil Judge of Ghazipur, have been produced and admitted without objection in this suit.

The decree, which is dated the 14th April 1856, assigned the disputed land to the Maharaja, and fixed its boundaries; and also found that he was "entitled to mesne profits from the date of the Deputy Collector's order until he recovers possession." An appeal was taken by some of the defendants to the Sadar Court, who, on the 29th November 1859, varied the boundaries fixed by the Subordinate Judge favourably to the defendants, and directed "that mesne profits be adjusted accordingly." The Maharaja presented a petition for review, upon which the Sadar Court, on the 7th April 1860, modified its previous decision with respect to boundaries, in his favour. An appeal was then taken by the defendants to this Board, which was dismissed on the 31st March 1870 for want of prosecution.

It is unnecessary to notice farther these proceedings by way of appeal, because the decrees pronounced in them had reference merely to the extent of the land which the Maharaja was entitled to recover, and did not disturb the general finding of the Subordinate Judge of Ghazipur in regard to mesne profits.

It having been judicially determined that the disputed land formed part of taluk Majharya, the action was, after the dismissal of the appeal to this Board, transferred to the Court of Shahabad, the district in which that taluk is situated. In 1874 the Maharaja was put in possession of the land in pursuance of the decree of the Sadar Court; but the question of mesne profits was not finally disposed of until 1877. On the 1st March 1877 the Subordinate Judge issued an order, which has become final, fixing the amount of mesne profits and costs due to the appellant as successor of the Maharaja at Rs. 10,69,667, for which he gave decree jointly against all the parties whose names then appeared as defendants to the action.

In June 1878 an order issued from the Shahabad Court for attachment of the interests of the judgment-debtors in mahal Umarpur, in satisfaction of these mesne profits and costs of suit. In the course of the proceedings the respondents applied to have a 2 ganda 2 kauri 2¼ dant share, which they alleged to belong to them, struck out of the inventory; but their objection was overruled, and the property sold in execution. The respondents then brought a regular suit for relief against the attachment and sale, in which they alleged that their share of the mohal was ancestral property, and that neither they nor their ancestors were judgment-debtors in the decree executed, or in any way liable under it. The suit was resisted by the appellant, on the grounds that the respondents had no interest in Umarpur, and that they were not the representatives of Jhanguri and Jaipargash. After adjustment of issues the action was dismissed with costs, on the 21st July 1881, because of the respondent's failure to adduce evidence in support of their allegations; and the respondents took no steps to set aside that order, which has consequently become final. It would hardly have been necessary to refer to these proceedings in execution, had it not been for the fact that the appellant relies upon them as constituting *res judicata* in the present suit.

On the 1st March 1881, the appellant instituted proceedings for execution in the Court of Ghazipur against property of the judgment-debtors situated in that district, stating in his application (1) the names of the judgment-debtors, and (2) the names of those against whom his decree was sought to be executed. Amongst the former there occurs the name of "Chakauri Rai," which is synonymous with "Jhanguri Rai;" and amongst the latter the names of all the respondents, who are described as "sons of Jaipargash Rai, deceased heirs of Chakauri Rai, grandson of Achraj Rai." So that in these proceedings the appellant rightly attributed to the respondents the character of heirs of Jhanguri and Jaipargash, which he denied that they possessed in his previous execution suit. The respondents lodged objections, praying for release of their interest, on the ground that it belonged to them, "and they were in possession thereof, and the judgment-debtors had no concern with it;" but these objections were repelled by the Subordinate Judge of Ghazipur, on the 10th March 1881, in respect of their having been once before raised by the same persons in the Court of the Sub-Judge of Shahabad and there disallowed.

On the 3rd March 1882 the respondents brought the present suit, in which there has been an unusual amount of litigation. Their cause of action is thus stated in the plaint:—"The Judgment-debtors have no connection or concern with this property, nor are the plaintiffs or their ancestors debtors under the decree under execution." In his written statement the appellant averred that the decree of 14th April 1856, and subse-

quent proceedings in execution, were taken against Jhanguri Rai and his son, Jaipargash Rai, and that these persons being judgment-debtors, the property, being ancestral, was liable to attachment for their debt. He also pleaded that, according to the provisions of sections 13 and 43 of Act X of 1877, the claim put forward by the respondents was no longer cognizable, inasmuch as it had already been adjudicated upon, in a regular suit, before the District Court of Shahabad.

The cause was tried upon six issues, which need only be noticed in so far as they relate to the main question raised in these appeals :—

"III. Is the claim of the plaintiffs barred by sections 13 and 43 of the Code of Civil Procedure ?

"IV. Are the plaintiffs or their ancestors liable for the judgment debt, and is the property liable to sale or not ?"

The Subordinate Judge, upon the 21st December 1882, sustained the appellant's plea in bar, and dismissed the suit with costs. His decree was carried by appeal to the High Court of the North-Western Provinces, by whom it was reversed on the 9th May 1885, and the case remanded to the Sub-Judge for disposal on the merits. As the decision of the High Court on that occasion has been impeached in these appeals, it may be convenient to state here that, in the opinion of their Lordships, it was well founded. None of the questions, either of fact or law, raised by the pleadings of the parties, was heard or determined by the Judge of the Shahabad Court in 1881 ; and his decree dismissing the suit does not constitute *res judicata* within the meaning of the Civil Procedure Code. It must fall within one or other of the sections of Chapter VII of the Code ; in the present case it is immaterial to consider which, the severest penalty attached to such dismissal in any case being that the plaintiff cannot bring another suit for the same relief. Assuming that the respondents are barred from seeking relief against the attachment and sale of their interest in mahal Umarpur, the decree of 21st July 1881 does not disable them from claiming relief against the attachment and sale of their interest in Narhi, or in any other property which was not included in the Judicial sale of Umarpur.

Acting under the remit made to him by the High Court, the Subordinate Judge, on the 21st July 1885, found as matter of fact that the respondents' ancestor, Jhanguri Rai, was defendant in the suit of 1855, and was one of the parties decreed against, as liable for mesne profits by the judgment of the 14th April 1856. Upon that finding the learned Judge dismissed the respondents' suit with respect to one-half of the interests claimed by them, but sustained it with respect to the other half, which he held to have been vested, by force of Hindu law, in their father, Jaipargash, who was admittedly not made a party to the proceedings of 1855 and 1856 at the instance of the Maharaja. Against that decision both parties appealed to the High Court, who, on the 5th August 1886, made an order remanding the case for the trial of the following points, and distinct findings upon them :—

(1) Was Jhanguri Rai, the grandfather of the plaintiffs, a co-sharer or in possession of the lands to which the litigation of 1855 related, and which ended in the decree of 14th April 1856 ?

(2) If so, was any process of Court in that litigation issued or served upon him ?

(3) When did the defendant first seek to execute his decree against the plaintiffs, either at Ghazipur or Shahabad ; and were they or any of their ancestors, *viz.*, Jaipargash or Jhanguri, parties to the execution proceedings which ended in possession of the property in suit, to which the decree of 1856 related, being given to the defendant by proceedings which ended on the 12th July 1874 ?

Their Lordships entertain serious doubts whether the Court was justified in making the remand, by the provisions of section 566 of the Civil Procedure Code. All the points remitted were substantially covered by the issues which had been previously sent for trial in the Court below; and it appears to their Lordships that there were sufficient materials for the decision of the case, to which little or nothing has been added by the evidence taken on remand.

On the 20th November 1886 the Subordinate Judge found upon the several points referred to him by the High Court. Upon the first point he found that Jhanguri was a coparcener and in possession at the dates specified; upon the second, that the issue of process to Jhanguri was not proved; and, upon the third, that it was not clearly proved that Jhanguri was a party to the proceedings in execution which resulted in possession of the disputed property being given to the Maharaja in the year 1874.

These findings, together with the oral evidence taken on remand, were duly submitted to the High Court, who, on the 4th May 1887, reversed the Subordinate Judge's decree of the 21st July 1885, and gave judgment for the respondents in terms of their plaint with costs. The decision of the Court was delivered by Mr. Justice Straight, Mahmood, J., concurring. Their Lordships agree with the conclusion at which these learned Judges arrived, although they are unable to concur in all the reasoning upon which it is based. Mr. Justice Straight says, with reference to a statement made by the respondents' pleader on the 27th September 1882, "It seems to me, so far as the plaintiffs were then concerned or are concerned now, the sole position for which they have contended was that their ancestor, Jhanguri, was not the judgment-debtor under the decree of the 14th April 1856." And the learned Judge adds "The whole matter, therefore, between the parties resolves itself into the single question of fact,—Was or was not Jhanguri, the ancestor of the plaintiffs, a judgment-debtor under the decree of the 14th April 1856?" The statement in question was not intended to be, and was not, a rehearsal of the whole facts relied on by the plaintiffs, but was made by their pleader in answer to specific questions put to him by the Subordinate Judge; and the issues which went to trial were not confined to that statement, but raised the general question whether the ancestors of the plaintiffs were judgment-debtors under the decree by virtue of which the respondent had attached and sold their interest in the lands of Narhi and others. That misconception of the real issue probably led to the remand of the 5th August 1886, and it certainly induced the High Court, in its ultimate decision upon the merits of the case, to deal with many points which do not appear to their Lordships to require consideration.

The respondents endeavoured to prove that Jhanguri Rai pre-deceased his father Achraj, some time before the year 1840; but their evidence on that point does not appear to be reliable, and their Lordships are disposed to think that the Subordinate Judge was right in holding that Jhanguri was a coparcener in possession at the date of the decree of 1856, and was alive for many years afterwards. The terms of that decree, as well as of the written statement for the defendants, and of their petition for leave to file documents,—in all of which the name of Jhanguri occurs in connection with the whole other descendants and heirs of Achraj Rai then in life,—afford *primâ facie* evidence that he was a party to the suit, and was included in the decree itself. Whether that inference is displaced by antecedent evidence derived from the pattidári papers of 1840, their Lordships do not think it necessary to determine. In their opinion, it is an obvious mistake to assume that the right of the appellant to take the respondent's land in execution for mesne profits wholly depends upon the fact of their ancestors being a party to the decree

of 1856. None of the defendants were, by that decree, made judgment-debtors for mesne profits, in the sense that their property could be attached by virtue of it. The decree, no doubt, found that defendants in the suit were accountable for mesne profits and by that finding they were bound; but it did not ascertain the amount of such profits or determine the important question whether the defendants were liable jointly or severally in respect of their wrongful possession. There was no adjudication upon any of these matters until March 1877, when for the first time the appellant obtained a money decree which was capable of being put into execution. But, according to the testimony of the appellant's own witnesses, Jhanguri died at least twelve months before that date. It does not clearly appear whether his son, Jaipargash, was then alive; but it is matter of certainty that neither Jaipargash nor the respondents were made parties to the suit in room of Jhanguri.

An operative decree, obtained after the death of a defendant, by which the extent and quality of his liability, already declared in general terms, are for the first time ascertained, cannot bind the representatives of the deceased, unless they were made parties to the suit in which it was pronounced; and their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court ought to be affirmed.

The appellant must pay to the respondents their costs in these appeals.

Appeal dismissed.

Solicitors for the appellant:—Messrs. *Burton, Yeates, Hart,* and *Burton.*

Solicitors for the respondents:—Messrs. *Ranken, Ford, Ford,* and *Chester.*

2nd 3rd 4th and 26th July 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

KALI KISHORE DUTT GUPTA MOZUMDAR * } *Plaintiff,*

and

BHUSAN CHUNDER *alias* BEPIN CHUNDER DUTT GUPTA } *Defendant.*

On Appeal from the High Court in Bengal

Evidence—Burden of proof—Right to begin—Proof of loss, and admission of secondary evidence, of a document alleged to have been executed—Evidence of execution of documents—Civil Procedure Code, ss. 141, 142, and 568.

A suit for possession by right of inheritance was brought by a claimant alleging himself to be the heir against, the alleged adopted son of the last male owner denying that an adoption, purporting to be made by the widow, had been duly authorised by the deceased. The Court of first instance called upon the defendant to prove his title as a son by adoption, notwithstanding that the plaintiff was out of possession, and could not have succeeded, in the event of the defendant's failure to prove it, without first proving his own title as collateral heir by descent: thus, in effect, proposing to make the establishment of the plaintiff's title depend upon the failure or success of the defendant in proving the adoption.

The High Court pointed out the error of this proceeding and the Judicial Committee affirmed its judgment, concurring also in its finding that the adoption had been proved.

It was found also that the loss of the *anumati-patra* had been established; so that secondary evidence of it was receivable.

APPEAL from a decree (13th August 1887) of the High Court, reversing a decree (27th July 1886) of the Subordinate Judge of Goalpara.

The question on this appeal was as to the right of the plaintiff, appellant, to

* 17 Cowell's Ind. Ap. 159; 18 Calc., 201.

succeed, as the nearest collateral heir, to a five-anna share in the zemindari of parganna Taria, in the Goalpara district. The last male owner of the estate, Jagat Chunder Dutt Gupta, died childless on the 5th April 1867, leaving as his heiress his widow Bamasunderi, who till her death on the 7th July 1877 was in possession of his estate. Under an alleged power from him, she had adopted the respondent, who was originally named Bhusan Chunder, but on adoption received the name of Bepin Chunder Dutt.

A pedigree table was appended to the plaint, and on it the plaintiff relied, as showing that Mukhtaram Dutt was the paternal greatgrandfather of both the plaintiff and Jagat Chunder. The defendant, then a minor, defending by his guardian Gunga Narain Dutt Gupt, denied its correctness; alleging also that he had been validly adopted by Bamasunderi on 28th June 1877, under a power executed by her husband on 17th March 1867. In addition to alleging the execution of an *anumati-patra* on that date, the written statement alleged that the power as fully stated in, and evidenced by, Jagat Chunder's will executed two days after, on the 7th Cheyt 1877. The minor became of full age while this appeal was pending. The Courts below came to conclusions directly opposed, the one to the other, on the questions raised, which were—first, whether the plaintiff was or was not the next reversionary heir, and as such entitled challenge the title of the defendant, who was in possession; secondly, whether the adoption was valid or not in regard to the authority for it. As to this last, the Subordinate Judge found the execution of the *anumati-patra*, said to have been executed by Jagat Chunder to Bamasunderi, when he was about to depart on a pilgrimage to Banares, had not been proved. He refused to allow to remain on the record a copy tendered, and also rejected the evidence of the will.

As to this the High Court (TOTTENHAM and BEVERLEY, J J.), in one of two interlocutary orders of 21st July 1887, said:—

"There is sufficient oral evidence on the record, if belived, to show that Jagat Chunder did execute an *anumati-patra*. There is evidence to show that after the death of Jagat Chunder, amongst the papers found in this house and taken possession of by the Police under the direction of the Magistrate, there was found an *anumati-patra* purporting to be signed by Jagat Chunder. There is evidence that this paper came into the possession of the Civil Court, and the copy in question is proved by the witnesses examined before the Lower Court in 1885, to have been made from an original then in Court. That an original did exist, and that it was returned to one Pudma Lochun, who was Manager of the estate left by Jagat Chunder, there is also evidence to show. The case set up by the defendant is that the document was stolen. On this fact the evidence is decidedly vague and inconclusive; but we think that there is sufficient evidence that search had been made for it, and the document is not now forthcoming.

"We think that, in a case appealable to a higher tribunal, the Court ought not to reject evidence essential to the case of either party, if it can possibly admit it. We think that the Court below was wrong in excluding some of the evidence bearing on the present question, and that if that evidence had not been excluded, the Court below probably would have been satisfied that secondary evidence of the *anumati-patra* ought to be received. At any rate, when tht Court has doubt upon the matter and its decision is open to appeal, it is better to admit than to exclude doubtful documents."

The conclusion of the judgment of the same Judges on a subsequent day, 13th August 1887, was that the adoption of the defendant was in every way valid; and they were not satisfied that, if it were not so, the plaintiff would be entitled to succeed to the property as heir to the last owner, Jagat Chunder.

On this appeal,

Mr. *J. Rigby* Q. C., Mr. *Boydell Houghton*, and Mr. *Herman Robinson*, for the appellant, argued that there was no sufficient evidence to show that Jagat Chunder executed an *anumati-patra* in favour of his wife Bamasunderi. The finding of the High Court that there was a valid adoption of the respondent by Bamasunderi was against the weight of the evidence. The evidence also showed that the appellant was the reversionary heir.

For the respondent, Sir *Horace Davey*, Q. C., Mr. *R. V. Doyne*, and Mr. *J. D. Mayne* argued that the plaintiff had failed to prove his relationship to Jagat Chunder as alleged, and his consequent right to disturb the respondent's possession. The evidence for the respondent on the other hand had established that he was validly adopted under due authority from Bamasunderi's deceased husband.

Mr. *J. Rigby*, Q. C. replied.

Their Lordships' judgment was delivered by—

THE RIGHT HON. SIR B. PEACOCK :—

This is an appeal from a decree of the High Court at Calcutta reversing a decree of the Subordinate Judge of Goalpara, who was also Deputy Commissioner of that district, and from two interlocutory orders of the High Court in the appeal to that Court from the Subordinate Judge.

The plaintiff is the appellant, and the defendant the respondent. Each of the parties claims to be heir at law of Jagat Chunder Dutt Gupta Mozumder, deceased, who was an inhabitant of Khagrabari, in the station of Dhubri, in the said district.

Jagat Chunder died on a pilgrimage in the year 1867 without issue, leaving a widow, Bamasunderi Gupta, as his sole heiress. The precise date of his death is disputed, the plaintiff's contention being that he died on a day in Falgoon 1273, corresponding with the 7th of March 1867, whilst that of the defendant is that he died on 24th of Cheyt 1273, corresponding with the 5th of April in the same year 1867.

The parties were not agreed as to the age of Bamasunderi at the time of her husband's death. The plaintiff makes her out to have been about 9 years of age, whilst the defendant puts her age at that time at 12 or 13. The point is not very material, and it may therefore be taken at 9, in accordance with the plaintiff's view.

Bamasunderi died on the 14th of Assar 1284, corresponding with 7th of July 1877, and that would make her about 19 at the time of the alleged adoption. The plaintiff's claim is that upon her death he succeeded to the property of Jagat Chunder as his second cousin and heir by collateral descent. The defendant claimed as an adopted son of Jagat Chunder, and in that capacity obtained, by means of his guardian and manager, possession of the property in suit which belonged to Jagat Chunder at the time of his death. On the 27th of June 1883 the plaintiff, then a minor, by his guardian and next friend, filed his plaint, and, after alleging that he was in possession of certain portions of Jagat Chunder's property, claimed that the remainder, being that specified in the plaint, might be awarded to him after the establishment of his right thereto by inheritance. The 5th paragraph of his plaint contains the following allegation:—

"Gunga Narain Gupta was the manager of the properties left by Jagat Chunder, the deceased husband of the minor Bamasunderi, on her behalf, till the time of her death, and did many fraudulent acts, even during her life-time, with the vain hope of becoming the malik of the properties in dispute. Having failed in this he at last, after the demise of Bamasunderi, entered into a conspiracy and fraudulent combination with Ramanund Mozumdar, the brother of his father-in-law, and falsely set up his minor son, the defendant, as the legally adopted son of Bamasunderi, with a view to keep in his own hands the properties left by the deceased Jagat

Chunder and Bamasunderi, depriving the real heir, the minor plaintiff. In fact, the minor defendant is not the adopted son of Jagat Chunder, and Bamasunderi never took him as her adopted son ; nor, indeed, had she any authority or right to adopt, nor had Jagat Chunder given her any permission to adopt."

The defendant, by his guardian, put in a written statement, in which, amongst other things, he denied the plaintiff's right of inheritance, and set up his own title as an adopted son.

The important issues recorded for trial were—

1st—Is the minor plaintiff Kali Kishore Dutt Gupta the heir of the late Jagat Chunder?

2nd—Is the minor defendant Bhusan Chunder *alias* Bepin Chunder, the legally adopted son of Bamasunderi, the deceased widow of the late Jagat Chunder?

At the trial the defendant was called upon to prove his title as a son by adoption, notwithstanding the fact that the plaintiff was out of possession and could not have succeeded in the event of the defendant's failure without proving his own title as collateral heir by descent. As remarked by the High Court :—

"From the judgment of the Lower Court it appears that the Subordinate Judge almost assumed the first issue in the plaintiff's favour, for, after setting out the facts of the case, he says :—'The whole question, therefore, turns upon the inquiry, was Bepin Chunder, defendant, really adopted by Bamasunderi under a legally valid power to adopt, conferred upon her *bonâ fide* by her husband Jagat Chunder, or not? If there was such a *bonâ fide* adoption, based upon a power to adopt duly and formally conferred by Jagat Chunder on his wife, then clearly the plaintiff is at once out of Court. But if no adoption of the kind alleged ever took place, or if the form or outward ceremony of an adoption took place without the indispensable basis of a formally conferred power to adopt emanating from Jagat Chunder Mozumdar, then the defendant is at once put out of Court, and the direct consequence is the establishment of the plaintiff's right and title. In other words he proposed to make the establishment of the plaintiff's title depend upon the failure or otherwise of the defendant in proving the validity of his adoption."

Five witnesses deposed to the fact of Jagat Chunder's having given his wife an *anumati-patra*. Biseswari Gupta stated that Jagat Chunder read it out and placed it in a box, and handed it to his wife. The witnesses stated that the *anumati-patra* was executed in the month of Cheyt 1273, before Jagat left home on his pilgrimage.

It was clearly proved, and in fact it was not disputed, that Jagat Chunder in the year 1867 left home on a pilgrimage to Gya and Benares, and that he died in the district of Monghyr prior to arriving at his destination.

Soon after the death Chunder Nath Gupta, who had a small interest as a co-sharer with Jagat Chunder in the zemindari parganna Taria, gave notice of the death to the Government authorities, as he was legally bound to do ; whereupon, in the month of May 1867, the property of Jagat Chunder was attached, and on that occasion a closed tin box containing documents, which was then in the residence of the deceased at Khagrabari, was taken possession of by the Sub Inspector of Police of Gauripur and placed in an iron safe in his custody. The box and its contents remained in the custody of the police until the 6th of September 1867, when, acting under an order of the Civil Court made upon the petition of Bamasunderi, a document purporting to be an *anumati-patra*, signed by Jagat Chunder and attested by, amongst others, Chunder Mohun Das, found in the box was sent by the Sub-Inspector of Police to the Deputy Commissioner, with a return under the seal of the Sub-Inspector to the following effect :—

"Incarnation of justice!

"In obedience to the order received, Chunder Mohun Sen, the uncle of Bama-

sunderi Gupta, was brought (to the station), and in his presence the closed tin box, which was attached, was opened, and on an inspection of the papers which it contained a closed cover to the address of the Registrar Saheb Bahadur was found. The Sen aforesaid stated that the cover contained the *anumati-patra* authorising the adoption; but as I could not believe his statement, I opened the cover in the presence of Babu Biseswar Roy, the Court Inspector entrusted with the charge of the Sub-district, and found the *anumati-patra* signed by the deceased zemindar Jagat Chunder Mozumdar, engrossed on a stamp paper, authorising the Gupta aforesaid (Bamasunderi) to adopt. I send it to the Court along with this report after re-sealing the cover containing it with sealing-wax."

On the 11th of September 1867 the said document was sent by the Deputy Commissioner to the Civil Court, where it remained until the 6th of February 1870, when it was returned to Pudma Lochun Goswami, the then manager of Bamasunderi, a copy, proved to have been examined with the original by the mohurrir in the Collector's office and the mohafez in the ordinary discharge of their duties, having been filed in the Court.

Thus it appears that the document found in the box which was seized at the residence of the deceased remained in the custody of officers of Government from May 1867 to February 1870, when it was returned to the manager of Bamasunderi.

The witnesses above referred to who spoke to the *anumati-patra* were examined in the time of the predecessor of the Subordinate Judge, and were believed by the Judges of the High Court, who had as good an opportunity as the Subordinate Judge himself of forming an opinion as to their credibility.

The defendant proposed to prove the *anumati-patra* by a copy of the document which was filed in the Civil Court, and by proving the loss of the original by a certified copy of a deposition of Gunga Narain Gupta made in a former proceeding between the same parties.

The copy had been filed by the defendant in the Court of the Subordinate Judge on the 24th of April 1885, and on the same day two witnesses had been examined on the part of the defendant to prove that the copy was a true copy of the original. This was in the time of a predecessor of the Subordinate Judge who decided the case.

The copy of the deposition of Gunga Narain was tendered by the plaintiff on the 17th of April 1886, as evidence intended to be used on his behalf. On the 1st of June the plaintiff's witness Chunder Mohun Das deposed to the signature of Gunga Narain to the original, and the document was then marked as an exhibit, and was admitted to the record as part of the plaintiff's evidence.

On the 21st of June 1886 the defendant put in a petition to the Lower Court, stating that the original *anumati-patra* executed by the deceased had been stolen, and praying that an authenticated copy might be used as evidence. In support of the petition the defendant relied upon the above-mentioned deposition of Gunga Narain, which stated that, on the death of Pudma Lochun, the said Gunga Narain was appointed manager of the said estate, that on taking charge of the said estate after the death of the said Pudma Lochun he received the original *anumati-patra*, and that, on search amongst the papers of the said estate, the said *anumati-patra* could not be found, and that since that time he had searched in different ways for the said document, but that from credible sources he came to know that the said document had been stolen.

The Subordinate Judge refused to allow the deposition of Gunga Narain to be used as evidence of the loss of the original *anumati-patra*, as Gunga Narain was living and ought to be called, and he afterwards allowed the copy of the deposition to be withdrawn from the record by the plaintiff. He also rejected the copy of the *anumati-patra* upon the ground that there was no evidence of the

loss of the original, and it was removed from the record.

It would have been much better if, when the Judge rejected the copy of the deposition, Gunga Narain had been produced as a witness on behalf of the defendant, but that was not done. It is true that Gunga Narain was afterwards tendered for cross-examination, but it was held to be then too late, as the defendant's case had been closed.

Before the rejection of the *anumati-patra*, Chunder Mohun Das, who was in the employ of Jagat Chunder up to the time of his death, had been examined before the Subordinate Judge as a witness on behalf of the plaintiff, and deposed that one month after the property was attached he was told by Chunder Gupta to sign his name to the *anumati-patra* and refused to do so, and that Chunder Mohun Sen, Mritunjoy Bose, and Pudma Goswami, who were then present, told him that they would cause his name to be written. This is a most improbable story, and is not at all in accordance with the plaintiff's case as stated in the 5th paragraph of the plaint. If this statement were true, Chunder Gupta, Chunder Mohun Sen, and Pudma Goswami must have been conspiring together, when, in fact, it appears from other parts of the evidence that they were hostile to each other.

The witness was disbelieved by the High Court, and their Lordships consider that his evidence was wholly unworthy of credit.

Amongst other things the witness swore that "when Jagat Chunder went on pilgrimage he did not, either at that time or before it, execute any will or *anumati-patra*, nor did he grant any," and further, "that he had heard that as there was no *anumati-patra* Chunder Nath, Mritunjoy Bose, and Pudma Lochun consulted together to fabricate one." Their Lordships cannot but remark upon the fact of the Subordinate Judge's having recorded as evidence such worthless statements. It is also worthy of notice that the document which the defendant attempted to prove by the copy which was rejected was that which was seized by the police in the closed box and forwarded to the Civil Court, and which was in the custody of Government officers from the time of the attachment of the property in May 1867 to February 1870, and that the time at which Chunder Mohun Das states that he was requested to attest an *anumati-patra* was about one month after the property was attached, or in other words, whilst the document relied upon by the defendant was in the custody of the police.

Another document, namely, a will of Jagat Chunder was tendered in evidence by the defendant and rejected by the Judge without referring to the evidence on the record in support of it. His reason for rejecting it, to use his own words, whatever may be the meaning attached to them, was, "Jagat Chunder's will was also put in, but refused admittance to the record on the ground of its inadmissibility under any definite section of the Evidence Act. It contains an allusion to an intention on the testator's part to proceed on pilgrimage after having executed, or after executing, a deed of power to adopt; but worded as it is, there is nothing to show definitely that such a deed of power ever was actually executed as a matter of fact."

The will was as follows :—

"To—

"The abode of all bliss, Srijut Chunder Nath Gupta, a co-sharer zemindar of parganna Taria, hissa half anna, inhabitant of Khagrabari.

"I Jagat Chunder Dutt Mozumdar, son of Ramkant Mozumdar deceased, a co-sharer zemindar of parganna Taria, inhabitant of Khagrabari station Gauripur, in the district of Goalpara, do execute this will to the following effect :—

"I am starting for Gya and Benares for the purpose of performing the necessary sradhs of my ancestors, of offering pindas to them, and of doing religious acts on my own behalf, after giving you the power to realize the rents of my zemindari in the said parganna, of my

invalid lakheraj property in kismut Uchita and others, and of my purchased brahmottur and mourasi jotes and other immoveable and moveable properties, to perform the sheba of the ancestral deities, to preserve the houses, to pay the debts and to collect the dues, to institute suits against any persons and to register my name in the sudder and mofussil and to sign the same. No son or daughter has yet been born unto me. The human body is transitory; no one can tell what may happen at any time. God forbid, but as I may die after going to the place of pilgrimage, I leave behind me an *anumati-patra* to my wife, to adopt a son in order to the preservation of the pindas of my ancestors and myself. You are also the husband of my uterine sister and have always been living with your family in the same mess with me, and for a long time have been doing me good service by way of caring for my zemindari &c. And there is also an unmarried niece (sister's daughter). As it is necessary for me to maintain them and you, I execute this will of my own accord and in a sound mind, to the effect that should I die after reaching the place of pilgrimage, you will take possession of a 1-anna share out of the 5-annas share which I have in the zemindari, and of a 1-anna share out of the 9-annas share which I have in the invalid lakheraj kismut Uchita and others, by registering your name in place of mine, and you shall enjoy the same down to son, grandson, daughter's son, &c., your heirs. With respect to my remaining 4-annas share in the zemindari and the 8-annas share in the invalid lakheraj, and with respect to the 3-annas share of the zemindari and the 3-annas share of the invalid lakheraj which I have obtained as a gift from my maternal grand-aunt Srijuta Bhairabi Chowdhrani, altogether with respect to the 7-annas share in the zemindari and the 11-annas share in the invalid lakheraj, and with respect to my purchased brahmottur, mourasi jotes and others which are in my possession and enjoyment, you shall, on my demise, cause a fit boy to be adopted from a good family or from out of my gyantis, by my wife Bamasunderi Gupta, and getting him recognized as heir, you shall manage the zemindari and all other properties till the minor attains his majority. If you or your son, grandson or daughter's son, &c., be not living, the 1-anna share of the zemindari and the 1-anna share of the invalid lakheraj and others, which I have given you, shall be obtained by me, or by my son, grandson, whoever may be in existence. If I or my wife, son, grandson be not living, then the zemindari, &c., left by me shall be obtained by you, or by your son, grandson, and daughter's son, &c., whoever may be in existence. To the above effect I execute this will.

"The 7th Cheyt 1273 B.S."

The will, if genuine, was a very important document, for it not only supported the evidence as to the *anumati-patra*, but amounted to an assertion by Jagat Chunder, through whom the plaintiff claims, that he had given power to his wife to adopt, which, in the absence of evidence to prove the revocation of the power, would, in their Lordships opinion, have been sufficient to support the adoption. Further, the direction to Chunder Nath to cause a fit boy to be adopted by his wife would in itself, in the absence of an *anumati-patra*, amount by implication to a power to his wife to adopt a fit boy from a good family.

It is very improbable that if the will had been forged by Chunder Nath after the death of Jagat, he would have made the devise to himself of a one-anna share in the zemindari and a one-anna share of the invalid lakeraj dependent upon a condition which he must have known had never been performed, namely, the reaching by Jagat Chunder of the place of pilgrimage, Jagat Chunder having died on the journey to that place in the district of Monghyr. That condition is also an answer to the objection made on behalf of the plaintiff that the will was never acted upon.

The Subordinate Judge then, having no evidence before him either of the original or of the copy of the alleged *anu-*

mati-patra, or of the alleged will, proceeded to deal with the whole case, and in the result expressed himself in the following terms. He said :—

"Upon a review of the whole of the evidence, I must confess that my faith has been utterly shaken in the evidence of the witnesses adduced on the defendant's side, whereas I see no grounds what ever for discrediting those much-maligned Mymensingh witnesses, on the plaintiff's side, who were examined by commission upon the subject of the plaintiff's genealogical claims to inheritance. They are apparently permanent residents of the Mymensingh district, and to all appearances unbiassed by any *personal* interest in the results of the present suit.

"Of course, *either* of the genealogical tables might be a forgery and false concoction, without difficulty. But I see no good or reasonable grounds for condemning the Mymensingh table as such, where as I *do* believe that the defendant's table is a fabrication in its suspicious brevity.

"In fine, I find no difficulty in arriving at the conclusion that the defendants claims are absolutely *nil*, and that they are based, from first to last, upon fraud and forgery. That *some* sort of a mock ceremony, to act as a *quasi*-adoption, actually *did* take place, I am quite willing to believe. But that what took place was really an adoption of the defendant (then about *nine* years of age) by Bamasunderi, or that any real *bonâ fide* adoption by her would have been attended by no more respectable a concourse of the surrounding zemindars and other native gentry than the few who had any pretensions whatever to the claim of respectability, who are said to have been present on the occasion, is a most significant circumstance.

"My belief is that the unfortunate Bamasunderi was for a long time past utterly crushed, and made to live a living, lingering death by the iron rod of restraint wielded by Gunga Narain so pitilessly; and that, as far as the sham adoption is concerned, the unfortunate creature was wholly unconscious of what was going on around her, being in her last collapse, and about to breathe her last.

"There being no reason, therefore, for doubting the genuineness of the plaintiff's claim in this suit, I decree the suit in plaintiff's favour, with all costs."

The Subordinate Judge was silent as to the persons whom he considered to have been implicated in the fraud and forgery, or the witnesses upon whose evidence he relied in support of that finding. The judgment of the Subordinate Judge is very unsatisfactory.

There was no evidence to justify the belief which the Judge avowed, "that the unfortunate Bamasundari was for a long time past utterly crushed, and made to live a living, lingering death by the iron rod of restraint wielded by Ganga Narain so pitilessly; and that, as far as the sham adoption is concerned, the unfortunate creature was wholly unconscious of what was going on around her, being in her last collapse, and about to breathe her last." The Subordinate Judge did not even confine himself to the case before him, but went out of his way to declare his suspicions and throw out insinuations without the slightest evidence to warrant them. He said, "It is difficult to prevent one's suspicions of foul play from carrying one back as far as the time of Jagat Chunder's death, and suggesting to one's mind that very possibly he did not die a natural death. The ever-convenient cholera was at once put forward as the cause of his end, and this might or might not have been so." The Judge does not condescend to particulars; Gunga Narain Gupta, described by him as an utterly unscruplous character, was not with Jagat Chunder on his pilgrimage or at the time of his death, nor was he the person who reported that the death was the result of cholera. Upon whom could his suspicions be supposed to rest, except upon those, or some of those, who were with deceased at the time of his death, and who reported that he died from cholera? Again, speaking of Bamasunderi, he says,

"I do not feel much in the way of scruples myself in suggesting another and more probable cause of her illness and death, and that is slow poison, resulting from her obduracy in refusing to adopt the defendant." Again, "It is curious what a high rate of mortality appears to have been amongst vitally essential personages, such as the late manager, Pudma Lochun, in whose time the alleged unfortunate theft of the box said to contain the all-important deed of power to adopt is stated to have occurred; the attesting witnesses also to the important deed are all dead," and so on.

Hasty, uncalled for, and indiscreet expressions like these, casting suspicions of grave crimes against unnamed absent persons, without one title of evidence to support them, are wholly unwarrantable, and cannot but destroy respect for the judgment and discretion of the Judge, and lower the confidence which might otherwise attach to his decision upon the questions really before him.

The case was appealed to the High Court, and by two interlocutory orders of that Court made in the appeal the copy of the *anumati-patra* and of the deposition of Gunga Narain which was put in as part of the evidence for the plaintiff were restored to the record. Those orders are also included in this appeal. Their Lordships consider that the High Court was right in making them, and also in their finding that the *anumati-patra* was executed by Jagat Chunder, and that the copy produced was a copy of the original which found its way into the Civil Court in the manner already stated.

The will of Jagat Chunder, which was rejected by the Subordinate Judge, and as to the genuineness of which he expressed no opinion, was produced, and proved to the satisfaction of the High Court. They gave credit to one of the attesting witnesses, Krishna Nath Surma Roy, and other evidence in support of it, and their Lordships see no reason to disturb their finding.

The High Court appear to their Lordships to have dealt very properly with the arguments urged on behalf of the plaintiff, and the documents produced in support of the contention that both the will and the *anumati-patra*, were fabricated after the death of Jagat Chunder. With regard to the contention that the *anumati-patra* and will were dated on days subsequent to the death of Jagat Chunder, it is impossible to believe, in the face of all the evidence in the case, that Jagat Chunder died in the month of Falgun 1273, and not on the 24th of Cheyt in that year, as alleged on the part of the plaintiff in the plaint. It was inconsistent on the part of the Subordinate Judge to admit evidence to prove that Jagat Chunder died in Falgun 1273 after leave to amend the plaint had been refused.

On the argument before their Lordships much reliance was placed on the account at page 93 of the record, dated 15th Bhadro 1274, or 30th of August 1867, in which a sum of Rs. 48-14 was charged for the expenditure for the half-yearly sradh of Jagat Chunder. It was contended that if Jagat died on the 5th of April 1867, the time of the performance of the half-yearly sradh had not arrived on the 15th Bhadro 1274, whereas, if he died on the 24th Falgun 1273, or 7th of March 1867, as alleged by the plaintiff, the period for performing the half-yearly sradh was on the very day of the date of the account. Their Lordships do not attach any importance to that document. It seems that the half-yearly sradh may be performed at any time during the sixth month after the death, and calculating by lunar months five months and four days had elapsed since the 5th April 1867. The account is signed by Chunder Mohun Sen, but he was not the manager of Bamasunderi's estate, nor had he been appointed her guardian. The reason for his rendering an account is not explained. The account is also signed by the Extra Assistant Commissioner, but it does not appear what he intended to vouch by his signature.

It is impossible to believe that, if the will and *anumati-patra* were forged, any of the persons interested in the forgery could have been ignorant of the date of the death, or would have forged documents dated a month later. Such an account as that now under consideration could never induce their Lordships to believe that Jagat Chunder died in Falgun, in the face of the statement in the plaint that he died on the 24th of April, and of all the other evidence in the cause to which the Judges of the High Court have adverted.

The High Court referred to a genealogical table produced in support of the plaintiff's title. They considered, for the reasons given, that it was not entitled to any credit. The original document is not on the record transmitted to this Board, and their Lordships are unable, therefore, to form any opinion respecting it, or to say that the High Court came to an erroneous conclusion respecting the plaintiff's heirship. They concur generally with the High Court in their findings upon the facts, and they will humbly advise her Majesty to affirm the judgment of the High Court and the interlocutory orders before referred to. The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Tatham, Son, & Lousada.*

Solicitors for the respondent: Messrs. *T. L. Wilson & Co.*

8th July 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

RAM CHARAN* ... *Appellant,*

and

DEBI DIN AND OTHERS ... *Respondents.*

On appeal from the High Court for the North-Western Provinces.

Hindu law—Evidence of partition of joint family—presumption.

In a suit to enforce an alleged right of one brother against another, to separate proprietary possession of a share in joint family estate, the concurrent findings of the Courts below were definitely to the effect that a partition had taken place, after which the brothers had been no longer joint as to their interests.

The Courts had fully gone into the case on either side, receiving the evidence offered by either party, and they had considered the whole of it. Therefore, it could not be effectively urged, as a ground of appeal, that the Courts below, in coming to the above conclusion, had erred in putting the burden of proof unduly upon the plaintiff, or disregarded the presumption arising from the original state of the family.

APPEAL from a decree (3rd July 1885) of the High Court, affirming a decree (14th July 1881) of the Subordinate Judge of Cawnpur.

The plaintiff claimed a one-half share of joint family property, suing his only and elder brother, the first and principal defendant, with whom two sons, a grandson, and a deceased son's widow, were joined as co-defendants interested in the subject-matter. The plaint (29th July 1880) alleged that both brothers had jointly succeeded to the estate of their father, Jian who died about the year 1828, consisting of an eight-anna share in mauza Bibrapur, and a smaller share in mauza Bakothi, besides household and other property: that the brothers continued joint, trading with the ancestral funds: and that about thirty-eight years before this suit their father's brother, Nayan, who had survived, was separated off. It was stated in the plaint that the joint property comprised shares in ancestral villages in the Cawnpur and Farrukhabad districts, which stood in the Collectorate books in the names of the two brothers, Umrao Singh, the plaintiff, and Debi Din, the first defendant, as joint proprietors; other shares in other villages were entered in their names separately; and shares in villages had been purchased out of the joint family funds,

* I. L. R., 13 All., 165.

in the names, respectively, of Beni Madho, son of Debi Din, and of Ramcharan, son of Umrao Singh; also other shares had been entered in the name of Mussammat Pem Kuar, widow of Beni Madho, and in the name of Bhima, son of Debi Din, subsequently to Beni Madho's death. Shares in villages purchased out of the joint family funds, had been recorded in the names of Pem Kuar and Ganga Sahai, after a purchase at a sale upon a decree obtained by Beni Madho in his lifetime. Also were claimed shares in gardens, groves, indigo factories, debts, and decreed debts, jewels, and furniture; the whole being valued at Rs. 1,68,811.

The plaintiff's case was that the brothers remained joint in estate, and that the parties were in possession of all the villages, and of the profits of the joint trading concerns, including an indigo factory, which profits were applied to the family expenditure, until the death of Beni Madho, the eldest son of Debi Din, on the 19th June 1876, when his father caused the name of Pem Kuar, the widow, and the name of Ganga Sahai, minor son of Bhima, another of Debi Din's sons, to be entered as proprietors of some villages, remaining himself in possession: that upon this followed disputes, and separate living, dating from the 16th October 1877, when the cause of action accrued: and that as all the property had been acquired while the family was joint, the plaintiff was entitled to a decree for one half of the entirety.

The defence of the defendant, Debi Din, mainly was that about ten years after the death of their father, which had occurred as the plaintiff stated, the brothers separated, each taking his half share; and that no part of the property in suit had been acquired by means of the ancestral stock or its profits, but by his, Debi Din's, own personal exertions, each brother carrying on business separately.

The Subordinate Judge found that Jian having died at the date alleged, left the property stated, and that plaintiff was in undisputed possession of a moiety thereof: but that after Nayan's separation, admitted by both parties to have occurred about thirty-eight years before this suit, the family no longer remained joint; "and although there was no division of the ancestral property by metes and bounds, the members separately appropriated and enjoyed the profits: they carried on business separately, and all their concerns were separate; each party having exclusive possession of the property personally acquired by him; and the interest of any party in any transaction in which he was admitted as a partner, was limited to the amount of money contributed by him."

The Subordinate Judge also found that the plaintiff was at one time employed as a jamadar in the opium factory at Bibiapur, and subsequently traded in grain; and that he made smaller profits than did his elder brother, who traded in cotton and indigo seed, and who carried on business at Cawnpur with the late Mr. Hugh Maxwell, an indigo-planter, through whom he made a large fortune.

The lower Court observed: "Moreover, it is neither alleged nor proved that the plaintiff shared in the profits of the estates held in mortgage or purchased in the name of the first defendant or his children within twelve years before his cause of action, while it is shown that he received profits of mauza Gauri and Musahibpur held by him exclusively and of a 4-anna share in Asalatganj and Bachitbhartu in which, besides Beni Madho, other parties unconnected with the family were shareholders. As the plaintiff used to receive no profits from those estates in which the names of the second and fourth defendants were substituted in the place of Beni Madho's it did not affect his position, and if the plaintiff's possession was not affected by these paper proceedings he could have no cause of action."

"Moreover, from the very fact of the plaintiff having in a former suit sued for possession of the property acquired in

the name of first defendant and his children, it is shown that he did not hold joint possession of those properties on the date of his cause of action (16th October 1877), for had he been in possession, he would have sued merely for establishment of his right and maintenance of his possession as an equal sharer, and as he has not in the present or former petition of plaint mentioned the date on, and circumstances under which he lost such possession, or was excluded from joint family property, his plaint does not disclose sufficient cause of action. The lower Court also found that the suit was barred by limitation, observing: "The plaintiff has not proved that the property acquired in the name of the first defendant and his children was joint family property in the profits of which he participated within twelve years before his cause of action. The suit is therefore barred by lapse of time." The suit was dismissed.

On the plaintiff's appeal, the High Court, after a remand for further evidence on the point whether Debi Din had been either personally, or by authority given by him to sign khewats, a party thereto, maintained the judgment of the Court of first instance. The judges (BRODHURST and TYRRELL, JJ.) pointed out that there was no evidence of jointness afforded by the revenue records, or that the plaintiff had ever interfered in villages bought in the names of the defendants, or conversely; and that, had it been otherwise, it would have been easy for the plaintiff to produce accounts, or other similar evidence, to show payments made by him to the defendants, or by them to him, for these estates. Nayan and the separated members of the family occupied the same building after their undeniable separation for some years, and that partition was not more formal, or more certain in its character, than this partition alleged by the defendants; and yet it was a fact.

The Judges then concluded in the terms quoted in their Lordship's judgment, concurring, in the finding of the Court below.

They added the following to the finding of the fact of previous partition, on which their Lordship's judgment proceeded:—

"We think that the Subordinate Judge has rightly found that the parties to the suit have realized and appropriated the rents, and have continuously been in adverse proprietary possession of the properties purchased in their respective names, and that the plaintiff has not, within twelve years of the institution of his suit, been in possession of the properties which he sues to obtain.

Umrao Singh having preferred the present appeal, was now represented by Ramcharan, his son.

Mr. C. W. Arathoon, for the appellant, argued that the burden of proof had been wrongly laid in this case upon the plaintiff, it having been incumbent on the defendants to establish the separation alleged by them, so as to rebut the presumption of Hindu law that the family had continued to be joint. The defendants had not proved their case. He referred to the application of the presumption in particular cases, citing *Bholanath Mahta* v. *Ajudhia Persad Sookul*, (1), and *Gobind Chunder Mookerjee* v. *Doorga Persad* Baboo (2).

The respondents did not appear. Their Lordship's judgment was delivered by

THE RIGHT HON. SIR R. COUCH:—

THE plaintiff in this suit, the late Umrao Singh, who is now represented by the appellant, and the defendant, Debi Din, are the sons of one Jian, who had a brother named Nayan. The plaintiff asked in his plaint for a partition of the property, which he alleged was joint family property, part of it having come to the brothers from their father Jian, and another part of it having been acquired after the death of the father, and in such a manner as to be joint family property. The defence was that there had been a partition subsequently to the death of Jian. There had been a pre-

(1) 12 B. L. R., 336.
(2) 14 B. L. R., 337.

vious partition between Jian and his brother of the property which came to them from their father, but that is not material. The real question was, whether there had been a partition between the plaintiff and the defendant, Debi Din. The issue was: "Did plaintiff and first defendant separate after the demise of their father, or did they continue to live in joint partnership until 16th October 1877, and hold joint possession of all ancestral property, or was the property acquired with the ancestral stock while they lived as members of a joint family?" The Subordinate Judge in his judgment says: "From the evidence of the defendants' witnesses, and the tenor of the letters of the parties produced in this case, it is shown that the parties had separate concerns, and each received the profit due to his share in respect to the villages in which his own or his son's name was recorded as proprietor or mortgagee, separately, and for his exclusive use." This is a finding that, as alleged by the defendants, there had been a separation, and that each of the parties, although no separation had been made by metes and bounds, had had separate enjoyment of his share of the property. When the case came before the High Court on appeal the finding of the High Court on the question was: "Having very carefully considered the evidence and the arguments of the learned counsel and pleaders on either side, we have arrived at the conclusion that no sufficient reason for disturbing the Judgment of the able and experienced Subordinate Judge has been shown; on the contrary, we agree with the lower Court that it is proved that the ancestral property was but of small value; that the two brothers made a partition of their ancestral property though they continued to live under the same roof; that Debi Din engaged in business on a much larger scale than did Umrao, who was in the service of the Government as a jamadar in the Opium Department; that the two brothers sometimes made purchases separately and sometimes jointly with their children or with strangers, but in all joint transactions the interest of each purchaser was limited to the amount contributed by him." This again is a definite finding that a partition had been made between the two brothers. It has been contended on the part of the appellant that the onus of proof had been improperly put upon the plaintiff to show that the family was joint. It does not appear from the judgments that the onus was so put upon the plaintiff. The case was fully gone into: the evidence offered by either party was received, and the whole of it was considered by both the lower Courts. It is not shown in any way that there has been any error in law in putting the onus of proof upon the plaintiff. There are two concurrent judgments of the lower Courts upon the question of fact, and there is no ground for the present appeal.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court and to dismiss the appeal. As the respondent does not appear there will be no order as to costs.

Appeal dismissed.

Solicitors for the appellant:—*Messrs. T. L. Wilson and Co.*

8th and 23rd July 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

BISHAMBAR NATH AND OTHERS* ... } *Petitioners,*

and

IMDAD ALI KHAN ... *Objector.*

On appeal from the Court of the Judicial Commissioner of Oudh.

* 17 Cowell's Ind. Ap., 181; 18 Calc., 216.

Attachment—Civil Procedure Code, 1882, s. 266, sub-section (g)—Political pension—Payments due under the Oudh loans of 1838 and 1842—Exemption from liability to attachment for debt.

Although it is probable that the enactments of section 266, Civil Procedure Code, 1882, were not meant to cover pensions payable by a foreign State when remitted for payment to their pensioner in India, they certainly include all pensions of a political nature payable directly by the Government of India. A pension guaranteed payable by the latter by a treaty obligation contracted with another sovereign power is in the strictest sense a political pension.

An allowance, payable by the Government of India under an arrangement made between the King of Oudh and the Governor-General in 1842, for the benefit of members of the King's family and household, and their respective heirs in perpetuity, and payable to one of such heirs, who has inherited it, as his share in the interest in the Oudh loan of 1842, is a political pension within the meaning of section 266, sub-section (*g*) Civil Procedure Code, 1882. The arrangement of 1842 cannot be treated as merely a provision out of the King's private estate for the maintenance of members of his family, there having been in a State like that of Oudh no distinction between State property and private property vested in the sovereign.

SIX appeals, consolidated by order (3rd April 1889), from orders (2nd September 1887) of the Judicial Commissioner, reversing orders (14th March 1887) of the District Judge of Lucknow.

The appellants, who were all judgment-creditors, respectively, of the respondent, raised the question whether a sum of money receivable by him from the Government of India, in the form of an inherited share in the interest of the Oudh loan of 1838, augmented in 1842, was liable to be attached by a decree-holder in execution for his debt, or was a political pension within the meaning of section 266, sub-section (*g*). The latter enacts that stipends and gratuities allowed to military and civil pensioners of Government, and political pensions, shall not be liable to attachment or sale.

The share was inherited by the judgment-debtor from his grandmother, Nawab Malka Jehan, principal consort of Mohammad Ali Shah, formerly a King of Oudh. With the latter, Colonel Low, on behalf of the East India Company, entered into the engagements of 1838 and 1842 referred to in their Lordships' judgment.

The first engagement (1) stipulated that the loan should bear interest at the rate of four per cent. per annum, and that, out of the total interest of Rs. 68,000, there "should be paid as pension in perpetuity, in four equal instalments, to the persons named in the 3rd Article, and to their heirs in perpetuity, on their receipts under their seals, the amounts set opposite their names." The first named of these persons was Malka Jehan, Queen of Mohammad Ali Shah, to whom, and her heirs in perpetuity, Rs. 400 per month, or Rs. 4,800 per annum, were thus made payable.

Of the proposal to the King in 1842 to advance to the East India Company a further sum of 12 lakhs, the result is thus stated by the Judicial Commissioner :—"The King readily acceded to this proposal, and sent in 12 lakhs of rupees to the British Minister, who issued promissory notes to the extent of 2 lakhs of rupees in favour of persons designated by the King. A few days afterwards the King proposed that instead of an ordinary subscription to the public loan, his twelve lakhs should be treated as a special loan, and that a paper of acknowledgment therefore should be drawn up, and that the Government note should not be negotiable, and that the interest accruing upon the loan should be paid as pension to his favourite Queen, Nawab Malka Jehan, and to her heirs for ever, and that the same should be treated as an augmentation of the small pension of Rs. 400 per mensem secured to her by the loan and treaty (XLVIII) of 1838, and that the said pension should be payable monthly, at the Resident's Treasury, at Lucknow."

The promissory note was in the form

(1) Aitchison's Treaties, Engagements and Sanads, Vol. II, p. 141, of edition of 1876.

of an ordinary Government Promissory note, payable on demand, after three months' notice, to Mohammad Ali Shah, his executors, or administrators, or order. The Margin of the note contained a statement that "the interest on this note is to be paid to Nawab Malka Jehan, and her issue, under order of Government, Financial Department, dated 9th February, 1842."

A suit was brought in 1884 by the heirs of Malka Jehan to obtain a decision as to the shares in which they were entitled to receive the pension inherited from her on her decease. This having been brought before the Judicial Committee in appeal [*Mariam Begum* v. *Mirza* (1)], their Lordships were of opinion that it was the intention of the King that, in the event of the death of any of the pensioners having issue, his, or her, heirs according to the Mahomedan (Shia) law of inheritance should receive payment of the pension in the proportions regulated by such law.

The interest payable on the note was paid to Nawab Malka Jehan until her death on 4th July 1881. She left four grandchildren, her heirs under the Imamiya law, of whom the present respondent was one. The shares of these descendants were finally settled by the decision above referred to. Pending the litigation, these appellants, as decree-holders, applied to have the respondent's share attached. An order was made accordingly attaching Rs. 14,354, then in the Government Treasury at Lucknow, and said to be this respondent's share. On the 15th January 1887, the latter filed his objections which were dealt with under section 244, Civil Procedure Code. Notice was issued, and, on the appearance of the decree-holders, issues were recorded. Of these the first, which applied to all the decree-holders, was whether the pension fell within the provisions of section 4, Act XXIII of 1871, the Pensions Act(2). The District Judge made his order (14th March 1887) in favour of these appellants. He considered that payment issuing as the result of the loan of 1842, were not pensions within the meaning of the Act of 1871, and he pointed out that they were not referred to in the Oudh Wasikas' Act, 1886(3).

The present respondent appealed to the Judicial Commissioner, resting his case for exemption upon section 11 of the Pensions' Act, 1871. The order of the District Judge was reversed by the Appellate Court, and the attachment were removed. The Court held that the claim did not fall within the prohibition of the Pensions' Act, 1871, any more than it did within the Wasikas' Act, 1886.

The Judicial Commissioner, however, considered that, as far as the settler Mohammad Ali Shah was concerned, the payment to the respondent and to his grandmother before him was a pension

(1) I. L. R., 17 Calc., 234; L. R., 16 I. A., 175; *Ante* page 422.

(2) This Act provides in section 4, "except as hereinafter provided, no Civil Court shall entertain any suit relating to any pension, or grant of money, or land revenue, conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim or right for which such pension or grant may have been substituted" And in section 11, "No pension granted or continued by Government on political considerations, or on account of past services or present infirmities, or as a compassionate allowance, and no money due or to become due on account of any such pension or allowance, shall be liable to seizure, attachment, or sequestration by process of any Court in British India, at the instance of a creditor, for any demand against the pensioner, or in satisfaction of a decree or order of any such Court."

(3) This Act (XXI of 1886) recites the creation of certain pensions arising out of loans made by members of the Oudh Royal Family to the East India Company in 1813, 1814, 1825, and 1838, which were known respectively as the Amanat Zamanat, and Loan, wasikas, and that doubt had arisen whether such wasikas were pensions within the meaning of the Pensions Act, 1871. It then proceeded (section 2) to declare that they were pensions within the meaning of the Pensions Act, 1871, and that that Act should apply to them as if they were pensions of classes referred to in sections 4 and 11 of that Act. No reference was made in the Act to the loan of 1842.

pure and simple made on political grounds. He therefore was of opinion that the sum lying in the Treasury and now in dispute was a "political pension" within the meaning of section 266, Civil Procedure Code.

On this appeal,

Mr. *J. D. Mayne*, for the appellants, argued that the order of the District Judge ought to be restored. The payment in question was neither a pension within section 11 of the Pensions' Act, 1871, as contended by the present respondent when appealing below, nor was it a political pension within section 266 of the Civil Procedure Code, as the Judicial Commissioner had held it to be. Act XXI of 1886 by implication excluded money payable under the loan of 1842 from those pensions which were by that Act exempted from the ordinary civil process. The payment was in virtue of a settlement of the King's private estate, he having made the Government of India the instrument for carrying out an arrangement whereby he provided for his relations. This was not a political pension.

Mr. *R. V. Doyne*, for the respondent, argued that the construction already put by their Lordships on the agreement of 1842 was that the loan of that year was by way of augmenting the loan of 1838, and was brought, in effect, within the terms of the previous engagement. This at all events gave the sums paid under the latter as well as under the former loan the character of a political pension, within the meaning of section 266, sub-section (*g*), of the Civil procedure Code.

Mr. *J. D. Mayne* was heard in reply.

On a subsequent day, 23rd July, their Lordships' judgment was delivered by

THE RIGHT HON. LORD WATSON :—

These are consolidated appeals at the instance of Judgment creditors of the respondent, Nawab Ali Khan, one of the heirs, according to Mahomedan law, of the late Malka Jehan, who was the principal consort of Mohammad Ali Shah, the last King of Oudh. In all of them the same question is raised for decision,—Whether a monthly allowance payable to the respondent by the Indian Government, under an arrangement made between the King of Oudh and the Governor-General of India in the year 1842, is liable to be taken in execution for his debts?

Mohammad Ali Shah had, in 1838, advanced Rs. 17,00,000 to the Government of India, in pursuance of a formal treaty, by which the latter undertook to apply the interest of that sum in payment of allowances to certain members of the Royal family and household, including his spouse Malka Jehan, and their respective heirs in perpetuity. In the treaty, these allowances are described as "pensions," and the persons entitled to them for the time being as "pensioners;" and on the failure of an original pensioner, and his or her heirs, the Government undertook to devote the lapsed pension towards the maintenance of a mosque selected by the king.

Mohammad Ali Shah subsequently advanced on loan to the Indian Government Rs. 12,00,000, which he intended to settle as an additional provision for Malka Jehan and her heirs. Being apprehensive that the lady or her heirs might, if the note or acknowledgment of the loan were issued in her name, be "persuaded at some future period, by evil advisers, to sell the note and squander away the money," His Majesty, by letter dated the 4th January 1842, requested the Governor-General, instead of issuing a promissory note in name of Malka Jehan, to "pay to her, and her issue in perpetuity, the interest at the rate of 5 per cent. per annum, that is, Rs. 5,000 a month, so long as 5 per cent. interest may be allowed, and afterwards such reduced interest as may be paid from time to time by the British Government." The letter made special reference to the guarantee or treaty of 1838, and the pensions thereby settled on the ladies of the Royal family, and represented that compliance with the request which it preferred "will prevent any new

guarantee being entered into, but will merely be the payment of a large sum of interest instead of a small one."

In reply to that communication the Governor-General, by a letter dated the 15th February 1842, intimated his pleasure "in concurring with the hearty desire and wishes" of His Majesty, and gave the assurance that an order would be duly passed for their execution.

A promissory note for repayment of the loan was issued in the name of Mohammad Ali Shah, which appears to have been renewed, in similar terms, as of date the 30th June 1854. The letters which constitute the arrangement between His Majesty and the Government of India, with respect to payment of the interest to Malka Jehan and her heirs in prepetuity, contain no provision for disposal of the capital of the loan, in the possible event of their failure. Whether the capital would, in that event, be payable to the representatives of the King, or belong to the Indian Government, appears to their Lordships to be a question the decision of which, one way or another, cannot affect the character of the right conferred on Malka Jehan and her heirs by the arrangement of 1842, under which the fund is at present held and administered by the Government.

The Civil Procedure Code of 1882, section 266 (*g*), enacts that "Stipends and gratuities allowed to military and civil pensioners of Government, and political pensions," shall not be liable to attachment and sale in execution of a decree. If the share, inherited by the respondent, of the interest on the loan of 1842, originally payable to Malka Jehan, be a "political pension" within the meaning of that enactment, the case of the appellants necessarily fails.

The appellants argued, in the first place, that the allowance payable to the respondent by the Indian Government is not a pension; and, in the second, place, that, assuming it to be a pension, it is not a political pension in the sense of the Civil Procedure Code, inasmuch as it is not a pension bestowed by the Indian Government in respect of political services, or for political considerations.

In support of the first of these propositions, it was maintained that the arrangement of 1842 was in its nature akin to a deed of settlement, by which the King made a provision, out of his private estate, in favour of members of his family who had a natural claim upon him for maintenance. The argument ignores the fact that, under a despotic government, like that of Oudh in 1842, there was really no distinction observed between State property and private property vested in the Sovereign, and that all the estate of which he was possessed passed, on his decease, to his successor in the throne.

Their Lordships had occasion in a recent case [*Mariam Begum* v. *Mirza* (1)] to consider the character and effect of the arrangement constituted by the letters passing between the King of Oudh and the Governor-General in 1842. Sir Barnes Peacock, who delivered the judgment of the Board, there said :—"Their Lordships concur with the Judicial Commissioner in the opinion that the King intended in 1842 to provide an additional pension for Malka Jehan of the same nature as that which he had already provided for her in the year 1838." Notwithstanding the argument addressed to them for the appellants, their Lordships see no reason to alter or modify the views thus expressed by Sir Barnes Peacock on their behalf. The Governor-General, in assenting to the King's letter of the 4th January 1842, expressly agreed to apply the interest arising upon the new loan in augmenting the pensions already secured to the Queen and her heirs by the Treaty of 1838, such augmentation being subject to the same conditions and under the same guarantee as the original pensions. In that view, it is impossible to say that the increase is not a pension, or that the heirs of Malka Jehan, the present recipients, have not been recognized as pensioners by the Government of India.

(1) I. L. R., 17 Calc., 234; L. R., 16 I. A., 175.

Then it is said that these payments by way of increment, although they may be pensions, are not political pensions within the meaning of the Code. The following passage, in the judgment already referred to, appears to their Lordships to be conclusive against this branch of the appellant's argument :—"It should be remarked that although a settlement in the terms of the King's letter of 1842, creating pensions in perpetuity, could not under the Mahomedan law be validly made by a private individual, the arrangement of 1842 takes effect as a contract or treaty between two sovereign powers."

It is probable (although the point is not one which it is necessary to determine in this case) that the enactments of section 266 (*g*) of the Code were not meant to cover pensions payable by a foreign State, when remitted for payment to their pensioner in India ; but these enactments certainly include all pensions of a political nature payable directly by the Government of India. A pension which the Government of India has given a guarantee that it will pay, by a treaty obligation contracted with another Sovereign Power, appears to their Lordships to be, in the strictest sense, a political pension. The obligation to pay, as well as the actual payment of the pension, must, in such circumstances, be ascribed to reasons of State policy.

Being of opinion that the respondent's pension is protected from execution by the provisions of the Code, their Lordships consider it unnecessary to express any opinion with regard to his pleas founded on "the Pensions' Act, 1871," and the "Oudh Wasikas' Act, XXI of 1886."

In one of these appeals a plea of *res judicata* was taken, upon the ground, apparently, that a ruling by the Judge in one application for execution ought to be held conclusive against the judgment-debtor in every other application for execution of the same decree. The plea requires no further notice, because the decree or order upon which it is rested has not been produced.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgments appealed from. The costs of the respondent in these appeals must be paid by the appellants.

Appeals dismissed with costs.

Solicitor for the appellants : Mr. *W. Buttle.*

Solicitors for the respondents : Messrs. *Young, Jackson, & Beard.*

9th July 1890.

PRESENT :

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

MAINA AND OTHERS * ... *Defendants,*

and

BRIJMOHUN AND OTHERS ... *Plaintiffs.*

On appeal from the High Court for the North-Western Provinces.

Act I of 1877 (Specific Relief Act) s. 42—Refusal of declaratory decree, the case made for it being defective.

Under the Specific Relief Act (I of 1877) s. 42, a suit was brought for a decree declaratory of the plaintiff's title to be mutawalis and managers of property from ancient times connected with religious observances, *viz.*, a ghat upon the Jumna with temples adjoining ; of their title also to receive a proportion of the offerings ; and they also claimed to have the proceeds of a decree obtained by the defendants against third party spent upon repairs.

Held that the suit had been rightly dismissed in the first Court. Even if the evidence had shown that the plaintiffs had some rights in respect of the property in question, they had, nevertheless, so far failed in giving definite proof of their claims that they were not entitled to the decree claimed. No decision was, however, given, nor was any opinion expressed, with respect to other rights, which either of the parties might have, or claim to have, relating to the property.

* 17 Cowell's Ind. Ap., 187 ; 12 All. 587.

APPEAL from a decree (5th January 1887) reversing a decree (30th June 1885) of the Subordinate Judge of Agra.

The respondents, who were plaintiffs, alleged themselves as representing the Sannadhia Brahmans in Mathra, while the defendants were at the head of the Mathuri (1) caste, to be entitled, together with the defendants, who were not solely entitled, to act as mutawalis and managers of the Bisram Ghat upon the bank of the Jumna, and of the temples attached, receiving the offerings made by jattris or pilgrims, their shares being in the prop rtion of two-thirds to the defendants and one-third to the plaintiffs, with reference to the number of houses in Mathra occupied by the Sannadhias and Mathuris, respectively. This claim was valued at Rs. 17,000. They also claimed that a sum of Rs. 400 should be set apart by the defendants for the repairs of the ghat, this being the amount of a decree for money obtained on behalf of the institution.

The defendants, denying the claim, alleged that the plaintiffs and all Sannadhias, used another ghat, the Swami, not assembling at Bisram ghat. The plaintiffs were not Chaubes. This defence was, in effect, accepted by the Subordinate Judge, who inspected the locality, and observed that the differences between the castes were such that it was improbable that they would conduct their ceremonies in the same place.

This judgment was reversed by a Division Bench of the High Court (STRAIGHT and TYRRELL, JJ.,) and a declaratory decree was made in favour of the plaintiffs.

The order referred to as supporting the assertions on behalf of the plaintiffs, purported to have been issued by "Muhammad Furrukh Shah, the king of Ghazis, to the Darogha of the nazul lands appointed by the Government at Agra." It, apparently, had no date upon it; and the translation of it on the record was:—

"On a petition being presented by Sobha Ram, Brahman, resident of Mathra, Islamabad, we have been informed that Bisram ghat, on the banks of the river Jumna, together with the thakurdwars (temples) built by Rájas and Sahukars at the said Islamabad, have been the places of worship of the Hindus since ancient time, and the Mathuria and Sannadhia Brahmans receive alms at those places, whereby they support themselves; that we have ascertained this after inquiry, therefore you are hereby commanded not to interfere with the thakurdwara buildings, which are the places of pilgrimage, by the order of the Kings, but to leave the same in the enjoyment of the Brahmans. You are enjoined strictly in this matter."

The Judges held it clear "from the photograph which is before us and the accuracy of which is not questioned, that in order to enable the plaintiffs to use these temples which are ancient buildings, they must have constantly and uninterruptedly from time immemorial use the ghát and the steps adjacent thereto. But the plaintiffs claimed something more than a mere right to pass and repass over the ghát and the steps, and they say that as Sannadhia Brahmans and a section of the Chaube class, they are entitled to use and enjoy the ghat in the same way as the Mathuria Brahmans in connection with the jijmans, who, on sacred occasions, come there and use the ghát for religious ceremonies. In support of their case they produced a firman of the Emperor Furrukh Shah and oral evidence of witnesses which go to support their assertions, and it seems to be virtually conceded that if they do belong to the Chaube sect, they are entitled in respect to the ghát to enjoy the privileges and rights of the respondents of the Chaube community concerned therein."

Mr. C. W. Arathoon, for the appellants, argued that the evidence had not supported the statements in the plaint; and the rights, if any were proved, were so indefinite that no decree declaring them should have been made.

(1) As to these castes, see Sir H. Elliott's Races of the N. W. P., edited by J. Beames, Esq., appendix, pp. 308, 319, 329.

The respondents did not appear.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR BARNES PEACOCK:—

This was a suit brought by the respondents and another for a decree declaratory of their right in a ghát, and also for certain relief specified in their plaint. The suit is governed by Act 1 of 1877, the 42nd section of which deals with declaratory decrees. By that section it is enacted that "any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right; and the Court may in its discretion make therein a declaration that he is so entitled; and the plaintiff need not in such suit ask for any further relief. Provided that no Court shall make any such declaration where the plaintiff being able to seek further relief than a mere declaration of title omits to do so." The plaintiffs, representing the body of a sect called Sannadhias, set out in their plaint what they considered to be the rights of that sect, and they stated therein their grounds for asking for a declaratory decree. They say: "That Bindraban Das, when he was alive, laid out Rs. 100 in the repairs of the ghât. He died at Mathra on or about the 5th of October 1879. When he was alive he deposited Rs. 900 with Bhagwan Das, with instructions to use the money in the repairs of the Bisram ghát, and Bhagwan Das having failed to use the money in the repairs of the ghát, Panna, deceased, the father of Madan, defendant, and Chatrban, defendant, instituted a suit without joining plaintiffs, and with a view of depriving them of their right, in the Munsif's Court at Mathra for Rs. 1,000, on declaration that they alone were the mutawallis (managers), and under a fictitious deed of compromise obtained a collusive decree on 21st December 1882. Through collusion they had it recorded in the deed of compromise that Rs. 600 had been laid out in the repairs, and with reference to the balance of Rs. 400 a payment by instalments of Rs. 80 a year had been agreed, and the application filed by the plaintiffs in the Munsif's Court at Mathra, praying to be joined as a party, was disallowed on 14th September 1883." That was one of their grounds for asking the Court to exercise its discretion in making a declaratory decree. The next ground was: "That a fictitious suit was instituted by Changaji and others, against Panna and others, defendants, in this Court, and plaintiffs filed an application in this Court, also praying to be joined as a party under s. 32 of the Civil Procedure Code; but the said application was disallowed on 3rd July 1883, and plaintiffs were not joined as a party. That all the defendants to this suit have colluded with one another, and have taken collusive proceedings in the Munsif's Court at Mathra, and in this Court, with a view of depriving plaintiffs of their right. They declare themselves to be the owners, and deny plaintiffs' right; hence the cause of action arose on 11th August 1882, the date of the institution of the suit in the Munsif's Court at Mathra, and on 14th February 1883, the date of the institution of the suit in this Court at Agra." They then stated what the relief was which they sought, and they prayed judgment for "a decree for the declaration of the plaintiffs' right as mutawali and manager of the Bisram ghát, and all the temples attached to the same, to the extent of one-third, be passed in favour of the plaintiff as head of the Sannadhias against his brother Sannadhias" and that it might be likewise declared in the said decree that "defendants alone were not owners and mutawallis of the said ghát. It appears to their Lordships that the plaintiffs have made no case. They have not proved that they were entitled as mutawallis and managers of the Bisram ghát to one third of the offerings made by their followers, and they could not be entitled to have a declaration that the defendants were not the sole owners, unless they could prove a right on their parts to be part owners. Having asked for a declaratory decree, they

go on in pursuance of the Relief Act to allege that "the collusive decree obtained by the defendants from the Munsif's Court at Muthra against Bhagwan Das, for which defendants have declared themselves liable under the Deed of Compromise, having been set aside, its amount be recorded from the defendants and it be used in the repairs of the Bisram ghát, either with the consent and management of the parties or through an official of the Court."

There were many witnesses examined, and considerable discrepancies in the evidence given. The first Court laid down certain issues, the fourth issue being "Are the plaintiffs guardians of Bisram ghát, vested with a right to receive the offerings made in it, to superintend the repairs and erection of the building there, or are they priests at Swami ghát, plying their professional duty there?" It might be that they were priests of Swami ghát and yet might also have an interest in Bisram ghát. The whole point of the issue is—were they guardians of Bisram ghát with a right to receive the offerings made in it, and to superintend the repairs and erection of buildings there? The Subordinate Judge delivered judgment, in which he said: "The plaintiffs in this case have no connexion with the Bisram ghát; they are Sannadhia Brahmins, having no concern whatever with the property which was used by the Chaubes as the place of their worship. Bisram ghát, is the worshipping place of the Chaubes, in the vicinity of which the plaintiffs, who are Sannadhias, have their temples. My inspection of the place has fully convinced me of this. The documentary and oral evidence abundantly establish this conclusion to my entire satisfaction. Both sects, the Sannadhias and the Chaubes, are bitter enemies to each other and could not be expected to have a common place for their worship." Having come to that conclusion he dismissed the plaintiffs' suit with costs.

It is not necessary for their Lordships in concurring in the judgment of the Subordinate Judge to agree in all his reasons. It is quite consistent with the decree which he passed, dismissing the suit that the plaintiffs may have some right in Bisram ghát; but they have not proved any right to have it declared that they are entitled as mutawalis to have an interest to the extent of one-third of the offerings. The Subordinate Judge dealt with the evidence in the most general terms. He did not allude to any particular witness or any particular document, but he said: "I think the plaintiffs have not made out their case."

The High Court dealt with the case in the same general terms. The Subordinate Judge had heard the witnesses. He had better opportunities of judging of the evidence, and of the several descrepancies, than the High Court, who did not hear the witnesses or see their demeanour. The High Court did not decide whether the plaintiffs were the mutawallis, entitled to one-third, but they said: "In support of their case they produced a *firman* of the Emperor Furrukh Shah." It appears to their Lordships that that firman, as it is called, did not vest any right in either party and is not a document which can be held to support the case either of the one side or of the other, but the High Court attached some importance to it. The judgment continues: "The plaintiffs produced oral evidence of witnesses which go to support their assertion; and it seems to be virtually conceded that if they do belong to the Chaube sect they are entitled in respect to the ghát to enjoy the privileges and rights of the Chaube community concerned therein." The learned Judge who delivered the judgment then proceeds: "It seems to me to be established beyond question that they do belong to the Chaube class, and no evidence is shown to us on behalf of the respondents to contradict that produced by the appellants. This being so, and taking all the circumstances of the case into consideration, I think the plaintiffs appellants are entitled to the same decree as that granted to the plaintiffs appellants in F.A. No 172 of 1885, decided this day,"—referring to another suit. Their Lord-

ships see nothing on the record to show that there was any concession by the defendants of the kind indicated by the High Court. The decree which follows is not confined merely to the order expressed in the judgment. It proceeds: "It is ordered and decreed that this appeal be decreed; that the decree of the Subordinate Judge of Agra be set aside, and in lieu thereof it is hereby declared that the plaintiffs appellants aforesaid are entitled to have, exercise, and enjoy, all rights of care, use, and management of the Bisram ghát, and the buildings appertaining thereto, situated on the bank of the river Jumna, in the city of Mathra, and in connexion with the expenditure of the sum of Rs. 1,000 bequeathed by the late Brindaban Das Khettri for the repairs of the said ghát, so far as the same have not yet been expended as declared by the deceased Brindaban Das."

If their Lordships considered that the judgment of the High Court ought to be affirmed, it would be necessary to state in what manner that decree should be altered; but their Lordships are of opinion that the judgment of the High Court has gone upon a wrong principle, it merely stating that if the plaintiffs belonged to the Chaube class they were entitled to all they claimed, and that they did belong to the Chaube class.

It appears to their Lordships that the learned Judges of the High Court have not sufficiently kept in view the only real question raised in this case, namely, whether the plaintiffs have proved that they, as mutawallis or managers of the Bisram ghát, are entitled to one-third of the donations given by the pilgrims to that, and also that the suits referred to were fictitious? In their Lordships' opinion the plaintiffs have not made out a case for the declaratory decree which they claimed, and certainly they have not made out a right to have the decree obtained by the defendants from the Munsif's Court, at Mathra, against Bhagwan Das, set aside, and to have the amount recovered from the defendants in that suit used in the repairs of the Bisram ghát.

Their Lordships think, therefore, that the decree of the High Court ought to be reversed, and the decree of the Subordinate Judge affirmed; but holding that the plaintiffs are not entitled to the right claimed or to the relief sought, their Lordships wish it to be distinctly understood that they do not express any opinion with respect to any other rights, if any, which either of the parties to the suit may have or claim to have in the aforesaid Bisram ghat.

Their Lordships will therefore humbly advise Her Majesty to reverse the decree of the High Court, and to affirm the decree of the Subordinate Judge, and to order the respondents to pay the costs in the High Court. The respondents must pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant:—*T. L. Wilson and Co.*

10th and 26th July 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

JARAO KUMARI * ... *Plaintiff,*

and

LALONMONI AND ANOTHER ... *Defendants.*

On Appeal from the High Court in Bengal.

Evidence—Admission in a mortgage as to amount of land excepted from its operation—Evidence Act (I of 1872), s. 83—Takbast survey map—Statements recorded on such map.

Debutter land within the limits of a revenue-paying mouzah, which had been mortgaged by the defendants to a predecessor in title of the plaintiff, was exempted from the mortgage, the deed specifying the number of bighas making the area of the debutter. Against a plaintiff, who made title to the mortgaged mouzah and claimed

* 17 Cowell's Ind. Ap., 145; 18 Calc., 224.

possession of all of it that had passed by the mortgage, the mortgagors set up that there was more debutter in the mouzah than the deed had specified, the intention of the parties to the deed having been to exempt whatever debutter there actually was :—*Held*, that the statement in the deed as to the quantity of the debutter was a deliberate admission, imposing upon the mortgagors who had made it, the burden of proving that it was untrue, or that they were not bound by it; also that the Subordinate Judge's finding that the defendants had not given proof sufficient to discharge themselves of this, was correct.

Among other evidence, adduced to counteract the effect of this admission, was a takbast map made of a revenue survey. The amin who made it had no authority to determine what lands were debutter, but only to lay down, and to map, boundaries :—*Held*, that this map could not be treated as raising a presumption of correctness within section 83 of the Indian Evidence Act, 1872, on the question as to the amount of debutter land in one of the villages mapped.

Statements, also, as to what lands were debutter appeared on the face of the map to have been made according to the pointing out of the agents of the proprietors of the mouzah, and the principal tenants in the presence of the agents of the holders of estates in the neighbouring mouzahs :—*Held*, that these statements were not evidence on the issue now raised.

APPEAL from a decree (24th July 1885) of the High Court, modifying a decree (21st December 1882) of the Second Subordinate Judge of the Hooghly district.

The question was whether the lands, of which the plaintiff, now appellant, claimed possession, were included in a mortgage of the 6th October 1871, or were excluded by the terms of the mortgage deed, which exempted a certain number of bighas of debutter land from its operation. The ancestors of the defendants, respondents, were formerly zemindars of a ten-annas share of Mahomed Aminpore in the Hooghly district, and had dedicated to the maintenance of the worship of several Hindu deities a yearly sum of Rs. 7,824 out of the zemindari rents.

Before the decennial settlement, lands yielding about that sum were set apart from the malguzari villages of the zemindari; and in 1770 a chhar chitta was given by the officer representing the revenue authorities to the zemindar, stating the plots of debutter. In 1787 the settlement of the zemindari took place, excluding the lands which, according to that document, were debutter. A resumption suit claiming 9,141 bighas, as liable to assessment and not assessed, was brought in the year 1839, lasting till 1845. In that suit, which was brought against Jogendra Chunder Roy, who was the husband of the first, and father of the second, of the present defendants and against his brother, the chhar chitta of 1770 was produced; and the proceedings ended in the confirmation of the debutter, and its release from all claim by the Government to assess it to the revenue. This same document was produced in a suit for rent brought in 1880 by the present appellant in which the respondents intervened, but it was not forthcoming in this suit. Default having been made in payment of the mortgage debt, the mortgagee obtained, on the 10th April 1877, a consent decree for Rs. 2,27,589, in execution whereof the mortgaged lands were sold, on the 9th December 1878, to Luchmiput Singh, in the name of his son Chutturput Singh. They were then, on the 15th November 1880, with other estates, sold to the second plaintiff, the Maharaja Sir Jotendro Mohun Tagore, K.C.S.I., who granted a putni ijara of eight annas of the twelve annas of Mahomed Aminpore to Srimati Jorao Kumari, the first plaintiff, the present appellant, who was bound by the conditions of the ijara to protect the estate against encroachment.

This suit was at first brought to obtain possession of 39 plots, but no question remained on this appeal as to any parcel except the first, which was described in the schedule to the plaint as the Seoraphuli hat, or market, together with land belonging to it. The mortgage deed of 6th October 1871, which was in English, set forth the exception upon which the present litigation turned, which was, "save and except the debutter lands therein comprised, namely": then followed the names of the villages, with the amount of debutter land in each. Against

Seoraphuli was set down the area of 87 bighas, that extent of debutter land being thus excluded. The plaintiff's contention was that Seoraphuli having been mortgaged, less its debutter lands, those lands were expressly limited to the area of 87 bighas, and that the rest of the village, over and above that total, was comprised in the mortgage, such having been the intention of the parties thereto, also passed at the sale in 1878, and the and subsequent sale. The defendants, on the other hand, alleged that their title to the debutter land in this village was not limited to the 87 bighas, but that they were entitled to have excluded from the mortgage all the debutter land, whatever its area, that the limits of Seoraphuli contained.

The Subordinate Judge, Babu Bhubanchunder Mukerji, considered the evidence on which the defendants relied to be insufficient to outweigh the presumption raised by the admission in the mortgage deed of 6th October 1871 that the debutter land in Seoraphuli was only 87 bighas. He went through all the defendants' proofs, by which they showed that the land in suit was part of their estate, but held these proofs insufficient to alter the alleged area of debutter land in Seoraphuli, or establish it as any more than the 87 bighas, admitted in the mortgage deed, a careful document. By the takbast survey map made in 1869, it appeared that the lands, measured as debutter of Seoraphuli, were 192 bighas. But that map was evidence of possession, not of title, and to report on the question now raised, the quantity of debutter was not within the amin's authorization. He referred also to the non-production of the chhar chitta of 1770.

Both parties appealed to the High Court, of which a division Bench (MITTER and NORRIS, JJ.) in part allowed, and in part dismissed, the appeals of both parties, with the result that the judgment was in favour of the defendants, as to the area of the debutter in Seoraphuli being the 192 bighas mentioned in the takbast map of 1869. The High Court held that, on the proper construction of the mortgage deed, the intention of the parties was to mortgage only the zemindari lands excluding the debutter, and that "the specification of the quantity of the debutter land did not enlarge the actual area of the mal lands agreed to be hypothecated." In deciding what was debutter, the Judges were of opinion that the measurement chittas made in the course of the resumption suit of 1840—45 would, if they had been procurable, have been the most satisfactory evidence. But, as they could not be found, the next best evidence was the takbast survey map of 1869. This they held to have been wrongly rejected by the first Court, and they considered it to be presumably correct, under section 83 of the Indian Evidence Act, 1872, it not having been shown to be inaccurate. As to the non-production of the chhar chitta of 1770, there was nothing to show that it was intentionally withheld by the defendants. Thus they arrived at 192 being the number of excepted bighas in Seoraphuli.

This appeal was preferred by the first plaintiff alone.

Mr. *T. H. Cowie Q.C.*, and Mr. *R. V. Doyne* appeared for the appellant.

Mr. *J. H. A. Branson* appeared for the respondents.

The principal points urged for the appellant were that the High Court was wrong in its construction of the mortgage deed, and also in not giving the right effect to the evidence. The true construction was that all of mouzah Seoraphuli, except 87 bighas of debutter, was included in the mortgage. The High Court had not attributed due weight to the defendants' admission in the deed, and had erred in holding that the takbast map of 1869 was within section 83 of the Evidence Act. The statements appearing on the map had been wrongly admitted as evidence on the issue between the parties.

For the respondents, it was argued that the High Court had rightly treated the mortgage deed as excluding the debutter in Seoraphuli. The insertion of the num-

ber of bighas forming the area was open to correction in a decree, upon evidence of its inaccuracy. The order in the resumption suit, the takbast map, and the other evidence, on which the judgment of the High Court had been based, supported the conclusion.

Mr. *T. H. Cowie, Q.C.*, replied.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR R. COUCH :—

By a mortgage dated the 6th of October 1871 to secure the repayment of Rs. 1,50,000 and interest, Srimati Lalonmoni Dasi conveyed all her share and interest, and Girindra Chunder Roy released, conveyed, and assured all his share and interest, as well as confirmed the share and interest of Lalonmoni Dasi, unto Doorga Churn Law, his heirs and assigns, according to the nature and tenure thereof, of and in an undivided moiety or eight-annas share of and in a large number of mouzahs, of which the names were stated, which taken collectively were said to compose the zemindari called and known as kismut pergunnah Mahomed Aminpore, in the zillah or district of Hooghly, save and except the debutter lands therein comprised, namely (this word being followed by a list of the mouzahs), and against the name of each the quantity in bighas and cottahs of land excepted making a total of 4,992 bighas 3 cottahs. Amongst the mortgaged mouzahs is one called Sarapuli or Seoraphuli, and the quantity of debutter land set against its name is 87 bighas. A suit having been brought by the mortgagee against the mortgagor for realization of what was due to him, and a decree obtained, the property was attached and sold by auction, and was purchased, in the name of his son, by Rai Luchmiput Singh, who obtained a sale certificate, and possession was given to him. He afterwards sold the property to Maharaja Jotendro Mohun Tagore, who granted a putni thereof to the appellant. The suit was brought by the appellant and the Maharaja, who has no immediate interest, against the mortgagors, to recover possession of parts of the mortgaged property, including Seoraphuli, of which the defendants were in possession, and the defence was that the properties claimed and mentioned in the schedule to the plaint were not mortgaged, and that certain of them, including Seoraphuli, were rent-free debutter properties.

The present appeal relates only to Seoraphuli, and the question in it is whether the debutter land in Seoraphuli exceeded 87 bighas. The mortgage deed conveyed all the land in the mouzahs which was not debutter, and the statement of the extent of the debutter land comprised in the mouzahs was a deliberate admission by the mortgagors, the defendants, which imposed upon them the burden of proving that it was untrue, or that they were not bound by it. It was admitted on behalf of the defendants that they had no original deed of endowment, and they relied on a resumption decree dated the 6th June 1845, from which it appeared that 5,618 bighas 16 cottahs debutter lands, situate in Burdwan, resumed by the Deputy Collector by his decree dated the 26th June 1837, were released as debutter to the ancestors of the defendants, on condition of their appropriating the proceeds thereof to deb-sheba. The decision in the resumption suit mainly rested on a chhar chitta of William Lushington, Esq., in 1770, and a letter of the Collector of the district of Nuddea in 1791, it appearing from the decision that the quantity of debutter lands of each village was mentioned on the back of the chhar. This had been filed in 1880 in a suit in the Small Cause Court at Serampore, and there was evidence of its having been returned to one of the defendants' servants in that year. The plaintiffs gave the defendants notice to produce various papers, including the chhar. It was not produced, and the Subordinate Judge held that, in its absence, he must adopt the area of the debutter lands as described in the mortgage deed as the real quantity of debutter lands excluded from its opera-

tion, and made his decree accordingly. The decree included many properties, and both parties appealed to the High Court. That Court allowed the defendants' appeal as regarded Seoraphuli, called plot No. 1, and modified the decree of the lower Court, and the present appeal is against this decision. The judgment of the High Court appears to be founded upon a takbast map made in a survey in 1869, which the learned Judges said they were of opinion "should be taken as the basis of the decision" of the question of the identity of the debutter lands, unless it was displaced by any better evidence, and they appear to have held that it lay upon the plaintiff to rebut the evidence of the map. The statements in this map of lands being debutter appeared on the face of it to have been made as pointed out by agents on behalf of the proprietor of the mouzah and the principal tenants in the presence of the agents of the holders of estates in the neighbouring mouzahs. The amin who made the map had to lay down boundaries, but had no authority to decide what lands were debutter. The value of the map must depend upon the inquiry which was made by the amin, and the statements of what lands were debutter may have been and probably were given by the defendants' agents, no one being present to question the accuracy of them. Section 83 of the Evidence Act has not the effect, which the High Court gives to it, of making those statements evidence. Their Lordships agree with the Subordinate Judge in the view which he took of the takbast map, and are of opinion that it was of no weight against the admission in the mortgage deed. Nor do they see that the decision of the Subordinate Judge proceeded upon an erroneous construction of the recital in the deed. The entire mouzah Seoraphuli, except debutter land, was conveyed, and it lay upon the defendants to prove that the 87 bighas set against Seoraphuli was a mistake, and that there was a greater quantity of debutter land in that mouzah. Whether or not they could have produced the chhar chitta and purposely refrained from doing so need not be inquired into. The evidence was not sufficient to show that their admission ought not to be taken as proof of the plaintiffs' case. Such an admission as that is entitled to great weight and should be met by satisfactory evidence. Their Lordships will humbly advise Her Majesty to reverse the decree of the High Court so far as it modifies the decree of the Subordinate Judge, and dismiss the plaintiffs' suit, and orders the plaintiffs to pay costs, and to order the defendants to pay the costs of the appeal to the High Court and the costs of the suit in the Court of the Subordinate Judge as ordered by his decree. The respondents will pay the costs of this appeal.

Appeal allowed

Solicitors for the appellant: Messrs. *Barrow & Rogers.*

Solicitors for the respondents: Messrs. *Watkins & Lattey.*

18th and 23rd July 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

BUDHA MAL* ... *Plaintiff.*

and

BHAGWAN DAS AND ANOTHER ... } *Defendant.*

On appeal from the Chief Court of the Punjab.

Hindu law—Partition—Evidence of Partition—Distribution of family estate followed by separate possession, equivalent to informal partition—Appeal to Chief Court, Punjab—Civil Procedure Code, 1882, s. 584—Questions of fact.

* 17 Cowell's Ind. Ap., 392; 18 Cal. 302.

The Courts below found that a distribution of ancestral estate among the members of a family had taken place in former years, and had been followed by continuous possession, without their having any intention to re-adjust or to hold on behalf of the family. The right of an individual member to claim another partition was therefore negatived.

The parties, who had long discontinued joint residence, were members of a family consisting at the time of the distribution of four sons left by a Sikh Dewan deceased. The son of one brother now claimed from the son of another, joining a third who still survived, partition of the property which had descended from the grandfather with the increment since his time.

That an actual partition had been effected, although probably no formal document of partition had been executed, appeared to their Lordships to be a just inference from the evidence.

An appeal from an Appellate Court to the Chief Court is not limited as such appeals are under the Civil Procedure Code, 1882, section 584; but evidence may be dealt with, and questions of fact are open for decision(1).

APPEAL from a decree (20th March 1886) of the Chief Court, affirming, with an exception as to part, a decree (26th February 1883) of the Additional Commissioner of the Lahore Division, who had reversed a decree (1st May 1882) of the Judicial Assistant Commissioner of the Lahore district.

The principal question raised was whether the separate possession by the brothers Tara Chand, Mangal Sein, Rattan Chand, and Harnam Das (the first two having been sons of Karam Chand, who died in 1835, by one of his wives, and the latter two his sons by another wife) had been rightly considered by the Courts below to constitute their separate estate, or this distribution among the brothers had been ineffectual to supply the place of a partition. The appellant, a son of Mangal Sein, suing on the 8th June 1880, claimed to be still entitled to a partition of the family estate, as against Bhagwan Das and Barkat Ram (the latter deceased during the proceedings), the two sons of Rattan Chand, and Harnam Das. The property to which the claim related consisted of houses in Lahore and its suburbs, with gardens, also houses in Amritsar, and some proprietary shares in the revenue-paying village of Bela Basti Ram, in the district and tehsil of Lahore.

The Judicial Assistant Commissioner found that no partition had been shown to have already taken place, and that there had been no possession by the brothers adverse to one another's title; but that the properties which had been at one time joint must be held to be so still. He considered that the claim was not barred by limitation, and he awarded to the plaintiff his share of nearly all the property sued for.

The Additional Commissioner agreed with the Judge of the first Court that the suit was not barred by limitation, but considered that the parties, by their acts and conduct, had shown that they had intended, and had tacitly consented, to possess separate portions of the family property in severalty, although there had been no formal act of partition among them. So that there was at the date of the suit no joint property of which a partition could be granted. He was of opinion that there had been long separate possession, and independent enjoyment, without trace of any joint account, or sharing of profits, or any proof of intention to have any future re-adjustment, or that each individual was holding, not for himself, but on behalf of the family.

The Chief Court substantially agreed with the lower Appellate Court as to the intention of the parties, and as to the legal effect of their dealings, except as to one piece of property, *viz.*, the village land in Bela Basti Ram; the result being that except as to this latter part of the claim, the suit was dismissed.

In considering the state of the family at Karam Chand's death, and what became of the ancestral houses, the Additional Commissioner found that the three sons held separate offices, with separate pay and jagirs, under the Sikh Government, the fourth being an infant under his own brother's, Rattan Chand's, care.

(1) Act XVII of 1877, section 38, providing for such appeals, was replaced by section 40 of the Punjab Courts' Act, XVII of 1884.

Tara Chand was the Sirdar Commanding the Charyari Cavalry; Mangal Sein was a ressaladar of the same troops. Rattan Chand was "hazur-navis," or Court-writer. The brothers were all separate in residence and food at the time of Koram Chand's death. Without being able to fix the precise time when the distribution of the houses happened, the Commissioner found that it was, most probably, in Sambat 1896, or 1839 A.D., when Tara Chand was about to depart to Benares; quitting Lahore without leave, and contrary to the order of the Sikh Government, prohibiting its servants crossing the Sutlej. A settlement took place at this time of most of Tara Chand's property, he having taken with him a large sum in cash and jewels, and having given his houses in the Punjab to his brother Mangal Sein, of which last the plaintiff was in possession. Koram Chand's property thence forward remained in possession of his sons separately. The Additional Commissioner added:—

"However unequal the sharing may be argued to be, I hold that it has taken effect and been adhered to for over 40 years at least, and that it cannot now be interfered with; it constitutes, in fact, a virtual or *de facto* partition, and this partition is further rendered unalterable, inasmuch as the intention of the parties was manifested by their subsequent conduct, by their sole and independent enjoyment of these properties. It is nothing to the point that Rattan Chand was clever and pushing, and got the lion's share. Unless the others resisted that in due time, and insisted on partition before any question of finality could arise, their displeasure, so far from being in their favour, is much against them; they were aware of their claims, and yet took no step to redress what they felt to be their grievances. It is too late to do so now when they have suffered the separate enjoyment to last without interruption for forty years."

He added that the plaintiff's case did not fail on the ground of limitation, but on the ground of long separate possession, and independent enjoyment, without a trace of any joint account, or sharing of profits, or any proof of intention that there should be any future re-adjustment, or that the properties held by each were only held for the family, not for the individual.

He lastly considered whether there was any affirmative evidence relating to the separate properties, and showing their purchase out of joint family funds. This he could not find, nor would he allow that the settlement record of the land in village Bela Basti Ram, which was entered in the names of all the family both in the first settlement of 1849, and in the second of 1867-68, was sufficient to show the plaintiff to be entitled to his share by inheritance in this part of the patrimonial estate.

On an appeal by the plaintiff the Chief Court considered the questions as to the intentions of Karam Chand's sons in distributing the property, and whether Rattan Chand's position had been shown to be that of manager. The judgment referred to the following authorities:—

"The presumptions as to the property of a Hindu family descended from a common ancestor remaining joint property until separation is shown are presumptions of fact such as are provided for by section 114 of the Evidence Act. The case of *Approvier* v. *Rama Subba Aiyan* (1), and the case of *Neelkisto Deb Baromono* v. *Beerchunder Thakoor*(2), and *Yunumula Venkayama* v. *Yanumula Boochia Venkondora*(3) illustrate the ordinary rule, but the presumption may be weakened or even rebutted by proof of facts which give rise to an inference that the property is held in seperate ownership, even though there is no evidence of a formal partition. See *Bodh Sing Doodhoria* v. *Gunesh Chunder Sen*(4), a decision of the Judicial Committee, and *Moro Vishvanath* v. *Gunesh Vithal*(5).

(1) 11 Moore's I. A., 75; 2 P. C. J., 218.
(2) 12 Moore's I. A., 523; 2 P. C. J., 567.
(3) 13 Moore's I. A., 333; 2 P. C. J., 546.
(4) 12 B. L. R., 317, at pp. 326, 327.
(5) 10 Bom., 444, at pp. 452, 453, 468, 469.

That there may be a partial partition of the family property, while other members remain united, is settled, contrary to the view expressed in *Radha Churn Dass* v. *Kripa Sindhu Dass*(1) by the Privy Council judgment cited in *Upendra Narain Myti* v. *Gopee Nath Bera*(2). See also *Manjanatha Shanabhaga* v. *Narayana Shanabhaga*(3) and Jolly's Tagore Law Lectures for 1883, page 135. The judgment in *Lakshman Dada Naik* v. *Ram Chandra Dada Naik*(4), while it notices the absence of a formal partition in the father's lifetime, really turned upon other grounds."

The result was that the Chief Court affirmed the judgment of the Additional Commissioner except as to the shares in Bela Basti Ram, as to which his decision was reversed, and a one-third share was decreed to the plaintiff.

Mr. *J. D. Mayne*, for the appellant, argued that the facts were consistent with there not having been a partition; and that the presumption of jointness should prevail. The question was as to the intention of the members of the family in separating, and the distribution which had taken place had not been the equivalent of a partition.

Mr. *K. V. Doyne*, and Mr. *John Eldon Bantes*, for the respondents, were not called on.

The judgment of their Lordships was delivered by

THE RIGHT HON. SIR RICHARD COUCH:—

The parties to the suit which is the subject of the present appeal are the descendants of one Karam Chand, who died in the year 1835, and who was in the service of Ranjit Singh, and apparently held a position of some importance in his service. Karam Chand had two wives. The first was the mother of Tara Chand and Mangal Sein, and the second was the mother of Rattan Chand and Harnam Das. Mangal Sein died leaving a son Budha Mal, who is the plaintiff, and Rattan Chand died in 1872, leaving a first son Bhagwan Das, also a son who is stated to have disappeared in consequence of getting into some difficulty and of whom nothing now is known, and a third son Barkat Ram, who is the second defendant in the suit, but who died on the 29th of June 1884. Tara Chand, the eldest son of Karam Chand, left Lahore, the residence of the family, and went to Benares, either in 1838 or 1839, taking with him a quantity of moveable property, according to the evidence of the plaintiff, of the value of Rs. 60,000 or Rs. 70,000. He died at Benares without children in 1858, his widow succeeding to the property which he had. It appears that during the life of Karam Chand the sons had themselves acquired and held separate property, and it is said that Rattan Chand had property to a greater extent than the other brothers.

The suit was brought by Budha Mal, the son of Mangal Sein, on the 8th of June 1880, and in it he alleged that the property, or a considerable portion of it, was still joint family property, and he asked to have a partition.

The question raised in the suit is stated by the Judicial Assistant Commissioner, before whom the case first came, to be that Bhagwan Das, who was the principal defendant, said, "that though he has no knowledge that the property of Karam Chand after his death was formally partitioned, yet all the brothers have always been separate in food, residence, and estate;" and that "each party enjoys the income of his own property, and has no concern with the property in the possession of the other;" and further, "that Rattan Chand never held nor purported to hold the property in suit as manager for the benefit of Mangal Sein and Tara Chand." The defence was made in that form; no doubt in consequence of the plaintiff having alleged in his plaint that at first Tara Chand was the manager on behalf of the whole family, and after he

(1) I. L. R., 5 Calc., 474.
(2) I. L. R., 9 Calc., 817.
(3) I. L. R., 5 Mad., 362.
(4) I. L. R., 5 Bom., 48.

went to Benares, Rattan Chand, who was a literate man, became the manager on behalf of the whole family. Substantially the plaintiff alleged that the property of which he sought a partition was, at the time when the suit was brought, joint family property. The principal defendant, Bhagwan Das, who is the only respondent who has appeared in the present appeal, alleged that although there had not been a formal partition of the property, yet that somewhere about the time when Tara Chand went to Benares, or shortly afterwards, there was in fact a separation of the family in estate as well as in food, and from that time there had been a separate possession of the property by the different members of the family in consequence of it.

The case was tried in the first instance by the Judicial Assistant Commissioner of Lahore; and in his judgment, he says: "Now the fact that plaintiff holds a large number of houses as separate estate, and that defendants do the same, would seem to point to some *de facto* if not formal partition of the joint family of the sons of Karam Chand; and this view receives emphasis from this other fact, that plaintiff's father Mangal Sein and Tara Chand have held together all along, and are the sons of Karam Chand by one wife; while defendants 1 and 2's father and defendant 3 have held together, and are Karam Chand's sons by another wife." He says further: "For the manager of a joint estate in which he is a co-shareer to acquire separate property would be unusual, but where we have it admitted that the respective alleged co-sharers are all in possession of distinct properties, it would seem to import that their joint condition had ceased to exist." And a few lines further on: "Where the two sons by one wife hold a long list of separate property, and the two sons of another wife do the same, it seems a fair inference that at some time anterior to that state of things there was a separation of interest." Now he does appear in a subsequent part of his judgment to have thought it necessary that there should be, not what he had found in the above passages, a separation *de facto*, but a specific partition. But it is evident that the conclusion which he came to from the evidence was that there had been a partition—some transaction between the parties, which in fact amounted to a partition of the property, and that from that time they had become separate in estate, and had enjoyed the property separately. He however made a decree partly in favour of the plaintiff and partly in favour of the defendant, in consequence of the view which he took as to the necessity of some specific partition.

From that decree there was an appeal to the Additional Commissioner, and his language upon the question of the partition is this: "The case does not throw any light as to the precise time at which the *de facto* distribution was made or happened. It was most probably about the time of Tara Chand's departure to Benares in Sambat 1896. I find accounts of rents for some of the houses as paid to Tara Chahd after Karam Chand's death, which lead to the supposition that some of them remained with Tara Chand for a time. All I can say with reasonable certainty is, that this distribution was existing in Sumbat 1897 (when the rents appear first in Rattan Chand's accounts), and has ever since that remained in operation." In a subsequent part of his judgment, after considering the evidence, he says: "To sum up, the conculsions I have come to are, that this family was predisposed to separation, or naturally circumstanced so as to lead to it, if this phrase be preferred. The family consisted of two sons of one wife, who held together, and two sons of another wife; they held separate offices with separate salaries, and had certainly acquired separate houses. I find then that it is in every way probable, and it is certainly proved that as far back as Karam Chand's death, or even before it, they were separate in food and residence, Harman Das, an infant, being in charge of Rattan Chand." Then he says: "I find that

Karam Chand's property was tacitly apportioned without objection at a time which is uncertain." And further on: "I find that from that day to this all these houses that came to the different members, as detailed in this judgment, have since been separately and independently held, and that there has been no trace of any magagership, anything remotely resembling a common fund, a common or joint account, or a sharing, or participation of profits." He afterwards says: "However unequal the sharing may be argued to be, I hold that it has taken effect and been adhered to for over 40 years at least, and that it cannot now be interfered with; it constitutes in fact a virtual or *de facto* partition, and this partition is further rendered unalterable, inasmuch as the intention of the parties was manifested by their subsequent conduct, by their sole and independent enjoyment of these properties." There is thus a most distinct finding on the part of the Additional Commissioner that there was a separation in fact, although no formal document could be produced, and probably there never was any formal document executed between the parties. If there had been, it might have been very difficult to prove it. This judgment was given after a careful examination of the evidence in the case, and certainly appears to their Lordships to be a fair inference from it.

There was then an appeal from the judgment of the Additional Commissioner to the Chief Court of the Punjab, and it is to be observed that although this was an appeal from an Appellate Court it was not limited, as such appeals under the Code of Civil Procedure are, to questions of law, and the Chief Court had authority to deal with the evidence and decide questions of fact. After noticing the evidence, and the facts that were relied upon as showing that the property continued to be held as undivided family property, the first learned Judge of the Chief Court says: "Under these circumstances I am of opinion that in 1854 at latest, and probably several years earlier, Rattan Chand had begun to hold adversely to the plaintiff's father, even if there had been no such acquiescence on the part of the latter as to operate as a *de facto* partition. Whether there had been such acquiescence the lapse of time and Mangal Sein's manifest dissatisfaction with the existing state of things 10 years before his death, make it difficult satisfactorily to determine."

It has been argued by Mr. Mayne, who appeared for the appellant, that this shows that this learned Judge was not satisfied that there had been an actual or a *de facto* separation. That he was so satified appears from the previous passages in his judgment, in which he says, after speaking of the presumption of a family being joint, "but the presumtion may be weakened, or even rebutted, by proof of facts which give rise to an inference that the property is held in separate ownership, even though there is no evidence of a formal partition." This part of his judgment shows that he was of opinion that there had been a separation, or partition, in fact; but that even if that had not been the case, there was the question of the operation of the adverse possession. The judgment of the other learned Judge is more distinct upon the question. He says: "The finding of the Additional Commissioner that there was (at least so far back as 1854) an absolute *de facto* separation between Rattan Chand had Mangal Sein, and that Rattan Chand was not the manager of the joint family property, seems perfectly right, and, as far as I can understand, Mr. Parker"—that is, the Judicial Assistant Commissioner—"came to the same conclusion in the 6th and 7th pages of the printed judgment."

Thus, upon the question which was the real issue between the parties, whether there had been a partition of the family property there are the findings of three Courts, all of which appear to have looked very carefully into the evidence. The judgments are very full, and nothing has been urged before their Lordships by the learned counsel for the appellant

which in any way shows that the conclusion which they came to was not a fair inference from the evidence in the case. It does appear that more than 40 years ago—although there might not have been any formal document drawn up between these persons—there was a partition of the family property.

The Additional Commissioner dismissed the plaintiff's suit entirely, but on the appeal to the Chief Court it appeared that there was a small portion of the property of which there had been no partition; and on that ground the Chief Court modified the decree of the Additional Commissioner by excepting that portion from the decree dismissing the suit. That decision has not been appealed from by the respondent.

The result, therefore, is that their Lordships will humbly advise Her Majesty to affirm the decree of the Chief Court, and to dismiss this speeal, and the appellant will pay the costs.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent Bhagwan Das: Messrs. *Speechly, Mumford, Landon, & Rogers.*

5th July 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Watson, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

IN THE MATTER OF F. W. QUARRY.*

On appeal from the High Court for the North-Western Provinces.

Act XVIII of 1879, Legal Practitioners Act, s. 13.

A pleader's professional misconduct having amounted to "reasonable cause," within the meaning of 13 of the Legal Practitioners Act, XVIII of 1879, for suspending him from practice, their Lordships declined to interfere with the decision of the High Court as to the punishment, it not being clearly shown that the quantum awarded was unreasonable and excessive.

APPEAL from an order (3rd December 1889) of the High Court.

The appellant, who in August 1871, had obtained a certificate under the Pleaders Act, XX of 1865, and had practised as a pleader at Mussoorie for some years, had been professionally concerned on behalf of the Delhi and London Bank, through their agent at that place, until the latter had ceased to employ him. After his employment by the Bank had ceased, a correspondence commenced between him and a suitor against whom the Bank had taken proceeding to recover a debt. It was alleged in the Court below that this correspondence showed unprofessional conduct on his part. The result was his suspension from practice for twelve months under s. 13 of the Legal Practitioners' Act, XVIII of 1879.

Mr. J. H. A. Branson, for the appellant, argued that the correspondence was open to a construction more favourable to him than that which the High Court had placed upon it. Even if that construction was correct, the sentence of suspension was in excess of what the circumstances required.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD WATSON:—

The appellant, Mr. F. W. Quarry, was heard last Saturday on an application to stay the execution of an order of the High Court of the North-Western Provinces pending an appeal at his instance, and their Lordships on that occasion directed the petition to stand over, and allowed the appellant to be heard to-day on the merits of his appeal.

The letters produced appear to their Lordships to afford ample evidence, under the hand of the appellant, that, in his professional capacity, he was guilty of grave improprieties which the Court could not overlook when the matter was

* 17 Cowell's Ind. Ap., 199; 13 All 93.

regularly brought under its notice. Such conduct, in the opinion of their Lordships, amounts to "reasonable cause" for suspending a certificated pleader within the meaning of s. 13 of the Act XVIII of 1879.

That being so, the only question which remains for consideration is, whether the learned Judges of the High Court have erred in visiting the offence with twelve months' suspension from office. It must be borne in mind that the Court which awarded that penalty were in a much better position than this Board to estimate the degree of punishment which, in the whole circumstances of the case, and in the interests of the profession and of the public, ought to follow such misconduct on the part of one of its pleaders. Their Lordships cannot, in a case like the present, interfere with the decision of the Court below unless it is clearly shown that the *quantum* of punishment was unreasonable and excessive. Notwithstanding the able and temperate argument of Mr. Branson, they are unable to come to that conclusion, and they will accordingly humbly advise Her Majesty that the appeal ought to be dismissed.

Solicitors for the appellant: Messrs. *W. Carpenter and Son.*

Appeal dismissed.

15th November 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Richard Couch, and the Right Hon. Lord Shand.

RAHIMBHOY HABIBBHOY* ... *Petitioner,*

and

C. A. TURNER, (OFFICIAL ASSIGNEE AND ASSIGNEE OF THE ESTATE OF ALLA'DINBHOY, AN INSOLVENT ...) *Respondent.*

Petition for special leave to appeal from a decree of the High Court of Bombay.

Privy Council, leave to appeal to—Perogative right of Crown to admit appeal where leave to appeal refused by High Court—Final decree—Meaning of "final" in Section 595 of Civil Procedure Code(XIV of 1882)—Section 601 of Code—Practice—Procedure.

Where a decree directing the taking of accounts which the defendant contends ought not to be taken at all, decides, in effect, that, if the result should be found to be against the defendant, he is liable to pay the amount, the decree is final within the meaning of section 595 of the Civil Procedure Code (XIV of 1882) for the purpose of appeal.

On the ground that a decree for an account was not final within that section, the High Court refused, under section 601, to grant the defendant a certificate.

On his application for special leave to appeal to Her Majesty in Council, not by way of an appeal from the local Court's refusal, but asking for the exercise of the prerogative right to admit an appeal:

Held, that, as leave could be granted on any other ground, should any appear, besides the ground that the Court had refused the certificate without good cause, while leave could also be granted on the latter ground, if established, to make this application was, perhaps, more convenient than to appeal from the order of refusal.

Held, also, that the real question in this suit having been the liability of the defendant to account to the plaintiff upon several claims, the decree had decided this against the defendant, in such a way that, although the account had not been taken, the decree was final within section 595.

PETITION for special leave to appeal from a decree (17 March, 1890), of the High Court, generally affirming, with a variation of detail, a decree (10th December, 1888), made in its original jurisdiction; also the appeal from an order (20th June, 1898), of the High Court (1) refusing a certificate under section 601 of the Civil Procedure Code (XIV of 1882).

The question now raised was whether a decree directing that accounts should be taken between the parties was final within the meaning of section 595 of the Civil Procedure Code.

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* 18 Cowell's Ind. Ap., 6; 15 Bom. 155.

(1) I. L. R., 14 Bom., 428.

The petitioner, who was a brother of Alladinbhoy Habibbhoy, an adjudged insolvent, was defendant in a suit, brought in 1887, by the Official Assignee as representing the insolvent's estate, on behalf of the creditors, to obtain a decree for assets alleged to belong to the insolvent, the property being in the possession of the defendant who was alleged by the plaintiff to be liable to account to him. The insolvent Alladinbhoy carried on buisness down to about the year 1866 as a merchant in Bombay; and there, as the plaint alleged, the defendant, who carried on a separate business with a third brother Ahmedbhoy, had, after Alladinbhoy's failure, assisted him in concealing his property, now retaining some of it.

In 1881, the present plaintiff sued Ahmedbhoy to obtain possession of some of the property held by him which, as the plaintiff alleged, belonged to the insolvent; and that suit, to which the present defendant was made a party, (but only for purposes of discovery), had been referred to arbitration, with a result in the plaintiff's favour. Part of the claim now made to the amount of Rs. 1,12,500 was dismissed by the High Court (Scott, J.) in December, 1888 (1). But the judgment, as to cash balances, shares and outstandings, transferred just before the adjudication of insolvency, was that there had been a fraudulent transfer. The decree directed an account of what was due to the insolvent at the date of the vesting order. Interest on any balance that might be found due on the accounts was declared payable to the plaintiff. This judgment, and all the others in this suit, are reported in the fourteenth volume of the Indian Law Reports of the Bombay Series (see pp. 408 and 428).

The defendant appealed, and the plaintiff filed cross-objections to the decree. The High Court (Sargent, C. J., and Bayley, J.,) confirmed the decree, with a variation as to the taking the accounts.(2)

On the 20th June, 1890, the High Court refused the defendant's application for a certificate required to enable him to appeal to Her Majesty in Council, on the ground that the decree was not final within the meaning of section 595, subsection (c) of the Civil Procedure Code(3).

The defendant now petitioned for special leave to appeal, alleging that the refusal was not well grounded: that he had a defence raised questions of law which should be disposed of before the taking the account: the leave to appeal, applied for, was from the decrees of 10th December, 1888, and of 17th March, 1890, as well as from the order of 20th June, 1890.

Mr. *A. Cohen, Q. C.*, with whom was Mr. *J. H. A. Branson*, appeared for the petitioner.

Mr. *J. B. Finlay, Q. C.*, with whom was Mr. *J. D. Mayne*, for the respondent.

For the petitioner, it was argued that the decree that the accounts should be taken was in itself a final decree, on the merits involved in this suit, which was to enforce the liability to account on the part of the defendant. The *North British Bank* v. *Collins* (4) decided that an interlocutor ordering the taking of account was appealable under the Statute 48 Geo. III, C. 151, section 15, as the merits were clearly involved. And on section 19 of the Judicature Act, 1873, giving a right of appeal from any judgment or order, an order, as in effect disposing of the merits, though only referring a case back to an arbitrator, was held appealable—*Shubrook* v. *Tufnell.*(5) In regard to the prerogative character of the special leave to appeal, reference was made to *Babu Gopál Thákur* v. *Teluk Chunder Rai.*(6) Act X of 1877, section 594, Act XIV of 1882, section 595,

(1) I. L. R., 14 Bom., 412.

(2) I. L. R., 14 Bom., 422
(3) I. L. R., 14 Bom., 428
(4) 1 Macq. H. L. Ca., 369.
(5) L. R. 9 Q. B. D., 621.
(6) 7 M. I. A. Ca., 551.

and W. Macpherson's Practice of the Judicial Committee, Chap. II, were also referred to.

For the respondent, it was argued that the High Court had rightly refused the certificate on the ground that the decree was not final. This application, which was not only by way of appeal against the decision that the decree was not final, was based also on the allegation that there were points of law that in the Court below had not been rightly disposed of. However, the one ground only, that the decree was final, was the reason brought forward why the special leave should be granted. But it could hardly be said that the rights of the parties were determined before all the facts were disposed of. And upon such a decree as the one now in question it might appear that no accounts were forthcoming, or it might be found that nothing was due. Thus the decree was not final. *Aben Sha Sabit Ali* v. *Cassirao Bàbà Sàheb Holkar*(1); *Mahant Ishvargar Budhgar* v. *Caudasama Amarsang*(2) were refered to.

Counsel for the petitioner was not called upon to reply.

Their Lordships' judgment was delivered by

THE RIGHT HON. LORD HOBHOUSE:—

In this case the defendant desires leave to appeal from the decree of the High Court, and the Court have refused him the necessary certificate, on the ground that the decree is not a final one within the meaning of section 595 of the Civil Procedure Code. This petition is not by way of appeal from the decision of the Court, but it is presented for an exercise of the prerogative right of the Crown to admit an appeal. Although it is not an appeal, it is perhaps a more convenient proceeding than an appeal, because their Lordships can then grant leave on any other ground, if other ground appears for the indulgence that is sought, and if their Lordships find that, in a case in which the appeal is claimed as of right, the Court below has refused the certificate for a reason which appears to them to be an unsound reason, then they would advise Her Majesty to admit the appeal.

Now in point of fact no other ground has been assigned for presenting this petition, and no other ground has been argued here excepting the one ground that the Court below did not take the right view of the word "final" in the Civil Procedure Code. Therefore, to test that point, their Lordships have to look at what was the real question before the Court when this decree was made. The plaintiff in the suit alleges that the defendant is accountable to him upon several claims. The defendant alleges that he has got legal defences to every one of those claims, and that he is not accountable at all. The Court held that the legal defences put forward were valid as to some of the claims, and as to others of the claims that they were invalid, and therefore that the defendant must account. It is true that the decree that was made does not declare in terms the liability of the defendant, but it directs accounts to be taken which he was contending ought not to be taken at all; and it must be held that the decree contains within itself an assertion that, if a balance is found against the defendant on those accounts, the defendant is bound to pay it. Therefore the form of the decree is exactly as if it affirmed the liability of the defendant to pay something on each one of these claims, if only the arithmetical result of the account should be worked out against him. Now that question of liability was the sole question in dispute at the hearing of the cause, and it is the cardinal point of the suit. The arithmetical result is only a consequence of the liability. The real question in issue was the liability, and that has been determined by this decree

(1) I. L. R., 6 Bom. 260.
(2) I. L. R., 8 Bom. 548.

against the defendant, in such a way that in this suit it is final. The Court can never go back again upon this decree so as to say that, though the result of the account may be against the defendant, still the defendant is not liable to pay anything. That is finally determined against him, and therefore in their Lordships' view the decree is a final one within the meaning of section 595 of the Code. They, therefore, think the case is one in which they should advise Her Majesty that the leave to appeal should be allowed on the usual terms as to security.

Petition granted: pecial leave to appeal allowed.

Solicitors for the petitioner:—Messrs. *Lattey and Hart*

Solicitors for the decree-holder:—Messrs. *Payne and Lattey.*

19th and 20th November 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Richard Couch and the Right Hon. Mr. Shand (Lord Shand).

HURRO NATH RAI CHOWDHRI* *Plaintiff,*

and

RANDHIR SINGH AND OTHERS *Defendants.*

On appeal from the High Court in Bengal.

Hindu law—Widow—Power of Hindu widow to alienate—Qualified title to alienate in contracting debt by manager of estate charging it in the hands of heir—Responsibility of lender—Rate of interest, as regards necessity, distinguishable.

A suit was brought by a creditor who had advanced money for the payment of Government revenue upon an estate under the management of a Hindu widow. The plaintiff's agent had received rents to a certain amount from part of estate. *Held,* that the plaintiff ought to have taken care that this sum was applied in part reduction of the debt to him, and that it must be deducted from the amount chargeable to the estate in the hands of the reversionary heir. *Hunoooman Persad Panday* v. *Munrij Koonwerce* (1) followed.

The widow was borrowing in a case where it was for the plaintiff to see whether there was actually a ground of necessity for the loan. Though the loan was necessary, for her to borrow at the high rate of interest charged, considering the security which she gave, was not necessary. The rate of interest had therefore been rightly reduced to twelve per cent.

APPEAL from a decree (24th March 1886) varying a decree (28th August 1882) of the Subordinate Judge of Rajshahi.

The suit out of which this appeal arose was brought by the appellant to recover Rs. 28,837, for money advanced by him to Shamasunderi Bai, the first defendant. She was the widow of Gobind Persad, and purporting to act under his authority, had adopted to him Radhika Persad, the second defendant. The claim was secured by mortgages upon the family estate, executed by Shamasunderi for herself, and as guardian of the adopted son who was a minor. The question now raised was whether the transactions between the plaintiff and the first defendant were binding on the estate in the hands of the reversionary heirs.

Shamasunderi commenced to borrow in 1877 and continued till 1880, the loans amounting to Rs. 17,650, secured by eight mortgages upon the property left by Gobind Persad.

The first ddefendant admitted the execution of the bonds, but asserted that they were not intended to bind the estate or herself, having been merely part of an arrangement whereby the plaintiff had undertaken to incur all the expense of a suit that had been going on in the family to set aside a compromise, it having been agreed that the plaintiff should receive a

* 18 Cowell's Ind. Ap., 1; 18 Calc., 311.

(1) 6 Moore's I. A., 393; 1 P. C. J., 552.

six-annas share of all the property recovered. She had another defence upon the bonds, which was that the consideration had not been received on her account, but for the use and benefit of the minor defendant as heir. Another defence, upon failure to establish either of the above, was that a sum of Rs. 10,000 had been received by the plaintiff's agent, Shamacharn Rai, which was part of the rents of the estate, and should have been allowed in account with the widow as manager. The Court did allow the deduction of Rs. 7,700, part of this sum, there having been an admission of Rs. 2,239 by the widow, and the suit was decreed against her for Rs. 21,076, with interest and costs. But as against the minor defendant, the Court dismissed the suit, holding that the plaintiff had not made out that the loans, as against him, were binding.

The plaintiff appealed to the High Court, and, while his appeal was pending, a decision was given in another suit, to which Shamasunderi Bai was a party, that the adoption by her of Radhika Persad was invalid. Also she died pending the appeal, and by order of the Court Randhir Singh, claiming as the next reversionary heir to the estate, and Romanath Sein, as purchaser of part of it from him, were substituted as respondents in the appeal.

The High Court (McDonell and Ghose, JJ.), in part disagreeing with the Subordinate Judge, held that about half the claim was binding on the estate, and in part agreeing with him, held that this amount must be reduced by the sum received by the plaintiff's agent. Deducting this Rs. 10,000, for the balance the High Court decreed in the plaintiff's favour, reducing the interest claimed down to suit brought, from 18 per cent. to 12 per cent.

The plaintiff having appealed,

Mr. *C. W. Arathoon*, for the appellant, argued that the whole amount claimed should have been decreed against the estate. He relied on the finding that the widow had borrowed for necessary purposes, the consideration money stated in the bonds having been advanced. It had been for the respondents to show that the advances had not been made for the benefit of the estate, and citing *Hunooman Persad Panday* v. *Munraj Koonweree* (1), he argued that the appellant had done all that had been required of him in advancing to a person whose powers to charge the estate were limited. He had inquired, and had acted *bonâ fide* with due caution, so that he was not bound to see to the application of the Rs. 10,000.

Mr. *J. D. Mayne*, for the respondents, was not called upon.

Their Lordships' judgment was delivered by

The Right Hon. Sir Barnes Peacock :—

Their Lordships are of opinion that the judgment of the High Court is correct, and that it ought to be affirmed.

The learned Judges of the High Court in delivering their judgment say :—"The question arises, what are the particular sums of money in respect to which the plaintiff is entitled to any charge upon the estate? It is alleged, and the recitals in the bonds are to the effect, that the moneys were borrowed for three purposes—first, litigation expenses; second, maintenance of the widow and deb-sheba; and third, Government revenue." With regard to the litigation expenses, the learned Judges disallow the amount claimed, upon the ground that the plaintiff has not proved what those litigation expenses were; that he has not properly rendered any accounts of them, and that under those circumstances he is not entitled to a decree in respect of them. As regards the maintenance of the widow and deb-sheba they say :—"We cannot say that the plaintiff was entitled to a decree as against the estate for the sums of money said to have been advanced for maintenance and deb-sheba except as re-

(1) 6 Moore's I. A., 323; 1 P. C. J., 552.

gards the sum of Rs. 2,239, which is admitted by the lady in her deposition to have been received by her, and which is proved by Srinath Dobey to have been paid for maintenance and deb-sheba expenses. To this extent we think the plaintiff is entitle to charge the estate." As regards the payment of Government revenue the learned Judges allow Rs. 12,418-10 6, which is proved in the judgment of the Court to have been paid by the plaintiff as Government revenue. They thus hold the plaintiff to be entitled to Rs. 14,657-12-6, as money which had been paid by him for maintenance and deb-sheba and for Government revenue, the litigation expenses having been disallowed, and their Lordships are of opinion that the High Court rightly so held.

A question then arises whether a sum of Rs. 10,000, which has been found by the Courts below to have been received by the plaintiff's principal man of business on account of the *ijara* rent, ought to be deducted from the sum of Rs. 14,657-13-6.

Their Lordships think that the plaintiff ought to have seen that this sum was applied in reduction of the debt for which the estate was liable, and that the judgment of the High Court was right in deducting the whole of that sum, leaving Rs. 4,657-13-6 as the proper sum to be allowed to him. It is contended for the plaintiff that he was not bound to see to the application of the money. The rule laid down in *Hunooman Persad Panday* v. *Munraj Kooniweree*, (1) is this:—"Their Lordships think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think under such circumstances he is bound to see to the application of the money." But then their Lordships proceed further and give the reason why he is not bound to see to the application of the money. They say:—"The purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the management, the means of controlling and rightly directing the actual application." In this case the plaintiff did have the control and actual application of the money, and having that control and application he was bound to see that the money was properly applied.

There was also a further question relating to interest. The learned Judges of the High Court say:—"The bonds stipulate payment of interest at the rate of 18 per cent. per annum. We do not think that the plaintiff is entitled to this high rate of interest as a charge upon the estate. But we are of opinion that the ends of justice would be quite met by allowing him interest at the rate of 12 per cent. per annum, which is to be calculated upon the several sums of money as they were advanced from time to time up to the date of the decree," and they allow the plaintiff a total sum of Rs. 6,194, the sum which they give for interest being the difference between this sum and the above-mentioned sum of Rs. 4,657-13-6. It has been said that there is a miscalculation of the interest at the rate of 12 per cent. If there is, the plaintiff ought to have applied to the High Court to set the figures right, and no doubt they would have been set right. No such application having been made, the decree ought not to be reversed upon this ground.

Then comes the question, was 12 per cent. a sufficient rate of interest? The widow was borrowing in a case of necessity. It was for the plaintiff to see whether there was really and fairly a ground of necessity. Was there a necessity to borrow at the rate of 18 per cent.? That is a question to which he ought to have applied his mind; and if it were unreasonable to suppose that the widow could not borrow the money at a less amount than 18 per cent., he ought not to have charged her that rate.

(1) 6 Moore's I. A., 393, at p. 424; 1 P. C. J., 552.

Their Lordships think therefore that the High Court were right in not allowing interest as against the estate at a higher rate than 12 per cent.

For these reasons their Lordships think that the decree of the High Court ought to be affirmed; and they will humbly advise Her Majesty to that effect. The appellant must pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *T. L. Willson & Co.*

Solicitors for the respondent: Messrs. *Wentmore & Swinhoe.*

21st November 1890, and 31st January 1891.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Richard Couch, and the Right Hon. Mr. Shand (Lord Shand).

SRI RAJÀ SATRUCHARLA JAGANNADHA RAZU, ZAMINDAR OF MERANGI *... } *Defendants,*

and

SRI RAJA SATRUCHARLA RAMABHADRA RAZU AND OTHERS ... } *Plaintiffs.*

On Appeal from the High Court at Madras..

Present partibility of a zamindari originally existing before 1759—Grant by Government in 1802, and again in 1835 of the same zemindari—Absence of intention to grant it as impartible—Sanad-i-milkiyat-i-istimrari.

Although it might be taken that the Merangi zamindari was formerly held on a military tenure under a raj, and that it continued to be held on the same tenure after it had been incorporated in another zamindari, and, subsequently, when, by conquest, it became part of the Vizianagram zamindari, which was dismembered in 1795. And, even if impartibility was the rule then applicable to the estate, yet the subsequent dealings with the zamindari, the nature and terms of the grants under which it was held after 1802, and the absence of proof of its having been impartible during the present century; also the character of the estate, which was in no way distinguishable from that of an ordinary zamindari assessed to the revenue, all led to the conclusion that the zamindari was now partible.

It was clear from the kabuliyat, or instrument of assent to the sanad-i-milkiyat-i-istimrari of 25th April 1804, that the latter was in the ordinary form of such grants, and there was no ground for inferring that the Government intended to create an impartible zamindari, or to restore an old one with impartibility attached.

In 1835, there was, for a second time, such a dealing with the estate by the Government, in granting it again by sanad, as showed that there was no intention to the effect above mentioned.

The case of the *Hansapur Zamindari*(1) situate in Behar, as to which their Lordships in 1867 held that it must be taken to retain its previous old quality of impartibility, after having been granted in 1790, was distinguished.

APPEAL from a decree (13th March 1888) of the High Court(2), affirming a decree (14th December 1885) of the District Judge of Ganjam.

The suit out of which this appeal arose was brought by three uncles of the minor Zamindar of Merangi to obtain a decree against him, he being entered in the revenue records as sole proprietor, for partition of that estate with mesne profits from the year 1873, when they were excluded from possession. The plaint (1884) stated that the istimrar was issued at the permanent settlement in the name of Sri Ganga Razu Garu, who was one of the sons of Venkata Pathi Razu, manager for the family. The sanad was not

* 18 Cowell's Ind. Ap., 45; 14 Mad., 237.

(1) *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee*, 12 M. I. A., 1; 2 P. C. J., 348.

(2) *Jaganatha* v. *Ramabhadra*, I. L. R., 11 Mad., 380.

produced, but only the kabuliyat, dated 25th April 1804. After his death, and in the time of his son, who succeeded him, the zamindari was, on 20th June 1833, sold and was purchased by the Government. In 1835, it was restored with a new sanad, dated 22nd September 1835 to Jagannadha, son of the last preceding zamindar. He died in 1864 leaving four sons, of whom the eldest was recorded as zamindar in the revenue papers, but, as the plaintiffs' case asserted, managed the estate for them, and their minor brothers, who were now made parties defendants.

The eldest son, Chandrasekhara, died in September 1869, and, his son being a minor, the zamindari was taken under the management of the Court of Wards (Regulation V of 1804). As manager and agent, the Collector in 1872 refused to divide the zamiudari.

The defence, which was filed by him, as Agent of the Court of Wards on behalf of the minor, set forth that Merangi was originally an impartible estate appertaining to a raj; and that not only from the character of the original tenure, and by immemorial usage and custom, but also by the terms of the sanad of 1804, it descended to the eldest male heir.

There being an historical account of the Merangi family among those of the ancient zamindari families and estates, given by Mr. D. F. Carmichael in the Vizagapatam Manual, at pages 301, 303, both parties accepted it as correct. This also was set forth in the judgment below, to the effect that "this hunda" came into the possession of the present family in the time of one of the rajas of Jeypore, in whose reign the zamindar of that time tried to make himself independent. He was, in the end, put to death, and Merangi was made over to Jaganath Raz, "a principal Jeyporean," who was called Satrucharla (destroyer of the enemy), a title still borne by his successors. About the year 1759, Merangi was incorporated with the neighbouring zamindari of Kurupam by a chieftain, who was afterwards overthrown, and both estates continued under Vizianagram till its dismemberment in 1795, when they were restored to the old families, Satrucharla Ganga Raz getting Merangi. He was a descendant of the Jaganath Raz upon whom the title was first bestowed. The admitted pedegree which also is set forth in *Jaganatha* v. *Ramabhadra*(1) does not go further back than Tammirazu, the grandfather of Ganga Raz, with whom the settlement of Merangi was made, after Venkata Raz had been deprived of it for taking arms against the Government. As to this, and as to the restoration of the zamindari to the Strucharla family, the Commissioners appointed to carry out the permanent settlement stated as follows, in their report to Government, dated 22nd September 1803:—

"On Mr. Webb taking charge of the dis-
"trict in 1795 Venkata Raz, the represen-
"tative of the younger branch of the fami-
"ly formerly in possession of the Merangi
"zamindari, was in arms against the Me-
"rangi Company, and his defection induced
"the Collector to recommend Ganga Raz
"being appointed zamindar as well on
"account of his better pretensions than
"those of Venkata Raz, as that he was
"descended from the elder branch of the
"family. This preference, it would appear,
"confirmed Venkata Raz in his opposi-
"tion to the Company's Government,
"and, on the breaking out of the distur-
"bances in Kimedi, he joined the party
"of Jaggernath Deo. To detach him
"from this rebel, Mr Webb considered
"it expedient to promote a settlement for
"his son Jagannath Raz in the Marangi
"zamindari, by granting him a portion
"of the country. In this he has so firm-
"ly established himself that it is known
"by the name of China Merangi, and, as
"he makes all his payments directly to
"the treasury of the Collector, he ap-
"pears to consider himself as joint za-
"mindar with his relation Ganga Raz,
"holding immediately from the Company,
"though, on being required to set forth
"his pretensions, he did not attempt to

(1) I. L. R., 11 Mad., 380.

"prove more than his being a son of the "younger brother of Ganga Razu's fa-"ther, which, of course, established no "right of participation. He must, there-"fore, be considered as holding the share "he now possesses through the favour of "his cousin, Ganga Raz. Consequently, "he cannot advance a claim to partake of "any addition that may be made to the "zamindari either by the resumption of "alienation or otherwise. If the tenure of "Jagannath Raz be viewed in this light, "Mr. Alexander conceives that the perma-"nent settlement need not be retarded, but "that, on its taking place, an engagement "may be entered into by Ganga Raz "with his relation for the temporary, or "permanent, lease of the country at pre-"sent held by him adverting to the a-"mount of the total jumma fixed on the "whole zamindari. We concur in opi-"nion with Mr. Alexander that an ar-"rangement of this nature was desirable "as tending to preserve the peace of the "country which might otherwise be dis-"turbed by Jagannath Raz; yet as his "claim originating only in the concession "of the late Collector Mr. Webb, yield-"ing to the pressure of temporary cir-"cumstances, without the authority or "even knowledge of Government, we do "not think that any reference should be "had to him in forming the permanent "settlement, which we would recommend "to be made exclusively with the ac-"knowledged Zamindar Ganga Raz, who "will be at liberty to make what arrange-"ment he pleases with Jagannath Raz."

The Government concurred with the Commissioners in their opinion that the permanent, settlement "should be concluded with the rightful proprietor Ganga Raz." He, however, died before the sanad was delivered to him, and Chandrasekhara, his son, received it on the 25th April 1804. The latter fell into money difficulties, and his estate was sold under a decree of the Civil Court to pay his debts. It was purchased by the Government for Rs. 500 on the 20th June 1833. At this time a rebellion was going on in Palcondah. The Dewan of the late Zamindar of Merangi suppressed it, with the help of his retainers. They were offered a reward, but entreated that instead of granting it to them, "the Government would be pleased to restore Merangi to the ancient family." This request was supported by the Special Commissioner, Mr. Russell, and agreed to by the Government, and accordingly a new sanad was granted, on the 22nd September 1835, to the minor son of the late Zamindar, Jagannadha. This sanad was in the usual form of such documents, except that it contained a special recital, stating the circumstances under which the estate had been lost to Chandrasekhara and restored to Jagannadha. This new zamindar was succeeded in 1864 by his son, also named Chandrasekhara, during whose life no attempt at a partition was made by his brothers, the present plaintiffs. In 1869, Chandrasekhara's son, the present defendant, Satrucharla Jagannadha Razu, succeeded his father. No attempt was made to oppose the entry of his name in the collectorate record as sole zamindar. In 1872, however, a claim was made by the present plaintiffs to have a general partition of all the property including the zamindari. But the claim was conceded only as regarded the moveable property, the division of which was referred to a panchayet. They made their award on the 7th October 1874.

In June 1883 a formal notice demanding a partition of the zamindari was served upon the minor Jagannadha, then under the guardianship of the Court of Wards, and, on the refusal which followed, the plaintiffs commenced the present suit.

The District Judge decreed in favour of the plaintiffs for a partition of the zamindari with mesne profits for three years, but without costs. In his judgment, he stated that the zamindari was originally held on a military service tenure from the Raja of Jeypore. He then traced its history down to 1821, and, after noticing the scantiness of evidence as to the devolution of the estate, and expressing his opinion that it could not be regarded as principalty or raj, he pro-

ceeded as follows :—"As to immemorial "family usage, it appears that the estate "had never been divided before English "rule, and, in ordinary cases, where pro-"perty descends to one member of a "family, the presumption would be in "favour of primogeniture, but any such "presumption would be much weakened "in the present case when we regard the "military nature of the tenure and the "unsettled character of the Government "in the last century, and would be quite "insufficient to establish a family custom "which must be proved by clear and "positive evidence. Further, even as "suming that the family custom of pri-"mogeniture formerly governed the "descent, there was a breach of conti-"nuity in the custom for nearly half a "century, and the old custom would not "attach to the estate, restored under "new conditions, unless the family sub-"sequently showed their intention to "adopt it."

Finally, he stated that there was nothing, at the time of the permanent settlement, to indicate that the Government intended to create an impartible estate for the first time and his opinion was that there was nothing in the terms of the new sanad to constitute the zamindari impartible. From this decree the defendant appealed on the merits, and the plaintiffs for costs.

The High Court confirmed the decree of the first Court, except as to costs, which it disallowed altogether.

The judgment of the High Court is given at length in the report of *Jaganatha* v. *Ramabhadra*(1). It was delivered by *Kernan, J.*, who commented on the break in the possession of the family from 1760 up to 1795, and said that after 1795 the zamindari was certainly not held on military tenure. He considered that from 1795, Ganga Raz was merely in possession on sufferance for seven years, and that there was no reasonable ground for presuming that it was the intention of the Government to create an impartible zamindari. He thought that the terms of section 6 of the sanad, as to the right of transfer, was inconsistent with the idea that the zamindari was impartible, and was to remain so: As to the sanad of 1835, he considered that it only conferred on the grantee an estate of the same kind that his father had held, subject to the ordinary incidents.

The plaintiffs having appealed, Mr. *J. D. Mayne* and Mr. *R. B. Michell* appeared for the appellants.

The decree of the High Court should be reversed, and the suit dismissed, the impartibility of the zamindari having been established. For impartibility to attach, the estate need not be traced to a ruling raj, but it was sufficient that the zamindari had been found to have originated in a military tenure, before the establishment of British rule. The zamindari was an ancient one, and no evidence had been given that it had lost the quality characteristic of the tenures to which it originally belonged. There had been three periods in its existence, and, as to the first, the High Court should have held that down to 1795 the estate having been a military tenure was impartible, and also by family custom. As to the second period, the circumstances under which in 1803 the zamindari was granted to Ganga Raz, and permanently settled with his son showed that the Government did not intend to create a new zamindari, but to restore an ancient one. The restoration of the old title carried with it all those incidents of impartibility, and primogeniture, which were formerly believed always to attach to such estates. The terms of the sanad, represented in section 6 of the kabuliyat, were not inconsistent with there having been an intention to restore an old tenure; to create no new estate, but to select another holder in the old line, and that a single person. The terms of the sanad were, in effect, neutral upon the question that now had to be decided, but with reference to the reasons actuating the Government, as especially shown by the re-

(1) I. L. R., 11 Mad., 380.

port of 22nd September 1803 by the Commissioners, and other documentary evidence, it seemed to have considered that the peace of the country would be better secured by the grant to a single zamindar. If, moreover, nothing was shewn, but a grant to a zamindar and his heirs, the presumption was that the estate accorded with the law, or the custom, of his race in devolving upon successors. The sanad, in effect, carried little beyond that an arrangement had been made for revenue purposes, and here the estate had virtually, if not formally, been already granted, the sanad only fixing the permanent revenue payable. Here the estate was impartible already when the Government took it in hand to grant it, and the same authority, having the power to withhold or to grant, selected a member of the old family, restoring it to him. Thereupon, as in the *Hansapur case*(1), the estate was granted with its customary rule of descent, and not to be held as an ordinary zamindari. In that case it was held that there was nothing to show that the quality of the estate was altered by the grant or that the intention of the Government in making it was to render the estate partible. The same principle was applicable here. The regulation giving the law of the partibility of zamindaries in Bengal (Regulation XI of 1793) had never been enacted for Madras. The judgment in the Hansapur case said :—"There was nothing to show that the quality of the estate was altered by the grant," and again "the zamindari must be taken to possess its old quality of impartibility." So also in the second Shivagunga case, *Muttu Vaduganadha Tevar* v. *Dora Singha Tevar*(2), it was held that the evidence of impartibility must receive effect, unless it could be avoided by showing some dealing with the zamindari transmitting its ancient quality. The Nuzvid case, *Raja Venkata Rao* v. *The Court of Wards*(3) was distinguishable from this, because, in that case, the zamindari could not be identified with any ancient one existing before the sanad of 1802 put into the same class with other zamindaries. The general observations in the judgment in the *Devarakota* case, *Mallikarjuna* v. *Durga*(4) were referred to as supporting the appellant's case.

The subsequent conduct of the junior members of the family showed a belief to exist that the custom of impartibility was binding upon them. A suit was brought by a relation against Chandrasekhara in 1805, but it did not seem to have occurred to any one that partition was claimable. In 1859, when Soma raz, another claimant, was referred by the authorities to a regular suit, he did not sue. The documentary evidence supporting the view that the family regarded the estate as impartible was referred to. The re-grant of the zamindari by sanad in 1835 was a restoration of the ancient title, and in no way was it the creation of a new estate.

The respondents did not appear. On the 31st January, their Lordships' judgment was delivered by

THE RIGHT HON. MR. SHAND :—

The matter for determination in this case, which arises on a question of disputed succession between the parties, is whether the zamindari of Merangi is partible or impartible. The appellant, the present registered zamindar of Merangi, maintains that the estate, which is described on the record as consisting of 86 villages with their hamlets, situated below the ghauts, and adjoining the zamindari of Jeypore, is impartible; and he complains of the decisions of the District Court of Ganjam, and of the High Court at Madras, in both of which Courts the judgments have been to the effect that the zamindari is partible, and, consequently, divisible between him and the respondents, for whom no appearance was made at the hearing of this appeal.

(1) 12 M. I. A., 1 ; 2 P. C. J., 348.
(2) L. R., 3 Mad., 290 ; L. R., 8 I. A., 99 ; 4 P. C. J., 289.
(3) I. L. R., 2 Mad. 128 ; L. R., 7 I. A., 38 ; 4 P. C. J., 81.
(4) I. L. R., 13 Mad. 406.

Their Lordships are of opinion that the judgments of the Courts of First and Second Instance are right. It is unnecessary to recapitulate the facts, which are fully stated in the judgments complained of. For the purpose of this decision, it may be assumed, as it was by the Subordinate Judge (the High Court say there is no evidence of it) that the zamindari was at one time held under military tenure from the Rajah of Jeypore, when it was granted to an ancestor of the present appellant. It may further be assumed, though there is little, if any evidence to warrant the assumption, that the tenure continued to be the same after the estate had been taken by force and incorporated in Kurupam zamindari, and, subsequently, when, by conquest, it again became part of the Vizianagrum zamindari, which was dismembered in 1795. Taking it, in accordance with the argument of the appellant's counsel, that impartibility was the rule then applicable to the estate, their Lordships are clearly of opinion that the subsequent dealings with the estate, the nature and terms of the grants under which it has been held throughout the present century, the absence of proof of any usage or practice of impartibility in the succession to the estate, contrary to the ordinary Hindu law of succession, and the character of the estate, which is in no way distinguishable from an ordinary zamindari subject to the payment of a fixed assessment of revenue, all clearly lead to the conclusion that the zamindari is now a partible estate in a question of succession.

The grant of 1803 by the Government does not appear amongst the documents on the record; but it is clear from the kabuliyat that the sanad-i-milkiyat-i-istimrari was in the ordinary terms of such grants. There is nothing in the circumstances under which this grant was made to lead to the inference that the Government had in view, in making this new grant, the creation of an impartible zamindari as an exception to the ordinary rule of succession of the Hindu law. The single circumstance that the property was given to a representative of an elder branch of the family formerly in possession, in preference to the representative of a younger branch, who had been in arms against the Government, is of very little weight; and, accordingly, even at this early date, in the beginning of the century, it appears to their Lordships that the zamindari of Merangi, if impartible before, became partible in question of succession, as it became also subject to the disposition of the zamindar by deed of transfer on sale or gift of the whole or part of the property.

What occurred in 1835, however, makes the determination of the case perhaps even more clear. The estate had again come into the possession of the Government. It had been exposed to public sale for payment of debt due by the zamindar, and might have been bought by any third party as purchaser. The Government, however, bought it, and held it for some time. During this time the Dewan of the former zamindar, and certain of the Doratanams, performed an important service to the Government, who had offered a considerable pecuniary reward for the capture or putting down of certain rebels who had caused much disturbance in the district. They succeeded in putting down the rebellion. Instead of the pecuniary reward to which they became entitled, they begged that a new grant of the zamindari might be given to the son of the former zamindar (then still in life), who was a boy of only nine years of age, and the grant was accordingly made to this boy in the usual terms of a sanad-i-milkiyat-i-istimrari, and his heirs, with the ordinary power of sale or disposal of the property in whole or in part, and concluding with the words:—Article 14. "Continuing to "perform the above stipulations, and to "perform the duties of obedience to the "British Government, its laws and regu-"lations, you are hereby authorized and "empowered to hold in perpetuity to "your heirs, successors, and assigns, at "the permanent assessment herein

"named, the zamindari of Merangi." It appears to their Lordships that here again, for a second time, there was such a dealing with the estate, as in the circumstances, and having regard to the terms of the grant, clearly shows that there was no intention to create an impartible estate, assuming there was power to do so, or to restore an estate previously impartible. The circumstances were entirely different from those which occurred in the Hansapur case, where an estate, in itself an important raj or principality, was simply confiscated to the Government and again given out to the nearest heir of the next line. As was observed in the judgment, "the "transaction was not so much the crea-"tion of a new tenure as the change of "the tenant." In the present instance, the grant followed on a purchase of the property by the Government. It was given, on the solicitation of persons who had a claim against the Government, to one who, though no doubt the son of the former zamindar, might have had no such grant, but for the intervention of those persons who were attached to him; and there is nothing in the terms of the grant to support the contention of the appellant,—on whom the onus lies of proving that this is the exceptional case of a zamindari impartible in its nature, —and nothing to prove a usage or custom of succession, throughout the operation of the grants of 1803 or 1835, contrary to the ordinary rule of the Hindu law.

Their Lordships, therefore, will humbly advise Her Majesty that the decree of the High Court ought to be affirmed and the appeal dismissed. The appeal having been heard *ex parte*, their Lordships make no order as to the costs of it.

The costs of an application for leave to be heard, which was made, after the conclusion of the hearing of the appeal, by certain of the respondents, and which was opposed by the appellant, must be paid by those respondents.

Appeal dismissed.

Solicitors for the appellant:—Messrs Burton, Yeates, Hart and Burton.

27th and 28th November, and 23rd December 1890, and 24th January 1891.

PRESENT:

Members of the *Judicial Committee*.—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, the Right Hon. Sir Richard Couch, and the Right Hon. Mr. Shand (Lord Shand).

PEACOCK AND OTHERS * ... *Plaintiffs*,

and

BAIJNATH AND OTHERS ... *Defendants*.

and

GRAHAM AND OTHERS ... *Defendants*.

and

BAIJNATH AND OTHERS ... *Plaintiffs*,

On appeal from the High Court in Bengal.

Sale and consignment of goods—Banian of firm, right of—Right of the consignor, as against the banian, to merchandise consigned to a Calcutta firm—Denial of banian's claim to a lien on general account with the firm—Banian's non-liability to account for past sales already brought into account with consignee—Contract Act, 1872, ss. 103 and 178—Lien.

There is no rule of law giving a lien to the banian as against his employer, nor is there any custom to that effect. If the banian claims a lien he must prove its existence, either by showing some express agreement giving to him the lien, or by showing some course of dealing from which it is to be implied

On the other hand, where merchandise consigned has been sold in good faith, and in accordance with the purpose for which the consignment was made and the proceeds have been brought into account between the consigee and

* 18 Cowell's Ind. Ap., 78; 18 Calc., 573.

the banian, he is not liable to account to the consignor. The principal of the agent cannot disturb the account with the sub-agent except on the ground of bad faith.

A banian, not setting up a written agreement, nor asserting that he had advanced to the firm on the security of specific quantities, claimed a lien as against the consignor on merchandise consigned to the firm whether arrived or in transit. The lien alleged was for the general balance of account, in virtue of an agreement extending to the whole of the merchandise consigned, whatever might have been the terms of the consignment between the consignor and consignee.

The banian had made advances, but for them the consideration was the profit to be made by sales. There was no pledge, nor any agreement, express or implied, giving the banian a lien on the goods consigned. It was, therefore, unnecessary to determine whether the banian had notice of the terms of the consignments. Nor was it necessary to consider the effect of section 178 of the Contract Act IX of 1872, there having been no pawn. The banian, having no lien against the consignee, had none against the consignor and could not question the right of the latter to stop *in transitu*.

APPEALS from two decrees (2nd March 1885) of the High Court in its Original Civil Jurisdiction.

The main question was between the consignors of merchandise from England to Calcutta and the banian of the consignees, as to whether the banian had a lien, enforceable against the consignors, in respect of advances made by him to the consignees, who had been declared insolvents. Upon the question of fact, whether, according to the evidence, a lien had been established by terms, express or implied, or was to be inferred from the course of dealing between the banian and the consignees, the Court below had, as to part of the consignors' claim, held that a lien existed, and displaced the right of the consignor. This was the subject of the present appeals, which also questioned the decision of the High Court as to the non-liability of the banian to account to the consignor.

In the first of the above suits (557 of 1882) Peacock & Co. alleged that they had consigned from Manchester to Tambaci and Son in Calcutta piece-goods of specified marks, which were in the possession of the latter firm when it became insolvent in September 1882; that the defendant, as banian of the firm, refused to re-deliver the goods to plaintiffs, who claimed a declaration of their right to them and an injunction upon the banian.

The defence was that the goods were subject to the banian's lien, having been pledged to him for advances made to the firm. Peacock & Co. made a similar claim as to bales consigned upon the express terms that the proceeds were to be appropriated to meet their drafts, Tambaci and Son being interested only to the extent of one-third in the profits or loss to arise: also in respect of other bales consigned for sale on commission. They claimed that the bales should be returned or the proceeds of sale paid over to them. They also claimed an account from the banian of sales before the insolvency.

The defence of the banian was, *first*, that this suit should have been included in the former; and, *secondly*, as to the merits, that he had been for years the banian of the firm under an arrangement giving him a lien for advances upon the goods from time to time received and kept in his custody; that he did not know, nor could he have known, that the consignments were made for the proceeds to be realized on the plaintiffs' account, and he did not admit that they were so to be.

An amendment having been made, the Court dealt with the two suits as one.

The other (552 of 1882) of the two suits now in appeal, was brought by the banian against Graham and others, the agents in Calcutta of Peacock & Co., alleging his lien by agreement with Tambaci & Co., that the latter firm in August 1882 received particulars of shipment to them of 55 bales marked P. T. C. coming by S.S. *Knight of St. Patrick*, and 24 cases marked P. by the same ship; that bills of lading on the ship's arrival on 14th September 1882 were endorsed and delivered to the banian to enable him to obtain the goods and hold them; that

on the banian applying to the ship's agents, delivery was refused, but was given to the defendants, Graham & Co, who claimed them on behalf of the consignors. The banian sued for a declaration of his lien and an injunction on defendants. The defence was that the firm of Graham & Co. were entitled as the agents for Peacock & Co. the consignors, on the insolvency of Tambaci on the 27th October 1882; that the 24 cases P. were consigned for sale upon the express terms that the proceeds of sale were to be specially appropriated to meet the consignor's drafts, as also were the proceeds of the 55 bales P. T. C.; also that the firm had no power to pledge the goods or assign the bills of lading, except, subject to the terms of the consignment, of which the plaintiff at the time of the alleged endorsement to him of the bills had full knowledge, that Peacock & Co. anticipating the insolvency, telegraphed to Hoare, Miller & Co., the ship's agents, not to deliver to Tambaci and Son, or to their order, but to deliver to the defendants, which they accordingly did.

The Court (30th October 1882) ordered that the goods should be sold, the banian depositing Government securities to the amount of the sale-proceeds; such securities to be held in the joint names of the solicitors for the parties, and subject to the order of the Court. Between September 1882 and April 1883 were instituted five other suits, including one by the trustee in bankruptcy of Tambaci, to all of which the banian was a party, the main issue in all being whether he was, by reason of the arrangements and course of dealing between him and Tambaci, entitled to a lien upon the merchandize consigned to that firm in Calcutta by merchants and manufacturers in England. In these suits questions were raised as to the title to the goods in the firm's godowns at the date of the insolvency; as to their title to the goods which had arrived in Calcutta, but had not been actually delivered; as to the consignors' right to an account in respect of goods previously sold, and as to his right to stop *in transitu*. In January and March 1883 commissions were ordered for the examination of witnesses in England, taken at Manchester in the same year, it being agreed that the evidence should be applicable to all the suits. In May and June 1884 they were heard by a specially constituted Bench of two Judges (CUNNINGHAM and WILSON, JJ.). On the 2nd March 1885 one judgment, applicable to all the suits on the points common to all, was delivered, and afterwards the Court stated its conclusions in separate judgments dealing with each suit. The amended suit (No. 557 of 1882) was dismissed, so far as it sought for an account of the goods sold by the banian and accounted for by him to his employers of an estimated value of Rs. 1,70,000. But it was held and declared that the banian was entitled to a lien upon bales P. T. and C., which were in the godowns of the firm at the time of its insolvency. In the second suit (552 of 1882) the Court held on the evidence that the banian's lien displaced the consignor's right to stop *in transitu*. As to both suits, the Court in the first, or general, judgment disposed of points common to all the suits, and stated the following:—"Paul Tambaci and Son carried on business, the father representing the firm in Manchester, and the son in charge of the Calcutta branch, until the death of the father in 1880, when the son left India and went to Manchester, where he directed the business alone, until, on the 27th October 1882, he was adjudicated a bankrupt in the Manchester County Court, on the petition of Peacock & Co., the present appellants. In April 1878 Tambaci in Calcutta employed Evangelo Vassilapolo, who from the departure of the younger Tambaci, until the latter became bankrupt in 1882, remained in charge of the Calcutta branch." The judgment then stated that there were three classes of piecegoods consigned, which the business of Peacock & Co. with Tambaci comprised, viz., (1) goods shipped by Peacock & Co. to Tambaci and Son upon the terms that the proceeds of

sale in Calcutta should be specially appropriated to meet the drafts drawn by Peacock & Co. in Manchester against the shipments. This class, called in these proceedings the "lien account goods," bore the mark P. T. C., borne by others also; (2) goods shipped by Peacock & Co. for sale in Calcutta by Tambaci on the joint account of themselves, the consignees and the manufacturers. This class, called in the proceedings the "joint account goods," was marked P. M.; (3) goods belonging entirely to Peacock & Co., and shipped by them for sale by Tambaci as their agent and on their account. This class was called the "pure consignment goods," and was marked P. The contents of two letters were then given. The first, dated 11th August 1875, contained the terms that the accounts of the shipments were to be kept distinct, and that the returns were to be remitted to Peacock & Co. for the protection of their drafts against the shipments. The letter continued thus:—"In consideration of our having made this consignment at your request, you are to guarantee to us a clear profit of two per cent. on the transaction, which, with interest, we are to include in our draft. You are to have all profit and bear all loss." The second letter, dated 10th August 1880, related to shipments on account of three firms; another firm, the manufacturers, taking part in the consignment to Tambaci as well as Peacock & Co. This was the joint account, called also the "three thirds account."

The "lien account goods," P. T. C., were dealt with as follows: Peacock & Co. having shipped them under the arrangement of the 11th August 1875, drew upon Tambaci and Son in Manchester at four months. The invoice sent by Peacock to the firm there was not passed on, as it was, to Calcutta, but a new invoice with the alteration that the goods were shipped on account and risk of Tambaci and Son was sent—a difference which appeared to the High Court to be material. Funds were regularly remitted from Calcutta to Manchester to meet the drafts against these P. T. C. goods, down to the time of the bankruptcy. In regard to this the Judges said—"The effect of this course of business appears to us to have been that upon the endorsement of each bill of lading of these P. T. C. goods by Peacock & Co. to Tambaci, the property in the goods represented by it passed to Tambaci, but, subject to the terms contained in the letter of the 11th August 1875, accepted on each occasion by Tambaci, and embodied in the heading of the invoice. Those terms seem to us to constitute a trust or appropriation as to the disposition of goods and their proceeds. As to these P. T. C. goods, we are dealing with consignments by an agent to his principal, and it has, no doubt, been held that an agent who consigns to his principal, endorsing and making over the bill of lading to the latter, so as to vest the property in him, cannot, at the same time, by a mere reservation on his part alone, create a trust or appropriation in his own favour: *ex parte Banner* (1). But in the present case there is an express agreement between principal and agent, creating, we think, an appropriation binding upon Tambaci, his assignee in bankruptcy, and any other persontaking with notice."

The judgment then described the relations between Tambaci and Son and the banian, which began in 1873: "The business of a banian is one well known in India, and has been frequently considered by the Courts. It means generally a native agent employed by firms for the purposes of sales, collecting funds, or other transactions, which the banian, from his better information and greater familiarity with the market and the people, is more able than his employers to conduct with advantage. He may act for several firms at once. He is generally a *del credere* agent. He may, or he may not, advance money to his employers. If he does, there is no rule of law giving him any lien."

(1) L. R., 2 Ch Div., 278.

"At this time Tambaci and Son appear to have been, as indeed they were throughout, without capital, and to have subsisted on various forms of credit. One of these was a system of mutual accommodation between themselves and Peacock & Co. Besides the funds thus supplied, extensive loans were obtained from the local banks. It would appear that the intention of the arrangement with the banian was to treat him as the supplier of funds."

Articles of agreement, drawn up in the office of Messrs. Berners, Sanderson & Co., were executed between the banian and Tambaci and Son on the 11th July 1873. These were an ordinary banianship agreement, under which the banian was to provide and pay servants, who were to be under the orders of the firm. He was to be responsible for the fulfilment of sales and payment. On the other hand, the banian was to be entitled to a commission on sales, and to a discount for cash. The agreement said nothing as to advances, and was not observed in practice. The evidence as to the course of business was then stated, and in a tabular form the value of the merchandize which arrived in 1882, with dates, and the advances made by the banian in that year down to September, were given.

The particulars of shipment advising the marks and numbers of the goods shipped were the first documents received by the Calcutta branch from the Manchester house of Tambaci. A week later, and usually a week or 10 days before the ship arrived, these were followed by the invoice and bill of lading. On the arrival of the ship the bill of lading was endorsed by Tambaci, or after his departure to England by his manager Vassilopulo, by an open endorsement, and handed to the banian, who then obtained delivery of the goods from the ship and had them sent to Tambaci's godowns. Offers to purchase the goods were made either directly or through the banian to Tambaci, or Vassilopulo, and if accepted were entered in one of the firm's books from which entries contracts of sale with the native dealers were made up and written out by the banian. The amount of the price was then debited in the bill book to the banian, as though he were the buyer, less his commission of 1½ per cent., the name of the actual purchaser not appearing in any of the firm's books, and the debit to the banian being entered as of the due date. The delivery of the goods to the purchaser was effected by the banian, who received payment from the purchaser either in cash or by a "bazar chitty" or promissory note, payable, not to the firm, but to the banian. Payments and advances were from time to time made by the banian to the firm in such amounts as were required. Neither payments nor advances were made against or in respect of any specific sale. In the cash account between the banian and the firm the former was debited with the price of goods sold (as appearing in the bill book) and with interest thereon and credited with his payments and advances with interest thereon. The rate of interest charged by and credited to the banian was 12 per cent. The cash account so made up was adjusted at the end of each year. On the 31st December 1881 there was shown by the account for the preceding year as so adjusted to be due by the firm to the banian Rs. 6.90,042. At the end of September 1882 the balances had been reduced, by the excess of sales over advances and payments, to Rs, 3,31,262. From the 1st August 1882 to 1st September 1882 the sales debited to the banian amounted to Rs. 92,000; and from the 1st to the 19th September to Rs. 4,12,000; while his advances and payments from the 1st August to the 19th September amounted only to Rs. 2,70,003.

The Court then considered the evidence bearing on two questions—*First*, whether the banian had such a lien on the goods which were in the godowns, or of which the bills of lading had been delivered, as justified him, in September, in detaining them by way of security for any balance due to him, on the taking of a general

account between him and Tambaci. *Secondly*, whether, if he had such a lien, he could enforce it against the consignors of the goods.

The banian's case was that from the outset in 1873 his advances were to be secured by the goods of which he had the custody; that in 1875 not only the goods in the godowns, but goods in transit were to be treated as security; that in 1882 this was made more explicit, and the particulars of the goods to arrive were looked upon as security. And as to the evidence in support of this, the Court said: "We have, besides the direct oral testimony, certain corroborative facts, the value of which it will be necessary to determine. These are (1) the keys of the godown being placed in the custody of the banian's servants; (2) the fact of the Custom House sircars and godown sircars being his servants; (3) the bazar chitties being made out in his name. As to these it is contended, on the consignor's behalf, that they are equally consistent with the view that the banian was merely the responsible custodian of the goods and the guarantor of their price when once sold. There is another set of facts, viz. (4) that policies of insurance, covering the goods in the godowns, were delivered to the banian; (5) that the bills of lading were upon arrival endorsed and delivered to him for the purpose of giving effect to his security; and (6) that the durwans were the servants of the banian. These allegations the consignors meet, not by questioning there cogency if true, but by denying their truth."

"As to the original agreement, we think that the balance of testimony is in favour of its having been, in the main, such as the banian describes, and that this view is supported by the probabilities of the case. The evidence of the banian himself and Vassilopulo is very distinct, and the corroboration afforded by Mr. Sassoon, whose trustworthiness was unimpugned, is most important. Of the circumstances adduced as corroborating the plaintiff's story, we think that the facts that the keys were in the plaintiff's custody, and that his godown sircars had the clearing of the goods are, at least, as much in favour of the view that the goods were placed in his possession by way of security as of any other view of his position; while the fact that the bazar chitties, instead of being made out in the name of the firm, were made out in the name of the banian, appears to us of some significance as showing the view taken of his position; though, as he was responsible for the price of the goods from the moment of their sale, there was nothing unnatural apart from any question of security, in the chitties being made out in his name. As to the question of the durwans, we think that the evidence fails to establish in any satisfactory way the existence of a separate set of durwans acting on behalf of the banian."

"As to the bills of lading, we are not satisfied that they were placed in hands of the banian or his servants at any time prior to the arrival of the goods; so that there is nothing in the fact of the bills of lading being in his custody which, necessarily, indicates that the goods to which they referred were pledged to him, or that he received them for any other purposes than that of obtaining clearance. On the other hand, there can be no doubt that from January 1882, at any rate, the firm was anxious to give to the banian any available security at the earliest possible moment, and certainly gave him to understand that all goods, particulars of which had reached them, would be available as security for his advances. Our view, accordingly, of the evidence as to the bills of lading, is that, standing by itself, it proves nothing as to the banian's security."

"Taking it along with the other facts, we think that the proper inference is that the bills were handed over for the purpose of carrying out the whole arrangement between the parties. As to the policies of insurance, we think that the balance of evidence is in favour of the view that they were handed over by way of completing the security afforded to him by

the possession of the goods, in the same way as they were transferred to the bank in the case of a loan."

"The conclusion at which, on the whole of the evidence, we have arrived is that from the outset the agreement was that the goods in Tambaci's godowns should be security for the advances made by the banian to the firm; that at some subsequent date it came to be understood between the parties that not only the goods in store, but goods, particulars of which had reached the firm, should be security for the balance from time to time due; that this understanding was made to assume a more definite and precise form at the conversation between Vassilopulo and the banian in January 1882, after which time the plaintiff's fresh advances were confined, as nearly as possible, to amounts equivalent to the value of the goods, estimated as Rs. 250 per bale, particulars of which were received by the firm; and that from this time there is discernable a general correspondence between the particulars received by the firm and the advances by the banian."

"The goods, however, thus pledged must, in our opinion, be held to have become security, not only for the sums advanced at the time upon them, but for the entire existing liability of Tambaci to the banian, and for any future liability of a like nature until they were disposed of in regular course. Their price then went to reduce the general balance due by Tambaci to the banian."

In considering how far the banian had notice of the rights and interests of the several persons in Machester, a distinct question arose with respect to each class of goods. The difference between the modes of dealing with the several classes of goods threw light upon the question of notice as to each. And the Court was of opinion that the evidence showed an actual and intentional holding forth, and representation, to all concerned of Tambaci as the owner of the goods. If found that as to the P. T. C., or lien account goods, the banian had no notice, or knowledge, of the arrangement set forth in the letter of the 11th August 1875, or that these goods were subject to a trust or appropriation of any kind. The judgment added that the probability was that the banian looked at the goods in the godowns, not merely as an indication of the prosperity of the firm, but as a tangible security for the money which he had advanced.

In the first judgment the Court, disposing of the points raised in suits 557 and 552 of 1883, held that Peacock & Co. were entitled in respect of the "joint account goods" and the "pure consignment goods," but that in respect of the "lien account goods" their title was displaced by the banian's lien. It held, however, that the banian, who had already accounted to the consignee, was not liable to account to the consignor. Afterwards, giving judgment in each suit separately, the Court stated the issues in the first of the above suits, and proceeded as follows:—

"*First*, on the general question as between Tambaci and the banian, whether the latter had a lien on the goods in the godowns we have already expressed our opinion."

"*Secondly*, whether as to each class of goods, that the lien is good against Peacock & Co., regarding them as the owners."

"*Thirdly*, whether in respect of the P. T. C. goods, Peacock & Co. are entitled to sue."

"*Fourthly*, a similar issue as to a one-third share in such of the P. M. C. goods as were shipped on the three-thirds account."

"*Fifthly*, whether the banian is liable to account to Peacock & Co. for the proceeds of goods sold and already accounted for to Tambaci."

"With reference to the second question, we have given our reason for holding that in the case of the P-marked goods, the P. T. C. and the P. M. C., the banian knew them to be Peacock & Co.'s goods, and knew of the interests of the several persons concerned in them. It

remains to consider whether his lien is protected by section 178 of the Contract Act. It is so, unless the circumstances were such as to raise a reasonable presumption that Tambaci was acting improperly in making the pledge he did. We are far from saying generally that the knowledge by a pledgee that his pledgor is not the owner of the goods pledged, but an agent for sale, of necessity invalidates the pledge. To say this would be to ignore the 'usual and ordinary course of business' on which the 5 & 6 Vict., c. 39, was based. But the pledge, to be good, must be one presumably made for the benefit of the principal. It can never, we apprehend, be right for an agent to pledge the goods of a principal to secure the balance due by him on his own general account with the pledgee. In such a case knowledge that the pledgor is an agent is therefore, we think knowledge that in so pledging he is acting improperly. In *Leuckhart* v. *Cooper*(1) a custom giving such a general lien was held to be bad in law. And in *Kaltenback* v. *Lewis*(2) the reasons why such a geneal lien is objectionable are clearly pointed out. We think, therefore, that as to the P. T. C. and P. M. C. goods, the title of Peacock & Co. must prevail."

"The case as to the P. T. C. goods is different. Those goods, as we have said, we find to have been Tambaci's goods, subject to a trust or appropriation of the goods and their proceeds. We have found also that Baijnath had no notice of this arrangement. It follows, in our opinion, that his lien upon those goods is valid."

"The special point raised as to the P. T. C. goods is this. Those goods were not actually the goods of Peacock & Co., but of a manufacturer on whose behalf they consigned them. And it was contended that they cannot maintain this suit, at any rate without the owners being made parties to the suit. As an objection to the suit for want of parties, we cannot entertain this contention. Any such objection must, by section 34 of the Procedure Code, be raised before the first hearing. This was not so raised. So that on this point we have only to say whether the plaintiffs have shown any cause of action in themselves as against Baijnath. We think they have. As between Peacock & Co. and Tambaci, the former were the consignors of these goods and the principals in the transaction; Tambaci could not have disputed their title. Baijnath who takes from Tambaci, and with notice, cannot, we think, stand in any stronger position than Tambaci would have stood."

"A similar point was raised with regard to the manufacturer's one-third share of such of the P. M. C. goods as were shipped on what was called the three-thirds account. To this there seem to us two answers,—one, that which we have just given as to the P. T. C. goods; secondly, those goods were specifically appropriated to meet the bills drawn against them. And that is a sufficient equitable interest to give a right to sue —*Lutscher* v *Comptoir d'Escompte de Paris* (3), *Ranken* v. *Alfaro* (4)."

"The question which remains is as to the claim of Peacock & Co. to hold Baijnath accountable for goods already sold and accounted in due course to Tambaci."

"As to this, we think the claim cannot be supported. There are only three grounds, so far as we are aware, on which a principal has been held entitled to sue a sub agent employed by his agent."

"The first is title, whereby he may follow his property in the hands of the sub-agent if he finds it there. This was the ground of decision in the House of Lords in *Mildred* v. *Maspons* (5). And on this ground we have held Peacock & Co. entitled to recover certain of their goods."

"The second ground is privity of contract. This was the ground of deci-

(1) 3 Bing. N. C., 99.
(2) L. R., 24 Ch. Div. 54, at p. 59.
(3) L. R., 1 Q. B. Div., 709.
(4) L. R., 5 Ch. Div., 786.
(5) L. R., 8 App. Cas., 874; 9 Q. B. D., 530.

sion in the Court of Appeal in the case just referred to. There is no such privity here. The position of the banian of a Calcutta firm, which firm receives goods for sale on behalf of principals in Europe, was considered in 1853 in *Orr Ewing* v. *Govinchunder Sein* (1). That was a suit by Glasgow manufacturers, who had consigned goods to a Calcutta firm for sale, against the banian of the Calcutta firm, in which the plaintiffs sought to recover from the banian the price of the goods. He had sold the goods and received the price, and had been debited with the amount in the general account between him and his employers, in exactly the same manner as the banian was in the present case. At the trial the Court found, amongst other things, that there was no privity between the banian and the Glasgow house. A rule *nisi* having been obtained to set aside the verdict or for a new trial on several grounds, that rule was discharged. In the judgments the position of a banian was much considered. Thus SIR L. PEEL, C.J., says at p. 539:—

"'The mode of dealing between the factors and their banian appears to have been this: They looked to him for payment, and when he had made the sales and the monies due were payable, but before the price was paid, he was debited with this price, and gave credit to them in account for the amount minus his commission.'"

"'The defendant was not the buyer of the goods, though the Calcutta house looked to him substantially for the price of them. The form of the contracts and commission show this. According, then, to this course of dealing, his receipts of the money on the sales effected by him as banian would be a receipt of money not to the use of the foreign principals, but simply a receipt according to the course of dealing between him and his principals, the Calcutta house, and independently of any pledge or lien under the Factor's Act.'"

(1) 1 Boul., 534.

"And again, at p. 544:—

"'The position of things here is peculiar; the interposition of such a person as a banian between the factor and the buyers is not known in England; it is not universal here, though more common, and it must be presumed that one who is in the habit of remitting goods to this market for sale by an European house, sanctions so very general and almost universal a course of trade, which the peculiar state of circumstances renders, if not absolutely necessary yet convenient and expedient. Such a person cannot properly be described as a servant or clerk, though the general presence of him at the place of business of his principal might seem to give his connexion with the agent at first view that appearance. He is rather a sub-agent of a peculiar kind.'"

"'The banian in the case, by the course of dealing between him and his principals, became liable as a *del credere* agent. Consequently, he could be called upon to pay, though he had been guilty of no fault or neglect. The giving credit in account between him and his principals, the agent, was, in the absence of fraud, equivalent to payment, and therefore his receipt of the moneys after such accounting was really, by virtue of the bargain between him and the agents, a receipt to his own use and not in any manner in fraud or derogation of the right of the distant principal, but in pursuance of a contract effected within the scope of his own agent's authority and for the benefit of the principal himself.'"

"This case is really much stronger than the many cases in England, in which it has been held that no privity existed between foreign principals and English sub-agents, such as the *New Zealand and Australian Land Company* v. *Watson*(2), *Caltenback* v. *Lewis*(3), because the banian is in the permanent employment of the Calcutta firm."

(2) L. R., 7 Q. B. D., 374.
(3) L. R., 24 Ch. Div., 54; 10 App. Ca., 627.

"The only remaining ground on which a sub-agent could be made liable to account to the principal for goods sold through the sub-agent is fraud, or something equivalent to fraud. The law applicable to India upon this point is now embodied in section 192 of the Contract Act. This section, which seems to us for this purpose substantially in accordance with the law in force before the passing of the Contract Act, says:—The sub-agent is responsible for his acts to the agent, but not to the principal, except in cases of fraud or wilful wrong."

"The only question, therefore, is whether any fraud or wilful wrong has been shown. We cannot see the slightest pretext for such an imputation. So far as the sale and delivery of the goods is concerned, that was clearly in accordance with the object for which they were sent to Calcutta. As to the banian's mode of accounting for the price, we have not to inquire whether if he had been *prima facie* accountable to Peacock & Co. either for the price as purchaser or for their sale proceeds as their agent, he could have discharged himself by showing a settlement in account with Tambaci. The question is, he not being *prima facie* accountable, whether anything has occurred to make him so. Now the mode in which he accounted was that in which he was bound to account, and had been bound ever since his employment commenced in 1873. It was a mode of dealing which we know from *Orr Ewing's* case, already cited, to have been prevalent in Calcutta for thirty years at least. As between the banian and Tambaci the course of business went on for nine years, during which time the banian made very large advances on the faith of it, a due proportion of which found its way into Peacock & Co.'s pocket. Throughout those years the banian never had reason to suppose that any remittance to England was in arrear. And now we know, from Peacock & Co's own witnesses, that their remittances were received with almost absolute regularity down to a date immediately before the bankruptcy. A clearer case of perfect good faith it is difficult to imagine."

"It follows that, in our opinion, Peacock & Co. have shown a good title to the P. T. C. goods; that to those of the P. M. C., which were their's alone, they are entitled on that ground, and that to the remaining P. M. C. goods, those on joint account and those on the three-thirds account, they are entitled, in part, by virtue of ownership, and as to the whole, by reason of specific appropriation to meet their bills of exchange. Under the arrangements made for sale of the goods, the banian will have to account to Peacock & Co. for those goods. As to the P. T. C. goods, the banian's lien is good against Peacock & Co; and the claim of the latter to an account of goods sold and accounted for to Tambaci fails altogether."

In the second of the above suits, *Baijnath* v. *Graham*, the separate judgment was as follows:—"This suit relates to certains of the goods which arrived in Calcutta by the *Knight of St. Patric* on the 14th September 1882. The goods on board of her consisted of 10 bales P. X. T., 8 bales P. T. C., 55 bales P. T. C., and 24 cases P. The bills-of-lading were endorsed and made over to the banian, and he obtained delivery of the 10 bales P. X. T. and of 7 bales out of the P. T. C."

"But before he could obtain delivery of the remaining goods, they were stopped by Graham & Co. acting under instructions from Peacock & Co. About the remaining one bale out of the eight of P. T. C., there is no dispute the banian is clearly entitled to it. The controversy is as to the 55 bales P. T. C. and the 24 cases P. As to the latter, the reasons which we have given in Peacock & Co.'s suit for holding that the banian had no lien on the goods, which he knew to be theirs, would apply to these goods had they been in the godowns. And he certainly can have no better title because they were stopped before they reached the godowns."

"With regard to the P. T. C. goods, an issue arises entirely different from any that has arisen in any of the previous cases, viz., whether, as between the banian and Peacock & Co., the latter had a right to stop the goods *in transitu*."

"The position of Peacock & Co. with respect to these goods we have already pointed out. They were agents who bought in Manchester with their own money or on their own credit, and shipped to Tambaci's house in Calcutta. We think, therefore, that according to the rule laid down in *Feise* v. *Wray*(1), and often acted upon since, they may, for the present purpose, be regarded as vendors with the right to stop *in transitu*. It was suggested, indeed, that the words 'a seller in section 99 of the Contract Act alter the law so as to exclude persons in such a position. But we do not think that is so. It was not denied that all other conditions requisite to entitle Peacock & Co. to stop *in transitu* existed; nor was it questioned that they did, in fact, stop the goods before the *transitus* was over. The only question raised was, whether the bill of lading of these goods was endorsed to the banian under such circumstances as to defeat the right to stop."

"The nature of the advances has been already considered. The legal effect of the transaction is now governed in this country by section 103 of the Contract Act: 'When a bill of lading or other instrument of title to any goods is assigned by the buyer of such goods by way of pledge to secure an advance made specifically upon it in good faith, the sellor cannot, except on payment or tender to the pledgee of the advance so made, stop the goods *in transitu*.'"

"In connection with pledges and liens one distinction is familiar—the distinction between a pledge for an existing debt and a pledge for a new advance. The words 'an advance made upon it' plainly required that the pledge of a bill of lading, in order to defeat the right of stoppage *in transitu*, shall be as security for a new advance, not for a pre-existing debt. The Legislature has thus adopted for this country the view taken by the Privy Council in *Rodger* v. *Comptoir d'Escompte de Paris*(2) and *Chartered Bank of India* v. *Henderson* (3); and not that since taken by the English Court of Appeal in *Leask* v. *Scott*(4)."

"But the section requires the advance for which the bill of lading is pledged to be 'made *specifically* upon it.' The construction of these words is by no means free from doubt. It was argued that they are pointed at the distinction between a particular lien on certain goods for a particular advance, and a general lien upon all goods to secure advances generally, or a floating balance; and it was contended that they require that there shall be a particular advance of a sum or sums on the security of the particular bill of lading in question apart from any other security. If this were the meaning of the words, the condition is not complied with in the present case. But we do not think the words of the section constrain us to take so strict a view; and the policy of the law is to protect *bona fide* dealings with bills of lading in the ordinary course of business. We think the requirements of the section are complied with when it is shown that any sum is advanced on the terms that it is to be secured by the particular bill of lading in question or the goods represented by it, though it may be secured by other bills or goods also, and though the bill of lading may have been intended to be security not only for the particular sum or sums advanced upon it, but also for some antecedent liability. Reading the section in this sense, we think that the banian is entitled to hold the 55 bales of P. T. C. goods as security for all the sums advanced by him after the arrival of the parti-

(1) 3 East, 93.

(2) L. R., 2 P. C. Cas., 393.
(3) L. R., 5 P. C. Cas., 501.
(4) L. R., 2 Q. B. D., 376.

culars of shipment by the *Knight of St. Patrick.*"

"We intimated at the close of the hearing that, as the question of costs might give arise to considerations not free from difficulty, we should make no order on that subject without giving the parties an opportunity of being heard. The cases can be set down for argument on this point on the application of any of the parties."

"Lastly as the goods have been dealt with under arrangements between parties, and it is possible that some unforeseen difficulty may arise in the application of our decision, we think it well to reserve liberty to apply to all parties in all the cases."

The matter of granting leave to appeal in the two suits only was disposed of in *Baijnath* v. *Graham*(1).

Mr. *H. H. Asquith*, Q C., Mr. *W. C. Smyley*, and Mr. *J. Roskill*, for the appellants :—The Court was wrong in the first case in excepting the P. T. C., or "lien account," goods from the consignments as to which it had correctly allowed the *prima facie* right of the consignor to prevail. This exception was made on the erroneous ground that the consignor's rights had been displaced by the banian's lien. The Court below had also been wrong in the second case in holding that the lien alleged by the banian prevailed over the right of the con signor to stop *in transitu* the bales coming by the *Knight of St. Patric.* Its finding that a lien had been agreed to was against the weight of the evidence; and even if, as between the banian and the firm employing him, the former had a lien for his advances, and on general account, that lien should not have been held to be of any avail as between the banian and the consignor. Again, as to the goods P. T. C., or "lien account" goods, the Court below should have found that the banian had notice of the consignor's interest in them, and should have held that, if the consignor had attempted to pledge them, it would have been invalid. As to the goods coming by the *Knight of St. Patrick*, the appellants had made good their title, and the Court ought to have held that the bills of lading had not been transferred under such circumstances by the consignee as to defeat the right of the consignor to stop *in transitu.* It was also argued that the High Court should have held that the banian was liable to account to the consignor for all the proceeds of the goods claimed by the appellant that had been sold by him before the insolvency of the consignee.

The view of the Court below of a banian's position might be accepted, viz, that although he had no lien by custom having the force of law, he might have one by agreement with his employer as against him. But the Court in finding him entitled to the security of the goods whether in Tambaci's godowns, or on their way, had mistaken the effect of the evidence. No lien was presumable from the expressions used or from the course of dealing. And no part of the consignments had been pledged to the banian within the meaning of section 178 of the Contract Act, 1872. Also, throughout, there never had been a time when the goods had been transferred, with intent to pledge them, from the possession of Tambaci to that of the banian, and yet to make a valid pledge there should be either actually or constructively such a transfer. And, again, as the banian, in fact, had notice of the interest retained by Peacock & Co. as against the consignee in the lien account goods P. T. C., a pledge, had there been one, would have been invalid, for the reason that the banian would not have been acting in good faith. He knew that Tambaci's business involved the receipt of goods for sale belonging to other firms. He knew that it was a consignment business, in which the goods from Peacock & Co. on "joint account," or as "pure consignments," were not Tambaci's; and the Court found him to have known that as to these classes of goods

(1) I. L. R., 11 Calc., 740.

he had no lien. In the case, however, of the "lien account goods," having regard to the fact that P. T. C. were numbered consecutively with Tambaci's own goods bearing the same mark, the Court found that there was no express notice to the banian of the consignor's interest therein, and concluded that the banian's lien was protected by the Contract Act and must prevail. This finding of a lien upon these goods was wrong. The banian had no right to assume that all the goods marked P. T. C, were those in which Tambaci alone was interested. The invoices sent to the Calcutta house on the occasion of each shipment disclosed the consignor's interest, and the banian was thus put upon inquiry. Even if these goods had been pledged within section 178, which was not admitted, the pledge was not protected, inasmuch as the alleged pawnee was not acting in good faith; or at least was acting under circumstances which were such as to raise "a reasonable presumption that the alleged pawnor was acting improperley." Also the proceeds of the sales effected by the banian before the insolvency ought to be accounted for to the consignor, even if already accounted for by the banian to his immediate employer. The High Court had held the contrary; but this was inconsistent with its having held that the appellants could recover all the goods on "joint account," and on "pure consignment," which were in the godowns at the date of the suspension. The appellants were no less entitled to follow the sales and recover the proceeds of goods than to recover the goods themselves while still remaining unsold. The particulars of shipment had been shown to the banian, not that he might consider each as supporting and becoming security for his advances, but only that he might have early information of goods to arrive, and might effect the sales as early as he could. The bills of lading also were not made over to the banian until the arrival of the ships; and then, not for the purpose of vesting them, or the goods which they represented, in him, but simply to comply with the requirements of the ship's agents, and to enable him to obtain delivery of the goods.

Between the 1st and 19th September 1882 there were forced sales and deliveries to the amount of two lakhs of rupees, pressed upon purchasers to get payment before the usual time. This would have involved purposeless trouble and loss if the banian had had the lien claimed. The existence of such a lien was not reconcileable with many proved or admitted facts.

As to the right which the appellants claimed to stop *in transitu*, that must prevail unless the banian had a lien on the specific goods. No lien as against Tambaci and Son would be of any avail as against Graham & Co. claiming, as the consignor's, the 55 bales marked ,P. T. C. on their way. This right had not been defeated by the endorsement of bills of lading to the banian, who had notice of the vendor's title. Particulars of shipment reached Calcutta on August 26th. The ship arrived on 14th September. The bills of lading were endorsed on the arrival of the ship. There was no evidence that the advances of the banian were made specifically against or on the security of the goods included in the particulars of shipment. They were all made prior to the endorsement of the bills of lading; and even if the banian had had a right of lien, it was prevented from operating upon the 55 bales by the stoppage *in trnsitu*. In any case, as to all goods sold by the banian in August and September 1812, the proceeds ought to be accounted for to the appellants; and so much of the judgment and decree of the lower Court as declared that the banian was entitled to a lien on the P. T. C. goods, and dismissed the claim to an account of the goods sold, ought to be reversed. The following cases were referred to:—

Ex parte Banner(1); *Evans* v. *True-*

(1) L. R, 2 Ch. D., 278.

man(1); *Kaltenback* v. *Lewis*(2); *Kemp* v *Falk*(3); *New Zealand and Australian Land Company* v. *Watson*(4); *Spalding* v. *Ruding*(5).

Mr *J. Rigby*, Q. C., and Mr. *E. F. V. Knox* (with whom was Mr. *R. S. Wright*) for the respondents:—By agreement, confirmed in 1875 and in 1882, the banian had, whithin the meaning of section 171 of the Contract Act, IX of 1872, a lien on the P. T. C. goods in the godowns of Tambaci as a security for his general balance of account. By the course of dealing the banian was in the position of a banker lending money to the firm which employed him, and he had a banker's lien under section 171 of that Act. Also, the firm—no trust attaching to their control over the goods, and all the parties acting *bonâ fide*—had made a valid pledge to the banian within the meaning of the above Act. As to the banian's having had notice of the mode of consignment, and of the interest of the consignors, with the result that no valid lien in his favour could have been effected between the parties by agreement, this view was contrary to the facts rightly found upon the evidence by the Court below. There was nothing to show that the banian had any notice of the terms of consignment of the P. T. C. goods, and it had been found that he had none. There had been, either actually or constructively, a delivery to the banian; for the goods had been placed, with intent to transfer possession to him, under his control, by the making over the keys to him, the endorsement of the bills of lading, and other acts. In like manner, when there was a temporary pledge of part to the Bank of Bengal, possession had been given to the Bank. What was questioned was that there was any trust attaching to the goods which would prevent a pledge. The judgments in *Kaltenback* v. *Lewis*(6) were referred to. It was the general principle of justice that gave power to the consignee *bonâ fide* to raise money on the goods, and this had been the origin of the English Factors' Acts. Reference was made to Acts 4 Geo. IV., c. 83: 6 Geo. IV. c. 94; 5 and 6 Vic., c. 39; 40 and 41 Vic., c. 39, for which had been substituted the Act of 1889, 52 and 53 Vic., c. 45 dealing with dispositions by mercantile agents, and advances by consignees, and their liens. The agent's disposition was valid when acting in the ordinary course of business, the taker acting in good faith, without having, at the time of the disposition, notice of the agent's want of authority. Reference was made to—

Evans v. *Trueman*(7).
Cole v. *North-Western Bank*(8).
Leuckhart v. *Cooper*)9).
Rodgers v. *Comptior d'Escompte de Paris*(10).
City Bank v. *Barrow*(11).
Leask v. *Scott*(12).

Section 178 of the Contract Act was dictated by the same considerations of equity. Under it there had been a valid pledge.

As to the claim for an account. To this the banian was in no way liable, he having accounted for the proceeds of sale to the firm that had employed him. With that firm he had contracted, not with the consignor; and the true answer to this part of the claim was given in the judgment of SIR L. PEEL, C.J., in *Orr Ewing* v. *Gobinchunder Sein*(13), that there was no privity of contract between the consignors and the banian. All the sales effected by the latter were valid as against the consignors within the first

(1) 1 Moo. and Rob., 10.
(2) L. R., 24 Ch. D., 54; 10 App. Cas., H. L., 617.
(3) L. R., 7 App. Cas. 573.
(4) L. R., 7 Q. B. D., 374.
(5) 12 L. J., Ch. (N.S.), 503.
(6) L. R., 24 Ch. D., 54; 10 App. Cas. 617.
(7) 1 Moo. and Rob. 10, per Lord Tenderden as to agent's knowledge.
(8) L. R., 10 C. P. Cas. (Exch. Ch.), 354; in error from L. R., 9 C. P., 470.
(9) 3 Bing. N. C., 99.
(10) L. R., 2 P. C., 393.
(11) L. R., 5 App. Cas., 664.
(12) L. R., 2 Q. B. D., 376.
(13) 1 Boul., 534.

exception to section 108 of the Indian Contract Act.

As to the right of stoppage *in transitu*, the transit had ceased when the goods were at the disposal of Tambaci. The consignors had no right to stop the goods under section 99 of the Contract Act, 1872, because (*a*) they were not "sellers" of the goods within the meaning of that section; also (*b*) they had drawn on the firm of Tambaci for the price of the goods, and their bills had been accepted, which acceptances had not been dishonoured.

Again, the advances on, and the endorsement over, of the bills of lading amounted to an assignment by way of pledge. This had been specially made upon the bills of lading, in good faith, within the meaning of section 103 of the Contract Act, 1872. If a present consideration was under that section necessary, and, if here not present in actual time, the endorsement over of the bills of lading related to the time when the advance was made. The judgments and decrees of the High Court should be affirmed.

Also were referred to—

Maspons v. *Mildred*(1).

New Zealand and Australian Land Company v. *Watson*(2).

Chartered Bank of India v. *Henderson*(3).

Kaltenback v. *Lewis*(4).

Mr. *H. H. Asquith*, Q.C., replied. Their Lordships' judgment was afterwards, on 24th January 1891, delivered by

THE RIGHT HON. LORD HOBHOUSE:—

These suits form part of a group of seven suits instituted for the purpose of deciding questions arising out of the failure of Caralambus Tambaci, who carried on business under the firm of Paul Tambaci and Son. The suits were disposed of by the High Court of Calcutta simultaneously upon evidence and arguments common to the whole. The decrees have not been challenged in appeal except so far as they are adverse to the interests of Messrs. Peacock, Mollison & Co., who are in effect the appellants in both the suits now the subject of these appeals.

The facts of the case have been so fully, accurately, and luminously stated in the judgment of the High Court, and, as stated there, have been so entirely relied on by the Counsel, and so repeatedly referred to during several days of argument, that their Lordships do not find it necessary to make any fresh preliminary statement, but will refer to the material facts, as and when they are required, to explain the conclusions arrived at.

The principal question in the High Court, and the only one which their Lordships propose to deal with in these appeals, is the question whether Baijnath, or, as he is usually called, "the banian," was entitled to the lien which he claimed against merchandise in the godowns of Tambaci, and against other merchandise which at the time of Tambaci's suspension of payment was on board ship, consigned by Peacock to Tambaci, and which Peacock claimed the right to stop *in transitu*. The effect of the High Court decrees is to deny the banian's claim of lien over goods marked with certain devices, of which the P. mark may be taken as an example, but to affirm this right over goods marked P. T. and C. The learned Judges were of opinion that he had stipulated for a lien over the whole, but that as to all except the P. T. and C. goods he knew that they were consigned by Peacock under express agreements, that the proceeds should be remitted to meet bills drawn against them, and therefore that Tambaci could not properly pledge those goods as security for the balance of a general current account.

The High Court rightly states that there is no rule of law giving a lien to a banian, neither is there any custom to that effect. If he claims one,

(1) L. R., 9 Q. B. D., 530; L. R., 8 App. Cas. 874

(2) L. R., 7 Q. B. D., 374.

(3) L. R., 5 P. C. Cas., 501.

(4) L. R., 24 Ch. D., 54; 10 App. Cas, 627.

he must prove it either by showing some express agreement, written or verbal, that he shall have a lien, or some course of dealing from which it must be implied. The banian relies on both these methods of proof, but he does not allege that there was any written agreement.

The express agreement relied on being only verbal, it is important to see how the banian states it. His plaint was the first step in the litigation, and in it he states, in general terms, that up to the year 1882 he made advances to Tambaci on the security of a lien on the goods in his godowns. With respect to the year 1882, he states with more particularity that he refused to make further advances without further security than the goods in the godowns afforded, and that he was assured by Vassilopulo (who was then managing the affairs of Tambaci in Calcutta) that more goods were coming out, and that in effect he made his advances thenceforward on the security of all the goods shipped from England, whether they had arrived or not.

In his examination on interrogatories the banian was asked whether he did not become Tambaci's banian under the agreement of the 11th July 1873, and whether that agreement had been recinded or altered. His answer is to the effect that he was employed under that agreement, and that it was never expressly rescinded, but was modified in some respects. The most important modification was that, whereas the agreement provides that the banian shall deposit with Tambaci Rs. 25,000 in Government securities or cash by way of security against his defaults, it was "shortly after the execution" agreed, at the request of Caralambus Tambaci, that the banian should, instead of the deposit, advance him Rs. 25,000 in cash with interest at 12 per cent., and on the security of the goods in the godowns.

He then goes on to state that "very soon after the execution" of the agreement, Caralambus Tambaci proposed to him that he should advance funds to the firm from time to time upon the security of a lien and charge upon all goods for the time being in the godowns of the firm, and that advances were made on that footing.

In the beginning of the year 1875, the banian says he found that Tambaci was enlarging his business, and required more advances, and he asked for a fresh written agreement giving him security, but Caralambus Tambaci put him off by saying that the word of a gentleman was sufficient, and that he need not be afraid, "as all the goods in the godowns would remain in my possession as a pledge." At the same time, he says, it was agreed, amongst other things, that his advances should carry interest at the rate of 12 per cent. per annum. As regards the transactions of the year 1882, he affirms the allegations made in his plaint.

The plaint was filed in September 1882; the banian was examined on interrogatories in June 1883; and in August 1883 Caralambus Tambaci was orally examined in England, and cross-examined at great length by the banian's Counsel. He denied that there was ever any agreement that the banian should have a lien on any goods for his advances. At the trial of the cause in May 1884 the banian was orally examined. He had then the advantage of knowing Tambaci's oral deposition, whereas Tambaci knew only what the banian had said upon interrogatory, and, being in England, could not be recalled to speak to any new matter.

In point of fact some very important new matter is introduced by the banian at the trial. His account now is as follows:—"One day" (which may be taken as being the 9th of June 1873, though it may be a day or two earlier, but the exact day is not material) he was introduced to Tambaci at the office of Mr. Sassoon, and Tambaci asked him to be his banian in the same way in which he was acting for Sassoon. They arrange to go more fully into the matter at Tambaci's house, and Tambaci went away. Sassoon said nothing on that occasion. "One day," probably

the next day, or (say) the 10th June, the banian went to Tambaci's house. "I asked him, 'How do you wish the business to be done?' He said he would give me a commission of 1½ per cent., and interst at 12 per cent. per annum, 'and I will take advances from you on my goods.' He further said this, he was carrying on business on a very limited scale, and only required small advances, but hereafter he intended to extend his business, and then he would require larger advances. Then I said to the sahib, 'State to me the nature of the business more particularly.'" Then it was arranged that the banian should have the key of the godowns; that his men should be in charge of the godowns; that the chitties for goods delivered should be made out in his name, "in respect of the advances which I shall have made on these goods;" that the godown sirkar was to be his man, and the durwan and the cash babu. The two parties then visited the godowns together, and the banian agreed to put a man in charge. The next day (say the 11th June) they met again at Sassoon's office, and "had all the conversation about the terms over again; commission, chitty, interest, advances, mode of delivery, and everything over again." This took place in Sassoon's presence, and he joined in the discussion, and said that those were the terms on which the banian was doing business with him. On the 12th June he paid the Rs. 25,000 to the Agra Bank to redeem goods in pledge; and it was probably on the 11th that he began his business as banian.

Sassoon speaks to the two meetings at his office, and he confirms the banian as to the nature of the agreement; but he says that the terms of it were all settled at the first meeting through his intervention, both because Tambaci wished to engage on the same terms on which Sassoon did business with the banian, and because he acted as interpreter when necessary. At the second meeting he says only that he learned they had agreed with each other and commenced the business.

When weighing the conflicting lines of evidence, the High Court addresses itself to the question of antecedent probability. The learned Judges think it improbable that a man like the banian would give such large credit without security to a firm situated as Tambaci's was in 1873. But it must be borne in mind that the business was very greatly enlarged after the banian's employment, and wholly by means of his advances; that besides his commission he got interest at 12 per cent., an amount of 4½ above the average bank rate upon pledges; and that this charge of interest so completely absorbed the assets of the business that in January 1882 Vassilopulo calculates that the firm is insolvent by exactly the amount it has paid for interest during 1880 and 1881. It may be true that a man supplying money as the banian did, would, though he looked to profit on sales, expect a higher interest than the bank which made specific advances on specific goods, but hardly so much higher. Their Lordships do not see the *a priori* improbability of the opposite theory, that the banian was glad to carry on a great trade with the credit and connection of Tambaci, of which the whole proceeds, except so much as was necessary for the actual living of the Tambaci's, would come into his pocket in the shape of interest or commission. The great inflation of the business, which proved after a time, when markets were adverse, to be ruinous, could not have been effected without his aid, given long after he knew that Tambaci had no capital of his own. That he should also be a secured creditor seems a somewhat exaggerated amount of advantage to stipulate for.

But there are other considerations affecting the *a priori* probability of a transaction. On Tambaci's part it was, as the banian states it, a dishonest one. In England he was buying goods on express agreements that the money got for them in Calcutta should be appropriated to meet bills drawn for their price, while

he was making such arrangements in Calcutta that the moment of their arrival there they would be subject to a prior lien for the whole amount due on account current with the banian. Indeed, the banian claims by virtue of the fresh agreement in 1875 to have a claim against the goods while yet in transit. It can hardly be thought *a priori* probable that Tambaci would make such an agreement.

No doubt many things that Tambaci knew were concealed from the banian. But the banian alleges one entire agreement, extending to the whole of the goods consigned to Tambaci in Calcutta, and operating continuously (with the extension in 1875) to the close of the transactions. Now it is proved beyond doubt, and the High Court have found, that as to portions of the goods (*e.g.*, those marked $\frac{PM}{O}$) the banian had notice of the interest of the consignors. Yet he went on maintaining that his agreement gave him a prior lien on those goods. Moreover, he was warned in 1875 by a friend that "commission goods" stood in a different position from others, and was advised to make inquiries on the subject. He says he had a conversation a few days after with the sahib (Tambaci), but it does not appear that he ever made, or if he made that he ever pursued, any serious inquiry on the subject. He held on his course just the same. The agreement then which he alleges is an agreement for a general lien on all goods coming to Calcutta on Tambaci's account, whatever might be the terms on which the vendors had shipped them. It is not *a priori* probable that any experienced man of business, such as the banian was even as early as 1873, should rely on such an agreement as that. It seems to their Lordships that the agreement, as stated by the banian, was, on his own side, a hazardous one, and on Tambaci's side dishonourable, both considerations being against its antecedent probability.

The direct oral evidence to support the original agreement alleged by the banian is confined to the banian himself and Sassoon. The High Court attach great importance to Sassoon's evidence. Nobody has impeached Sassoon's veracity. But the weight of his evidence to support the banian depends also upon its accuracy, upon its accordance with the banian's own account, and partly upon the opportunity given for meeting it. The conferences at Sassoon's office and at Tambaci's house in June 1873 are the corner stone of the banian's case as presented by his oral evidence. It is most important that there should be no doubt as to their tenor. There is no doubt that in some way, and it may have been by conversation in Sassoon's office, arrangements were made that the banian should take charge of merchandise, should incur expenses in employing a staff, should effect sales on commission, should receive the money, and should bring it into account, receiving discount at the rate of 12 per cent. on it if paid before it was due, and paying interest at 12 per cent. if retained after it is due. When a discussion is carried on between three persons, sometimes in English, sometimes in Hindustani, and with one of them acting occasionally as interpreter between the other two (which is Sassoon's account of the first conference), it must be very easy indeed to confuse between a conversation and an agreement, and between such an arrangement as Tambaci alleges and as is embodied in the agreement of the 11th July, and an arrangement to advance money against the security of the goods. Sassoon tells us that "somebody said, if money is to be advanced it must be against the security of the goods." The somebody, he thinks, was the banian, and this was evidently, according to Sassoon's recollection, the first introduction of this important matter between the parties, and he himself took an active part in making the bargain. But the banian's memory is materially different. Nothing, according to him, was done at the first meeting except the introduction

of himself to Tambaci, and Sassoon said nothing. All the details were settled the next day in the absence of Sassoon at Tambaci's house. They were "made pucka" at the second meeting in Sassoon's office in Hindustani, though Sassoon says only that he then learned that the parties had agreed and commenced business. Now when such differences are found between the parties in their recollection of those occurrences, which are the most striking in their nature and the most likely to endure in the memory, they must materially impair the value of statements as to other parts of the conferences which are less likely to endure in the memory, viz., the exact expressions used, whether in Hindustani or in English, concerning the banian's advances and his position with respect to the merchandise he was to keep and to sell. It may be that something was said about advances, but it would be dangerous to hold an agreement proved upon such evidence, even if there were nothing but Tambaci's previous denial to bring it into doubt.

Then as the possibility of meeting this evidence, which in effect was sprung upon the banian's opponents at the trial. Tambaci, the only other person present on these occasions, could not be recalled, which, as the High Court says, was unfortunate; and the appellants are entitled, on that ground at least, to have the evidence very critically examined. But the objection goes somewhat deeper. Why were not these extremely important conferences mentioned earlier? The first person who introduced the name of Sassoon is Tambaci himself. When under cross-examination he stated that Sassoon introduced him to the banian. That would have been the time to press him as to his recollection of the conferences in June 1873. But though several questions were put to him about Sassoon's introduction, nothing was asked about the conferences. On the contrary, it is suggested that it was not Sassoon at all, but Demetriadi, who introduced the banian. His legal advisers then could not have been instructed as to these important conferences which gave birth and shape to the agreement now relied on. Their Lordships find it very hard to believe that, if the banian had really relied on the making of the agreement he now alleges, he would not have put it forward at the earliest moment, whereas he failed to do so when invited by the interrogatories to say under what agreement he carried on business, and failed again, when in Tambaci's examination it would have been proper to lay a ground for its introduction. It is not till the trial that he brings forward the conferences which are the origin of his agreement and strongest direct evidence.

As regards the evidence of the banian, the High Court, while thinking, him capable of adding a fringe of fictitious evidence to his case, and in fact disbelieving him in some instances, were favourably impressed by his demeanour, and think him not untruthful in the main; and they express belief in his main statement, though not till after satisfying themselves that a number of incidents in the course of the business tell in its favour. Their Lordship accept the view taken of the banian's character, but they can not help taking his evidence as labouring under two great difficulties.

One has been already mentioned in commenting on Sassoon's evidence. The other is that, at least down to the year 1880, there is no written document produced which is so much as alleged to confirm him. On the 11th July 1873, just a month after the conferences at which the terms of his employment were settled, the written agreement was executed, and it is wholly silent about advances or security, except a security to be given by him to Tambaci. It is a most extraordinary thing that the banian, who thought it necessary that the terms which he had settled with Tambaci should be repeated all over again and "made pucka" in Hindustani before Sassoon (such is his version of the affair), should not think it necessary to see that

they were embodied in the formal written agreement. His mode of meeting this difficulty is even more extraordinary. He says that the written agreement was never read over to him, and that he did not, even up to the time of his examination, know what it contained. "I was under the belief when I signed it that it contained the terms arranged for the pledge of goods advanced on." Their Lordships find it impossible to believe this statement. He did not put it forward when examined on interrogatories. It was not suggested in Tambaci's cross-examination. The agreement was prepared, and its execution witnessed, by a solicitor of the highest standing, to whose office the banian is said by Tambaci to have gone several times about this matter. That solicitor would hardly have permitted a party ignorant of English to execute the agreement without satisfying himself that he understood it. And the banian's then partner in this one business, Mohendro Nath, who knew English well, and who appears to have been taken into the business on account of that knowledge, and who is stated to have accompanied the banian on several occasions to the solicitor's office while the draft was in preparation, and who executed the agreement, is not called to say anything about it.

Their Lordships hold that the oral evidence wholly fails to establish the agreement for lien on which the banian relies in the year 1873. As for the asserted modification or new agreement in 1875, there seems to be no evidence of it but that of the banian himself, given at the trial, and quite contrary to the story told in his answers to interrogatories; unless the statement of his gomashta, Nowrung, can be considered a corroboration. The High Court have justly disbelieved it. But the learned Judges consider that there was an agreement for a lien in 1873 on the goods in the godowns, and that it was extended to goods in transit at some subsequent date, relying on inferences drawn from a variety of circumstances which their Lordships will proceed to consider.

The first is, that the banian had the keys of the godown in which the goods were stored and appointed men to take charge of them. That is no more than was necessary for the performance of his duty to take and keep the goods, and to make sales and deliver to the buyers. His predecessor in the post, Nolit Mohun, who made no advances, had the same kind of custody. When the banian tries to make out that his custody was of a more exclusive character, and that the durwans were all appointed by him and not by Tambaci, the evidence is against him. The High Court disbelieve him, and treat this story as one of the instances in which he adds a fringe of fiction to his real case. It is observable that when the Bank of Bengal took goods in pledge they were careful to have the exclusive possession of them, changing the locks and appointing their own durwans. Having regard to this difference, and to the fact that the banian thought it desirable to strengthen his case by evidence which was proved to be untrue, their Lordships think that this incident of the course of business bears against the banian's contention.

The next point is, that the bazar chit ties were made out to the banian whereas in Nolit Mohun's time they were made out to Tambaci. That change seems a very immaterial circumstance, if in itself the new practice was more convenient. It certainly seems more convenient that the banian, who, after a contract of sale had been made, was debited in Tambaci's books with the price, and was held responsible for it, and who transacted with the buyers from first to last, should also (even independently of the fact that the firm was usually in debt to him) be the person to whom the buyers should give th ir notes for payment. Their Lordships think that this incident bears neither one way nor the other on the point in controversy.

The next point is, that policies of insurance of the merchandise against fire were regularly effected by the banian

in the name of Tambaci, and then endorsed by him and handed to the banian. The practice is denied by Tambaci, but is proved to have existed during the whole period of Vassilopulo's management, and must be taken to have been in existence when he assumed the management in April 1878. The High Court consider that the policies were endorsed by way of completing the banian's security. Their Lordships agree that this incident makes more for the banian's theory than for the opposite one, but it does not make very strongly. It is the common case that, at all events in the later years of the business, the firm was always heavily indebted to the banian, and that he looked for payment to the sales of goods. If then sales should be prevented by fire, it would be, as between Tambaci and the banian, right that the latter should have the substitute for the price, and convenient that he should have in his hands every facility for getting it. It may be observed that no fire ever occurred, so that no occasion has arisen for dispute as to the property in the policies or in the money secured by them.

An important feature in the course of business is the treatment of the bills of lading. At the trial the banian asserted that they were endorsed to him directly upon their arrival in Calcutta; and his gomashta Nowrung backed his assertion. If that had been the case, it would have given support to the banian's contention that he was intended to hold a security upon the coming merchandise. If there was an agreement to that effect, it certainly would be of importance to him that he should have the title assigned to him and should possess the documents of title at the earliest possible moment; but the banian's assertion on this point appears to be part of the fringe of fiction. The facts are the other way, and are so found by the High Court. The object of endorsing over the bills of lading was that the endorsee might obtain delivery of the goods from the ship, and they were never endorsed till the arrival of the ship, which was generally a week or ten days, and sometimes longer, after the arrival of the bills. In his plaint, which was framed at the very beginning of the controversy and before the importance of these details had been observed, the banian states what happened in the case of one ship, the *Knight of St. Patrick*. "On the arrival of the said vessel, ...the said Vassilopulo . . . . endorsed and delivered to the plaintiffs the bills of lading and the said goods . . . . in order to enable the plaintiffs to obtain delivery of the same, and to hold the same subject to their lien, &c." This is a plain account of the practice of the firm both with Logothetis when he acted as carrier from the ship to the godown, and afterwards with the banian when he became carrier, only with the addition of the then controverted matter of lien. The opinion of the High Court is that the practice as to the bills of lading, standing by itself, proves nothing either way. To their Lordships it appears to bear against the banian's theory, if standing alone.

But it does not stand quite alone. For a considerable period, dating back at least to the year 1877, particulars of shipments of merchandise, which were sent out from Manchester as early as possible, were communicated by Tambaci to the banian. There is the inevitable dispute about the meaning of such a practice. One side says it was because the banian was to advance against those shipments, and on the security of the goods shipped; the other side, that it was to facilitate dealings between the banian and the customers at the earliest possible time. Their Lordships are not now dealing with the events which happened at the end of 1881 and during 1882, about which there are some peculiar features, but with the practice which prevailed for some years previously. If the banian's theory of the communication of particulars were the true one, it is almost impossible to conceive that he would not (as he now alleges he did)

get the most important document of all transferred to him as soon as it arrived in Calcutta. But he did not. And the two parts of this practice throw a reflex light on each other. The retention of the bills by Tambaci goes to show that the communication of the particulars was for the mercantile object which he alleges. And the communication of the particulars lends more significance to the fact that the documents of title were retained till the moment when it became necessary to transfer them for the purpose of obtaining delivery of the goods.

It will be seen that, in their Lordships' opinion, the incidents of business hitherto enumerated tell much more against the banian's case than in its favour. But it has been strongly urged at the Bar that during the latter period of his employment the banian did, with the knowledge of Vassilopulo, make advances in contemplation of specific quantities of merchandise either arrived in Calcutta or notified to arrive; and that it must be taken to have been the contract between the parties, at least at that time, that the goods so taken into consideration were to be held in pledge for advances made immediately afterwards. It is not indeed asserted that in any instance there was a specific sum of money advanced on the security of a specified quantity of goods. The lien claimed at this period is still a lien for the general balance of account. But the fact that the banian calculated the amount of goods belonging to Tambaci is said to show that he must have advanced on the security of them.

A number of letters have been put in evidence to sustain this contention. Some were written by Tambaci to the banian, and these contain nothing to the purpose. Others passed between Vassilopulo and Tambaci during the latter part of 1881 and in 1882, and in them Vassilopulo enlarges on the fears and irritation of the banian, and on the necessity of so encouraging him by sales of stock or reduction of debt on the Indian side, and by purchases of new stock on the English side, that he may continue to supply the funds necessary for the existence of the firm. The contention on the banian's part is that, though he was no party to this correspondence, it faithfully reflects the interviews between himself and Vassilopulo, that Vassilopulo's expressions are inconsistent with the idea that the banian was not advancing on the security of the merchandise, that Tambaci approved what Vassilopulo was saying and doing, and that it was not open to him afterwards to say that there was no agreement for such security.

The earliest document relied on, the document before referred to as the only one produced to confirm the banian's case, is of earlier date than this correspondence. It is a list of goods in the godowns, dated the 2nd June 1880, made out by Vassilopulo, and with some calculations written on it by the banian. He sets down the value of the goods, the amount of his advances and his receipts from sales for some time past, and concludes that he may advance more. That is all. The High Court thinks it some corroboration of the banian's case. But that depends upon the view taken of the then subsisting relations of the parties. It appears that Vassilopulo had asked the banian for money at a time when no goods had arrived for two or three months. It is the common case that the banian got his profits by means of the constant influx of goods from England and their sale in Calcutta. It must have been essential to him at all times after the large advances began that he should be well acquainted with the magnitude of the business. And if he had reason to think that its life blood was being dried up by the stoppage of supplies from England, it was natural for him to calculate the amount available for sale in Calcutta before making further advances. The ordinary course of the business would shortly bring the whole of the price into the banian's hands. There is nothing to

show that at this time he was looking beyond the ordinary course of business. The incident now under consideration is consistent with the theory he now sets up, but it is equally consistent with the contrary theory.

The banian does not assert that there was any alteration in the terms of his employment, either at this time or later on. His account of what passed in 1882 is as follows :—

"In 1882 I had the arrangement also with Mr. Vassilopulo. In this way there was an arrangement before it was made more pucca in 1882, as regards the goods in transit. The arrangement was the same, only before 1882 I used to advance as much money as he wanted; subsequent to 1882 I advanced only to the extent of the goods I received. The arrangement as to the goods in transit was made in 1875. There was no alteration or addition to it in 1882."

Strictly construed, this statement would mean that before 1882 money was advanced by the banian just as asked for, and without any reference to amounts of goods, which would be destructive of his case. Such can not be his meaning; it is impossible to think that there ever was a time when he had not regard to the volume of the business; and he probably means only that during 1882 he made advances with a more careful eye to the quantities of goods available for sale. But that increase of caution would not give him a lien. The course of the business continued as before.

It is to be noticed that Vassilopulo himself believed that the banian had a lien on all the goods purchased. His views are succinctly stated in his letter of the 7th November 1888, where he combats Caralambus Tambaci's assertion that the banian had no such lien.

"You deny that the goods are pledged to the banian, and, as I hear, will send an affidavit to that effect. But have I said or do I say anything to the contrary? On the contrary, I maintain that there is no agreement of the sort. What I do not deny though, and what I never shall nor can I deny, is that the banian always held the keys of the godowns, and this circumstance, and the manner in which the banian made the advances since January 1882, entitle the banian to a lien. And then, just notice how many other circumstances have turned up in favour of the banian. Nobody can take from him those goods on which he paid the drafts or which he released from the Bank of Bengal."

The same views insisted on in his evidence. He and the banian are at one in stating that there was no new agreement made in his time. He is indeed drawing a conclusion of law on which his opinion is of no value. He infers a lien from the practice from which it is not to be inferred. And he does not distinguish between the various classes of goods to which it may apply, viz., the goods which were specifically pledged to the Bank and redeemed, and the goods the drafts against which had been paid, and the goods whose proceeds ought by Tambaci's express agreement to be appropriated to pay the shippers the price still due to them.

The correspondence between Vassilopulo and Tambaci must be read with these conflicting views of the two parties clearly kept before the mind, and with the recollection that the conflict had not until late in 1882 been brought into relief, and that the question is whether Tambaci must have understood Vassilopulo's expressions as meaning that, beyond his interest in obtaining merchandise and selling it, the banian held a legal security upon it. In two or three passages Vassilopulo speaks of "cover" to the banian by purchases and by goods. But he also speaks of "covering" him by sales, which was Tambaci's view of the legitimate way of reimbursing him. He says in one passage that the banian and the Bank in case of insolvency would "take all our stock;" but in the next sentence he says that the creditors in England would "take" the property there, though there was no pledge of that.

Again, he writes of a discussion with the banian, in which he sets forth the great profit which the latter is making—about a lakh a year by interest, besides other profit; and he sets their debt to him against the "value of the goods in your hands." And the conversation proceeds thus :—

"After I had pointed out to him the increase of our business on the one hand and the profits he makes without any danger on the other, I said to him point blank,—Baboo, you must allow us more accommodation in proportion to the business we are doing, and which is increasing daily. At least 10 laks, if you have confidence in our business, our character and honesty, and in the management of the business. If you have no confidence, or if you are not prepared to supply us with the requisite accommodation, tell me plainly, because I consider it my duty to place everything before Mr. Tambaci, so that he may do what is necessary in connection with the increase of our business. If we are able to do a large business, let us do it, if not, we must curtail it; in any case though I, as manager here, must know, so as to arrange my transactions accordingly."

After which he says the banian assented to give further help when his other engagements permitted him to do so. That conversation has been very much pressed at the Bar as being impossible to reconcile with the conclusion that the banian had no legal security against the goods. To their Lordships it appears to be consistent with the banian's contention, but to lead more naturally to the inference that the parties to it were not thinking at all of lien or any other legal question, but of the banian's interest in keeping up and extending a business from which he was deriving great profit, without incurring the risk of a partner, and with practical security, as Vassilopulo contended, so long as his advances and the volume of the business answered to one another. As for the mere expression "goods in your hands," *i. e.*, the banian's hands, Vassilopulo frequently speaks of the same goods, or of goods in the same position, as goods in "our" hands, "our" stock, and so forth.

Their Lordships think that too much stress has been laid on those letters passing between Vassilopulo and his principal, but as they have been so much discussed on both sides, their Lordships have examined them, with the result of finding that there are no expressions in them which Tambaci, or indeed any other person knowing the relations of the parties, might not naturally read without suspecting that the banian was setting up a claim to legal security upon the goods, and that no conversation with him is related which is not referable to his commercial advantages and practical security in the increase of the business.

We have evidence of the usual course of business being followed down to July 1882 in the case of the ship *Myra*, which has been relied on at the Bar as showing that the security of the merchandise was a condition of the banian's advances. The particulars of shipments by the *Myra* arrived on the 6th July, and Vassilopulo immediately transmitted a copy to the banian's gomashta, with a written request endorsed upon it that he wanted Rs. 18,000, and that sum was paid to him. It was the only occasion on which a request for money was made in that way. Now if the advance was made on the security of the goods, we should expect that the banian would be very careful to perfect his legal title by getting the bills of lading at the earliest possible moment. But though he asserts that he did procure them on their arrival, he could not prove a single instance in which he had done so. That is strong to show that even in the case where a special request for money was made on showing a special shipment, the consideration for the advance was, not a pledge of the goods, but the profit to be made by their sale, and the reimbursement of general debt by their price when sold, according to the ordinary course of the business.

The upshot of all this examination is that there never were any such agreements for security as the banian alleges in 1873 and 1875, and that the transactions of 1881 and 1882, though they show more caution on the banian's part in regulating his advances according to the volume of business, yet left the prior arrangements untouched, and that they remained untouched until Tambaci's insolvency.

This view renders it unnecessary to examine the question of notice, or whether, in the language of the Contract Act, the circumstances raised a presump-

tion that the pawner was acting improperly. It is also unnecessary to consider whether Messrs Peacock had a right to stop *in transitu*, because the banian, having no lien, had no interest entitling him to dispute their claim to effect a stoppage.

As to the goods sold and brought into account between Tambaci and the banian, their Lordships agree with the High Court for the reasons given by the learned Judges. It has been argued at the Bar that the sales effected in September 1882, which undoubtedly were large and rapid, were a wrongful act as between Tambaci and the banian, who, it is said, falsely represented Tambaci's wishes to Vassilopulo, and thereby induced him to effect the sales. Without stopping to consider whether, if such a case were proved, it would give such a right to recover the money as Messrs. Peacock claim, their Lordships hold that the evidence does not disclose such a case. They are much more disposed to think that during his visits to Cawnpur Tambaci was behaving deceitfully towards the banian, and leading him to suppose that large sales would be effected, and his debt reduced thereby. Nobody attributes misconduct to Vassilopulo. There is no suggestion that the sales were effected at unfair prices. The sales, though negotiated by the banian and strongly pressed for by him, were the acts of Vassilopulo as manager of the firm, and were in accordance with the purpose for which the goods were consigned. As their proceeds have been duly brought into account between the firm and the banian, the principals of the firm cannot disturb that account except on the ground of bad faith.

It remains to consider how their Lordships' views affect the decrees made below in the two suits.

In *Baijnath* v. *Graham* it was declared that the banian (the substantial plaintiff) is entitled to one bale out of eight, and to 55 others marked P. T. and C. ; and Messrs. Peacock (the substantial defendants) are entitled to 24 bales with the P. mark. The banian is ordered to pay Messrs. Peacock the sum of Rs. 6,608-14, being the net proceeds of sale of the 24 bales, and their cost of a commission to examine Vassilopulo in Calcutta. Messrs. Peacock are ordered to pay to the banian his costs of suit, and one-fifth of the costs of the commissions to examine witnesses in England. It appears that the one bale was admitted to belong to the banian. Vassilopulo's examination was asked for by the banian and turned out to be useless. It is not clear why Messrs. Peacock are ordered to pay the whole costs of a suit in which they succeeded to a substantial extent ; but it is probably because in the other suit, where the victory and defeat were also divided, the banian is ordered to pay costs. It is stated at the Bar that the method of dealing with costs has proved injurious to Messrs. Peacock.

The banian has now failed in this suit entirely, except as to the one bale to which his title is not disputed. Their Lordships have to make the decree such as in their judgment the High Court should have made it at the trial. The proper course will be, *first*, to affirm the decree so far as regards the one bale awarded to the banian, and the net sale-proceeds of the 24 bales awarded to Messrs. Peacock, and so far as it directs payment of Rs. 6,608-14 with interest to Messrs. Peacock, and so far as it directs payment of the costs of the commission to examine Vassilopulo with interest, and provides for the scale of taxation ; *secondly*, to discharge the rest of the decree ; *thirdly*, in lieu thereof, to declare that the banian had not at the institution of the suit any right or interest in the 55 bales and the sale-proceeds thereof awarded him ; to dismiss the suit so far as regards those bales ; to direct him to pay to Messrs. Peacock their price, if sold, with interest at 6 per cent. from the time of sale, or otherwise their value, with interest at 6 per cent. from the institution of the suit, and also to pay them the costs of suit and one-fifth of the costs of the

English commissions. Messrs. Peacock must also be repaid the costs paid by them in pursuance of the decree.

In *Peacock* v. *Baijnath* Messrs. Peacock were ordered to pay the banian's costs occasioned by their having instituted two suits instead of one. The suit was dismissed so far as it concerned the goods sold and accounted for. It was declared that the banian was entitled to the bales marked P. T. and C. It was declared that Messrs. Peacock were entitled to 104 bales marked $\frac{PT}{C}$ (which is clearly a mistake for $\frac{PM}{C}$), and to 52 bales marked $\frac{PT}{C}$, and the banian was ordered to pay them Rs. 33,619-18-9, being the sale price of so many of those bales as had not been delivered to them. And the banian was ordered to pay to Messrs. Peacock their costs of suit, except as aforesaid, and one-fifth of the English commissions.

The proper course will be, *first*, to affirm the decree so far as it directs Messrs. Peacock to pay the costs occasioned by bringing two suits, and provides for the scale of taxation, and so far as it relates to goods sold and accounted for, and so far as it relates to the bales marked $\frac{PM}{C}$ and $\frac{PT}{C}$; *secondly*, to discharge the rest of the decree; and, *thirdly*, in lieu thereof, to declare that out of the bales marked P. T. and C. and mentioned in the plaint, Messrs. Peacock are entitled to be paid the amount of the bills drawn by them against such bales, with interest thereon at 6 per cent. from the institution of the suit; to direct accounts, if necessary, for the purpose of ascertaining the amounts due to Messrs. Peacock, and the amount of the value or price of the bales, with interest thereon from the date of suit or of sale, as the case may be; to direct the banian to pay the amount found due on the bills out of the amount of value or price, so far as the same will extend; and to declare that each party ought to bear his own costs of suit, and to be charged with one-half of one-fifth of the cost of the English commissions. The banian must also be repaid the costs paid by him in pursuance of the decree.

As in these appeals each party has succeeded and each failed on a substantial issue, their Lordships award no costs, except that, under the circumstance of the extreme bulkiness of the record, they direct the respondents to pay the appellants one moiety of the costs of it

Appeal allowed; decree varied.

Solicitors for the appellants: Messrs. *Phelps Sidgwick and Biddle.*

Solicitors for the respondents: Messrs. *Sanderson, Holland and Adkin.*

9th and 13th December 1890.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Macnaghten, the Right Hon. Sir Richard Couch, and the Right Hon. Mr. Shand (Lord Shand.)

LALA MUDDON GOPAL LALL* *Plaintiff,*

and

KHIKHINDA KOER ... *Defendant.*

On appeal from the High Court in Bengal.

Hindu law—Inheritance—Mitakshara.—Disqualification of a brother to share—Intention as evidenced by conduct—Waiver of rights—Estoppel—Limitation.

Between the two surviving brothers of a Mitakshara family, the action of the elder to the younger, who had been born deaf and dumb, was such as to recognise for some years that the latter had a joint interest in the family property. The proper inference to be drawn from this was that the elder treated his brother as a member of the family, and entitled to equal rights until it had become clear that his disqualification would never be removed by his being cured. Their Lordships would not infer that there was an intention shown by the acts of the elder to waive the rights accruing to him in consequence of this disqualification, nor would they hold that his acts operated to create a new title in the younger.

* 18 Cowell's I. A., 9; 18 Calc. 341.

This branch of the family became extinct, the brothers having died, and also the elder brother's daughter, she having been the only descendant. This daughter had an only son, who died before her, after taking, however, the whole family estate under a gift made to him with his mother's assent by his maternal grandfather in 1876. In 1882 the plaintiff, a collateral relation, sued the widow of the donee to obtain the estate of the younger of the brothers. The widow made title under the gift to her deceased husband, followed by his possession, and hers afterwards, since the date of the gift. Upon the facts found, the suit was held to be barred by limitation.

APPEAL from a decree (12th January 1887) of the High Court, affirming a decree (16th May 1883) of the Subordinate Judge, Mozufferpur.

This suit was brought against a widow some years after the death of her husband, the son of the last survivor of his branch of his family. The plaintiff was a collateral relation, who alleged that this family consisted of three brothers, named Kuldip Narain, Madhoram, and Sadhoram, sons of Kishen Jiwan Lal, of whom the last, Sadhoram, was the survivor; and that he, the plaintiff, as a "sapind gotia (gotra)" (the late Kishen Jiwan Lal having been his third cousin) was entitled to Sadhoram's estate. He did not sue for Kuldip's share. The dates of the brother's deaths are stated in their Lordships' judgment.

The name of Sadhoram, who was born deaf and dumb and remained incurable, was nevertheless in his early life entered in documents relating to the family estate, as one of the joint coparceners, though on account of his mental incapacity he was represented by a guardian.

On the 13th September 1838, Kuldip for himself and as guardian of his minor brother, Sadhoram, entered into an agreement with Mussummat Rajbunsi Koer, widow of Madhoram, whereby he agreed to allow her to have one-third of the family estate for her life, after which it was to pass to himself and Sadhoram and their heirs. Mussummat Rajbunsi sued to enforce this agreement, but her suit was ultimately dismissed on the ground that, as the widow of an undivided brother, she had no right to share in the estate, and that as Kuldip was not the guardian of Sadhoram, he could not enter into an agreement which would deprive him of part of his inheritance.

On the 29th February 1856, Mussummat Urhi Koer, describing herself as mother and guardian, entered into an agreement, whereby after stating that his name had been originally entered in documents in the hope that his disease was not such as to disqualify him from inheritance, but that it had since been pronounced incurable, she fixed a certain annual sum for maintenance, and renounced the right to all the rest of the family estate in favour of Kuldip.

On the 18th June 1867 Kuldip executed a tamliknama in favour of his grandson, Biseswar, whereby, after reciting the suit by Rajbunsi Koer in 1844, and the ikrarnamah of 29th February 1856, and that he had no hope of male issue, he proceeded: "therefore I do of my own free will and accord, and with the consent of my daughter Ramlochun Koer (who is a widow, and has no other son beside the said Babu), make the said Babu my heir, successor, and representative, and put him in possession and occupation of all my moveable and immoveable properties." Then followed provisions for the maintenance of the grantor and of the female members of the family. "He shall take proper care of the maintenance and proper expenses of Babu Sadhoram, who is deaf and dumb and devoid of sense, so that he may be in no want and difficulty."

Dakhil kharij, or mutation of names in the Collectorate record, was effected in the name of Biseswar, who received rents and managed the property.

The plaint (6th May 1882) alleged that Sadhoram survived Kuldip, and that Biseswar had been in possession without title (the tamliknama of 1867 being inoperative) of all the interest that had belonged to the former. The defendant in her written statement alleged the disqualification of Sadhoram, and alleged besides that he died, before his

brother Kuldip, also that the tamliknama in her husband's favour was valid. She also relied on limitation, and on this ground the suit was dismissed.

The plaintiff appealed to the High Court, and on the 1st April 1885 that Court remanded the suit for decision upon the following issues :—

1. Did the tamliknama come into operation during the lifetime of Kuldip; and if so, when ?

2. Did Ram Lochun Koer waive her right of inheritance, if any, in favour of Biseswar ?

3. Did any and what title pass by the tamliknama ?

Upon this remand the original Court decided that the tamliknama came into operation during the lifetime of Kuldip and before the death of Sadhoram ; that Ramlochun did give at least an implied assent to the tamliknama, and therefore waived her right to the inheritance. As to the last question, the Subordinate Judge's view was that, though Sadhoram was not competent to take by inheritance, he might take by gift, and that the conduct of Kuldip in recognizing his brother as joint owner after his incapacity became apparent, amounted to the creation of a new title in favour of Sadhoram, who was admitted by his brother into a joint ownership and a joint possession, which made him a joint tenant with Kuldip. This title could not legally be renounced by his guardian in 1856, and continued till his death, when it devolved on Kuldip. In his opinion, therefore, "the tamliknama passed the share of Kuldip in the joint estate to Biseswar, and that share, in the absence of any allegation to the contrary, might be presumed to have been half the entire estate on the date of the gift."

Both parties appealed against this decision, and both appeals were dismissed.

As to the legal result of the mode in which Kuldip had dealt with his brother, the High Court (WILSON and O'KINEALY, JJ.) were of opinion that it had the effect of giving a new and good title to Sadhoram, either by way of family arrangement, or by virtue of the law of limitation, and that this title was in force in 1856.

They then proceeded to examine whether the suit was barred by limitation by virtue of what took place in 1856 and 1867. As to this, they said that in 1867, Kuldip claiming to be the sole owner conveyed to Biseswar, and the conveyance in the clearest and most express terms was not of an eight annas, but of the whole sixteen annas. This conveyance they pointed out was followed by absolute and exclusive possession on the part of Biseswar and this respondent after him.

They added :—" Supposing, then, that limitation did not run during the life-time of Sadhoram, it certainly ran from the moment of his death. It appears to us that the very latest point of time at which the present cause of action can be placed is the death of Sadhoram, and that is the time at which the plaintiff has placed it in his plaint. From that time, which is in the year 1869, down to the institution of the present suit, is a period which clearly bars the suit. The result is that the suit it barred by limitation.

Mr. *R. V. Doyne* and Mr. *J. H. A. Branson*, for the appellant, argued that the right of suit did not accrue to him until the death of Ramlochun Koer, which occurred in 1880 ; and that the suit was therefore within the period of limitation. Ramlochun Koer was entitled as the daughter and only child of Kuldip Narain, whose brothers died childless and before him : and she had not, by assenting to the tamliknama of 1867, disturbed the right of the heir to the inheritance coming after her. To have done so would have been beyond the power of a daughter inheriting family estate. Her son died before her, and the title of the collateral heir, the present appellant, was therefore made out. Again, the tamliknama of 1867 could not transfer the interest of Sadhoram, which, notwithstanding his dis-

qualification according to the Shastras, had been treated as a subsisting interest, and was the effect of family arrangement confirmed by long recognition of his being entitled. Thus the possession of Biseswar by favour of his mother was not adverse as regarded the interest of Sadhoram to a collateral claiming after the death of Ramlochun Koer. They referred to the Transfer of Property Act, IV of 1882, sections 13 and 14.

Mr. *J. Graham, Q. C.*, and Mr. *J. D. Mayne*, for the respondent, contended that, in fact, Sadhoram had no interest whatever, and that if he had, he having died before Kuldip, the transfer of 1867 was entirely within Kuldip's right to make. Kuldip originated the tamliknama for the benefits of his daughter's son. The previous conduct and acts of Kuldip in recognizing an interest in Sadhoram, when there was a hope of his cure, could not be taken to alter the state of things, which was that Sadhoram remained from first to last totally disqualified to inherit. When Ramlochun Koer assented to the tamliknama she accelerated the vesting of the interest in Biseswar, her son. They referred to *Gungapersad Kur* v. *Shumbhoo Nath Burwan* (1), which decided that if a Hindu female, entitled to the succession, relinquishes her right, a complete title is vested in the reversionary heir. The effect of Ramlochun Koer's assenting to the tamliknama was to relinquish her estate, and when she did so was a question of fact found by both the Courts below in favour of the respondent. By that means the inheritance was accelerated, with the result that the complete title was in Biseswar, and after that could not devolve, on the death of his mother, upon the next heir of her father, but remained vested in Biseswar and his heirs, of whom his widow was the representative during her life. Thus, upon the merits, the appellant could not succeed, and the suit had been rightly dismissed. There were concurrent judgments both on the facts, and the suit was barred by limitation. While both the Courts had, without any real cause, misstated the case for respondent by their mistaken opinion that the acts and conduct of Kuldip showed intention to create, and did create, a new title in Sadhoram.

Mr. *R. V. Doyne* replied.

At the conclusion of the arguments, their Lordships' judgment was delivered by.

THE RIGHT HON. LORD MACNAGHTEN :—

Kishen Jewan Lal, who seems to have acquired, or succeeded to, considerable property, moveable and immoveable, was the head of a Hindu family governed by the Mitakshara law. He died in the year 1835. He left issue three sons and no more. Kuldip was the eldest, and it is upon his acts and conduct that the question in this case mainly turns. The second son was Madhoram. He died about a year after his father's death, without issue, leaving a widow named Rajbunsi. The third son, Sadhoram, was not more than two or three years old when his father died.

Twenty-two years afterwards the position of the family was this :—Kuldip was advanced in years. He was apparently a widower, and without issue living, except one daughter, Ram Lochun, and one grandson, the son of that daughter, who was named Biseswar. Rajbunsi was living, and entitled to maintenance under a compromise following litigation and a previous ineffectual compromise. Sadhoram was a widower, and childless ; but it appears that he had been deaf and dumb from his birth, and it is found that he was incapable of inheriting or succeeding to property according to Hindu law.

In this state of things, on the 18th June 1867 Kuldip executed a document called a tamliknama, stating the deaths of Sadhoram's mother and wife, and the particular circumstances which showed that Sadhoram, by reason of his incapacity, had no interest in the property,

(1) 22 W. R. 393.

[illegible] over the whole of the property. Biseswar's possession; and Biseswar was [illegible] by [illegible] with possession. Kuldip died on the 6th May 1870, Sadhoram having died in the previous year. Biseswar died in 1876, without issue, leaving his wife, Khikhinda, who is the present respondent. On Biseswar's death she succeeded to the property, and continued to enjoy it, without any interruption from Biseswar's mother, Ram Lochun, who lived till 1880.

In 1882 the appellant Muddun Gopal brought the present suit. By his plaint he made no claim to the estate left by Kuldip. He left over that claim, he said, for another occasion. His case was that Sadhoram survived Kuldip, and that on Sadhoram's death Biseswar illegally took possession under the tamliknama, and he sued for recovery of possession of the property of Sadhoram, whose nearest heir he claimed to be. The Subordinate Court dismissed the suit, having found that Sadhoram was incapable of inheriting, and also that he died before Kuldip. Muddon Gopal appealed to the High Court. The High Court agreed with the Subordinate Court both as to the incapacity of Sadhoram and the survivorship of Kuldip; but for some reason not very apparent, they seem to have thought that Muddon Gopal ought to be permitted to make out his case in some other way if he could; and accordingly, with the consent of the respondent, and for some reason which is also not very apparent, they remanded the case to the Subordinate Court for the trial of certain issues. One of those issues was whether any and what title passed by the tamliknama. Further evidence was taken, and in the result the Subordinate Court held that though Sadhoram was incompetent to take by inheritance, he might take by gift, and that Kuldip, by recognising him as joint owner after his incapacity must have become apparent, had created a new title in his favour. Both parties took objections to the finding of the Subordinate Court. On the 12th January 1887 the High Court pronounced final judgment. As to the legal result of Kuldip's conduct, the High Court were of opinion that it had the effect of giving a new and valid title to Sadhoram, either by way of family arrangement, or by virtue of the law of limitation. They discussed the effect of the tamliknama, and the effect of Biseswar's possession, which they held to have been exclusive; and they came to the conclusion that the law of limitation ran against Muddon Gopal from Sadhoram's death at the latest, and that the suit was accordingly barred.

Their Lordships are of opinion that the dismissal of the suit may be justified on other and, perhaps, sounder grounds. They are unable to agree with the High Court in thinking that the acts and conduct of Kuldip operated to create a new title in Sadhoram. Undoubtedly up to the year 1856 Kuldip did in every way and on every occasion recognise Sadhoram as jointly interested with him in the family property. Nothing, perhaps, shows this recognition more plainly than the line of defence adopted in the litigation with Rajbunsi, in which her claim was defeated by setting up Sadhoram's interest. It is also shown by a deed of conveyance, by a petition for registration, by leases, and other documentary evidence. But nevertheless their Lordships think it would be [illegible] to hold that Kuldip's position was prejudiced by his conduct. Kuldip naturally and properly treated his afflicted brother as a member of the family, and entitled to equal rights, until it became absolutely clear that his malady was incurable. Their Lordships think it would not be reasonable, or conducive to the peace and welfare of families, to construe acts done out of kindness and affection to the disadvantage of the doer of them, by inferring a gift when it is plain that no gift could have been intended.

Their Lordships are satisfied that there is no ground for supposing that Kuldip intended to divest himself of his property or to waive any rights accruing

to him by reason of Sadhôram's incapacity; and they are equally clear that there is no principle of law founded on the doctrine of estoppel, or laches, or the law of limitation or otherwise, which compels them to hold that, under the circumstances of this case, Kuldip's acts and conduct had an effect and operation which he could not have intended or contemplated.

Their Lordships therefore think that the suit was properly dismissed, and that this appeal ought also to be dismissed, and they will humbly advise Her Majesty accordingly. The appellants will pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant, Messrs. *T. L. Wilson & Co.* Solicitor for the respondent, Mr. *Samuel George Stevens.*

18th and 19th December 1890, and 7th February 1891.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, and the Right Hon Sir Richard Couch.

CHANDRABATI KOERI AND ANOTHER* ... } *Plaintiffs,*

and

E. T. HARRINGTON ... *Defendant.*

On appeal from the High Court in Bengal.

Right of occupancy—Act X of 1859 (Bengal Rent Law), sections 6 and 7—Bengal Rent Act (Bengal Act VIII of 1869) sections 6 and 7—Mostajiri lease—Cultivating possession.

Under Bengal Act VIII of 1869, sections 6 and 7, as well as previously under the similar sections 6 and 7 of the Rent Act, X of 1859, a raiyat paying rent for and cultivating land continuously for a period of twelve years had a right of occupancy, whether he held under a potta or not (1).

In reference to this, it was *held* that a lessee of land continuously in cultivating possession for a period of twelve years, under several written leases or pottas, which were for specified terms of years, but in which there was no express stipulation for the landlord's re-entry on their expiration, had a right of occupancy. The mere existence of a term in a lease was not an "express stipulation" to the contrary, within the meaning of section 7, so as to exclude the right of occupancy.

The decision of the Full Bench in *Sheo Prokash Misser* v. *Ram Sahai Singh* (2) approved, and held applicable.

In a suit for the recovery of possession, with mesne profits, of land, brought by a lessor against a tenant holding over, the defence was, as to part of the land, that the tenant had a right of occupancy, his cultivating possession having lasted for more than twelve years. The right was established, but the burden of proving to which part of the land it attached was upon the tenant, and for proof as to this the suit was remanded.

APPEAL from a decree (4th June 1888) of the High Court, reversing a decree (31st March 1886) of the Second Subordinate Judge of Bhagulpore.

The appellants, who brought this suit, were the zemindars of a separated one-third share of a mouzah, named Dahia, in pergunnah Naipore, in the Bhagulpore district The respondent, defendant in the first Court, was the owner of the estate named Bhugwanpore, belonging to a neighbouring indigo factory, and lessee of land within Dahia. The plaint (13th March 1885) alleged, as the ground of suit, that on the 3rd July 1877 the plaintiffs granted a lease to the defendant of land somewhat less than their share of Dahia, comprising 89 bighas and some fractions, for a term of seven years, which lease expired on the 5th September 1884, when the defendant, though required to give up possession, refused to do so. They claimed possession of the leased land, to be marked out in accordance with maps filed by them, and mesne profits from the above date.

* 18 Cowell's I. A. 27 ; Calc. 349.

(1) These Acts were wholly repealed by the Bengal Tenancy Act, VIII of 1885, of the Governor-General in Council, which gives the law now in force on the subjects to which they related.

(2) 8 B. L. R., 165.

The defendant, by his written statement, admitted the lease and his kabuliyat; but as to 34 bighas 3 cottahs 8¾ dhoors, part of the land leased, he alleged that he had long been in possession, before the date of the lease, of 85 bigahs in the entire of Dahia, so that before 1870 he had acquired a right of occupancy; and that out of them the 34 bigahs odd had under a partition of the revenue-paying estate in which Dahia was with other villages included (a partition made by the Collector in 1874) fallen into the putti or separate one-third share of the plaintiffs; and that of this he had a right to retain possession on his previously-acquired title as a tenant with rights of occupancy. He claimed the latter rights under the 6th section of Act VIII of 1869 of the Bengal Council, or the 20th section of the Bengal Tenancy Act IV of 1882 of the acts of the Government of India. (1)

Having fixed issues as to whether the defendant's possession of the disputed land commenced with the lease of July 1877, and whether he had a right to hold after its termination, the Subordinate Judge decided that "the defendant's possession of the plaintiffs' land was all along under one or another mostajiri, or farming lease." The result was a decree for the plaintiffs.

On the defendant's appeal, the High Court (NORRIS and O'KINEALY, JJ.,) differing from the first Court, held that, though the defendant had taken a lease from the plaintiffs in 1867 for nine years of their share, during which term the butwara of Dahia had taken place, and the lands of the alleged jote had fallen to the plaintiffs in severalty, the defendant had during those butwara proceedings asserted, without contradiction from anyone, his right as jotedar, and that therefore when the defendant in July 1877 took, on the expiration of the first term, a second lease for seven years of the plaintiffs' whole share, he should, in the absence of any expressed reference to the jote in the lease, be presumed to have continued to be both lessee for a term and jotedar, *i. e.*, with a right of perpetual occupancy as to the lands of the jote, and one limited to seven years as to those outside it. And they remanded the suit for the purpose of having the boundaries of the defendant's jote, in which he claimed a right of occupancy, ascertained and laid down on a map. On this remand, an amin was deputed by the lower Court to identify the land, by reference to the butwara, the lease, and other papers, and to make a map. After hearing objections to the return made, under section 567 of the Civil Procedure Code, the High Court (NORRIS and BEVERLEY JJ.) held that the remand order had been substantially carried out. They allowed the appeal, dismissing the suit, limiting the costs of the appeal to the first hearing, and making the defendant bear his own costs of the enquiry under the remand order.

The plaintiffs now appealed.

Mr. *R. V. Doyne*, for the appellants, argued that the respondent had, in fact, failed to show the right of occupancy by him as a raiyat, and therefore could not defend his retention of possession. He could not have derived occupancy rights from other proprietors of the mauza before the partition of 1874, as against the appellants, who were not parties to any such arrangement; and in order to make good his claim to the right of occupancy, he should have shown that he held as a cultivating raiyat

(1) Sections 6 and 7 were practically identical in both the Bengal Rent Act, X of 1859, of the Legislative Council of India, and the Act of the Bengal Council, VIII of 1869. Section 6 enacted as follows:—"Every raiyat who has cultivated, or held, land for a period of twelve years, has a right of occupancy in the land so cultivated, or held by him, whether it is held under a potta or not, so long as he pays the rent payable on account of the same . . . . . The holding of his father, or other person from whom a raiyat inherits, shall be deemed to be the holding of the raiyat within the meaning of this section." Section 7 enacted:—"Nothing contained in the last preceding section shall be held to affect the terms of any written contract for the cultivation of land entered into between a landholder and a raiyat, when it contains any express stipulation contrary thereto."

under them. This he had not shown; and besides this defect in his case, he had, by taking the lease of 3rd July 1877, admitted the absence of such a right, and must be considered as having surrendered it, if any such right had previously existed. The lease expired in 1884, and the respondent was now retaining possession of the whole of the appellants' share of Dahia. It further appeared from the return made by the amin that no defined area was in the respondent's possession, as to which it could be maintained with probability that over such distinct portion of the appellants' share he exercised occupancy rights. The state of things contemplated by sections 6 and 7 of Act X of 1859, and of the Bengal Act VIII of 1869, did not here exist.

Mr. *T. H. Cowie, Q. C.*, and Mr. *J. H. A. Branson*, for the respondent, argued that the right of occupancy had been correctly held to be an incident of the respondent's tenure. He claimed his jote, or tenanted land, of which he had been in cultivating possession for more than twelve years. He therefore had a right of occupancy, as being a tenant who himself took the profits of the cultivation carried on by those whom he employed. The sections of the Bengal Act VIII of 1869 were applicable, and might be shown to correspond with those of the Act of the Government of India, the Bengal Tenancy Act, VIII of 1885, which did not, however, govern this case. The question was only as to the effect of the respondent having held under leases, which, however, as they did not contain anything that was inconsistent with his acquiring rights of occupancy under the enactments in force while he held cultivating possession, did not contain any such "express stipulation to the contrary" as was contemplated in section 7.

They referred to *Kaleschurn Singh* v. *Ameeroodden* (1), *Sheo Prokash Misser* v. *Ram Sahai Singh* (2), *Soorut Soondri Dabea* v. *Jardine Skinner & Co* (3), *Laidley* v. *Gourgobind Sirkar* (4), and *Dhunput Singh* v. *Gooman Singh* (5).

Mr. *R. V. Doyne* replied.

Their Lordships' judgment was delivered by

THE RIGHT HON. SIR R. COUCH :—

The plaintiffs in this suit and appellants in this appeal alleged in their plaint, which asked for recovery of possession and mesne profits, that they are proprietors and zemindars of a third share of mouzah Dahia, pergunnah Naipore, and that a mostajiri settlement —a lease—of the mouzah, except 3 bighas 14 cottahs of khodkasht land, dated the 3rd July 1877, was made by the plaintiffs and the husband of the first plaintiff to the defendant; that at the expiration of the lease the defendant did not give up possession of the leased share of the mouzah, and was forcibly holding possession thereof. The plaint was filed on the 13th March 1885, the defendant being stated therein to be Mr. T. Poe.

In the order sheet in the record of proceedings, it appears that on the 17th April, before the time allowed for filing the defendant's written statement expired, an order was made on the petition of the plaintiff that E T. Harrington should be made a defendant in the place of A. T. Pugh, and the plaint be amended accordingly. A. T. Pugh is evidently a mistake for T. Poe, which is not the only inaccuracy in names in the documents in the suit. This order is not in the proceedings, and the reason for making it does not appear. It could not, however, have been made under section 368 of the Code of Civil Procedure, in consequence of the death of T. Poe, as in that case a summons would have been issued to Harrington, as his representative, to appear and defend the suit, which does not appear in the order sheet to have been done. Apparently the

(1) 9 W. R., 579.
(2) 8 B. L. R, 165; 17 W. R., 62
(3) 25 W. R., 347; on app L R., 5 I. A., 164 3 C. L. R 140.
(4) I L. R., 11 Calc., 501.
(5) W. R., Act X, 61.

suit was continued against Poe under the name of Harrington. Poe is the person who is stated in the plaint to be holding possession when it was filed, and is described in the title of it as proprietor of the Bhugwanpore concern—meaning the indigo factory. This is material as to the right of occupancy which is one of the questions in the case. A right of occupancy cannot be transferred, and it is necessary that Poe should have been in continuous occupation.

In the written statement of Harrington, filed on the 11th May, the defence set up is "that since a long time the defendant, as tenant, got possession of 85 bighas of land in mouzah Dahia while the aforesaid mouzah was joint. Before 1278 F."—1870—"the defendant acquired the right of possession in respect of the aforesaid land. Out of the aforesaid land 34 bighas 3 cottas 8¾ dhoors has under the butwara"–partition—"fallen into the putti"—share—"of the plaintiffs, and it has been held by the defendant as tenant after the expiration of the term of lease. The defendant being a tenant enjoying the right of occupancy is not liable to ejectment." In another written statement of Harrington, filed on the 12th May, the same defence is set up as to the 34, &c., bighas, and it is said that the remaining land is not held by the defendant. Thus there were two questions—(1) Whether the defendant had acquired a right of occupancy in the 34, &c., bighas. (2) Whether the defendant was in possession of the remaining land. The Lower Court decided both questions in the plaintiffs' favour. The High Court has reversed the decree, and ordered the suit to be dismissed. Their Lordships have to decide both questions.

As to the first, the evidence is both oral and documentary. The witness Jawhur Lal, 73 years old, an inhabitant of Dahia and a small shareholder in Hurpore Chuhar, the principal mouzah, deposed that for 34 or 35 years before the trial 34 bighas in Dahia had been in the possession of the factory under indigo cultivation; and the witness Nund Lal Roy, aged 60 years, a shareholder in Dahia, deposed that indigo was planted by the factory in 34 bighas which now "lie in the putti (or share) of the plaintiffs;" that at the time of the ijmali (the joint ownership) they were in the putti of the other two-third sharers; that the 34 bighas were granted to the saheb—meaning the factory—34 or 35 years before the trial, and since that time the factory had been in possession of the 34 bighas cultivating indigo. Other witnesses deposed to the same effect.

By a pottah bearing a native date, corresponding with the 29th May 1856, Bahal Roy and Dukha Roy, described therein as shareholding proprietors of mouzah Harpore Jower and two dependent mouzahs, leased about one-ninth share held and owned by them to Mr. A. B. Lowe, mokhtar, on behalf of Mr. Kitt MacLeod, proprietor of the Bhugwanpore and Suraj pore factories. The lease stated that the lessee had been in possession and occupation of the leased property, and was to cultivate indigo or other crops and get cultivation made.

In April in the following year one Posan Roy presented a petition to the Magistrate under Act IV of 1840, regarding the possession of 29 bighas 11 cottas 6 dhoors of khodkasht land in mouzah Dahia, the dakhili of mouzah Hurpore Chuhar. The petition stated that certain persons whose names are given, proprietors of a portion mouzah Hurpore Chuhar and Hurpore Berhal, granted a ticca pottah (in respect of usli and dakhili) in favour of Mr. Macdonald, the proprietor of the Bhugwanpore factory, and that the servants of the factory had ploughed up the crops sown by the petitioner and had dispossessed him, and prayed that possession might be awarded to him.

The record of the Magistrate's judgment is dated the 21st April 1857, and the defendant is stated to be Mr. E. T. Poe, proprietor of the Bhugwanpore indigo factory. The case was dismissed on the ground that the plaintiff had failed to prove any one of three points:—(1) That the land was in the plaintiff's possession

as a shareholder in Dahia; (2) that the land was in Dahia; (3) that the parties who granted a lease of their share to Mr. Poe had no share in Dahia. It is immaterial whether the former proprietor of the factory was called McLeod or Macdonald. Mr. Poe appears to be then the proprietor, and in a receipt for rent in 1859, which will be hereafter noticed, he is called proprietor by purchase of 16 annas (the whole) of the factories of Bhugwanpore, &c. The Subordinate Judge takes a very erroneous view of this judgment when he says of it in his judgment:—"It is conclusive proof showing that the raiyati holding now set up did not then exist." It was not proof as to any holding. It proved only that a charge of dispossession was made against Mr. Poe and was dismissed. As it does not appear that the plaintiffs or any persons through whom they claim were parties to the proceeding, the statements in the petition are not evidence either for or against the plaintiffs.

There are in the evidence six receipts for money received "from the general agent of Mr. E. T Poe" for rent of land in indigo and jai (oat) cultivation. They are dated as follows:—30th September 1859 (two), 23rd July 1860, 5th July 1862, 3rd February 1864, and 14th March 1868. There is also in the record a kabuliyat executed by Mr. L. G. Crowdy, described as mokhtar of the Bhugwanpore, Surajpore, and other concerns, pergunnah Naipore, which states that he had leased a third out of the whole of mouzah Dahia at an annual rental of Rs. 525 from the beginning of 1275 to 1283F. (September 1867 to September 1876), being a period of nine years, and on receipt of a pottah from Mussummat Chandrabati Koeri, daughter of Janki Roy, deceased, and mother and guardian of Goman Singh, minor, had entered into possession of the estate leased. Then follow these words :—"For this reason, I do hereby declare that I the declarant shall by good treatment keep the resident and non-resident tenants satisfied and contented, and shall to the best of my ability cultivate or get others to cultivate the aforesaid village with indigo or with other crops." The pottah is not in the record. In 1874 the owners of Dahia took proceedings to obtain a partition of it, and on the 15th June 1874 Mr. William S. Crowdy, described as the manager and general agent of the indigo factory of Bhugwanpore, presented a petition, complaining that the butwara (partition) amin had omitted to record in his measurement of the lands of the mehal Hurpore Chuhar the indigo cultivations made by the Bhugwanpore factory in about 85 bighas of land of the mehal, which it was his duty to do. The Deputy Collector dismissed this petition on an explanation made by the amin that he had recorded the name of the malik—the owner. On an appeal to the Collector he allowed the appeal, and by an order dated the 6th August 1874, he directed the amin "to mention the plots under indigo, together with the names of the planter and the concern." This was done, and there is in the record an extract from the khusra (rough paper) of measurement of the lands of mehal Dahia prepared by the partition amins. In this 36 bighas 18 cottahs 6 dhoors of land are stated to be "in the zerat cultivation of indigo of the Bhugwanpore factory."

Of the documents in evidence, the next in date are a lease and kabuliyat thereon, dated the 3rd July 1877, the lease being, with other lands of other owners, of the third share of Dahia, which had been awarded to Chandrabati Koeri in the partition. It is the lease referred to in the plaint as the foundation of the suit. In it and in the kabuliyat there is a provision that the lessee is to cultivate and get others to cultivate indigo, oats, or any other grain or crop.

Both the first Court and the High Court have found, what in their Lordships' opinion is proved by the evidence, that the defendant had possession of the land in the plaintiffs' putti, which he now states to be 34 bighas 3 cottahs

8¾ dhoors, from 1856. But the First Court held that the "possession was all along under one or another mastajiri lease, and that therefore he did not acquire any right of occupancy." The High Court held that there was a right of occupancy, but the grounds of their opinion do not appear to their Lordships to be clearly stated. It appears to their Lordships that the leases were for the purpose of cultivating the land as a raiyat and were not ijaras; and that the decision of the Full Bench in *Sheo Prokash Misser* v. *Ram Sahoy Sing* (1) is applicable to this case. There it was held under Bengal Act VIII of 1869, the law in force during part of the occupation in that case, and under Act X of 1859 previously in force, that a raiyat who has held or cultivated a piece of land continuously for more than 12 years, but under several written leases or pottahs each for a specific term of years, in which there is no express stipulation for re-entry, is entitled to claim a right of occupancy in that land. Therefore, in the opinion of their Lordships, there is a good defence to the suit so far as regards the 34 bighas 3 cottahs 8¾ dhoors.

The plaint stated that the quantity of cultivated land in Dahia except 3 bighas 14 cottahs, which were excluded from the pottah and kabuliyat, was 89 bighas 7 cottahs 7 dhoors 15 dhoorkis. The defendant in his written statement said this was not true; that, "according to the measurement which took place in 1880, only 63 bighas 9 cottahs 13 dhoors 15 dhoorkis of land was found to comprise the entire putti of the plaintiffs which was held by the defendant." As the suit was dismissed by the High Court, this question of the quantity of land included in the lease has not been determined by that Court in this suit. In a suit for rent which by consent of the parties was tried together with this suit, the first Court decided this question against the defendant, and there does not appear to have been any appeal upon it.

(1) 8 B.L R., 165, 17 W. R., 62.

As to the second question—possession by the defendant of the remaining land the first Court thought there was reliable evidence that the defendant was in possession, referring to three of the plaintiff's witnesses as proving it. The defendant appears to have mainly relied upon a lease to one Mannu Chowdry, made by Muna Koeri, the mother-in-law of Chundrabati, dated the 25th November 1884. This lease alone, if really made, would not be evidence of possession by Mannu Chowdry, and only one witness, Dukha Mahton, a holder of two bighas, deposed to payment of rent to him. Neither Mannu Chowdry nor Mr. Crowdy, the manager of the factory, who must have known about the possession, was called as a witness, nor any proof given that either of them could not be called. The High Court found that the defendant was not in possession of the land; that it was in possession of the "plaintiff's mother-in-law as owner." They rest this finding mainly upon the report of a police officer, made in consequence of a petition of Muni Sing, the husband of Chundrabati, after the suit was instituted, that the defendant had sided with his old co-sharers in the village, and had given orders that whenever he should go to collect the rents a criminal case was to be brought against him. The High Court say—"In that (the report) the police officer intimates that *in his opinion*, the case was untrue; that the mother-in law, Mussummat Muna Koeri, had only one daughter who married Muni Sing, and on that occasion she had made a gift of the property to her daughter and her son; that Muni Singh, on coming into possession, appropriated all the money and left the mother-in-law in a state of starvation; that she in retaliation took possession of the property from the saheb (the factory), and leased it out on receipt of Rs. 600." This report is not in the record. Their Lordships are unable to understand upon what ground the High Court considered that the opinion of the police officer was evidence of Muna Koeri being in possession A police officer has not authority to make

a judicial inquiry about possession, and his opinion most probably was founded entirely upon hearsay. Seeing that Mr. Crowdy was not a witness, it appears to be possible that the allegation in the petition of Muni Singh of collusion was true, and that the lease was made to be used as a defence to the suit. The finding of the first Court on this question of possession was in accordance with the evidence, and should not have been reversed by the High Court.

Their Lordships' attention has been called to the inquiry which took place for the purpose of ascertaining the lands in which the defendant claimed his right of occupancy. On the hearing of the appeal the High Court rightly held that the onus lay on the defendant to point out these lands, and they referred it to the District Judge to depute an amin to find out the "lands covered by the khusra of the butwara." That appears to be right in principle. The defendant was bound to identify the 34 bighas 3 cottahs 8¾ dhoors which he claims, and to show that they are in the khusra and in the putti of the plaintiffs as he alleges in his written statement. But the finding of the amin does not specify any such quantity of land. He finds that the lands now identified as the defendant's jote are 76 bighas and a fraction by one measure and 36 bighas and a fraction by another, and that the indigo plantation land in the khusra is 49 bighas and a fraction. In dismissing the suit the High Court say, "We accept the report of the amin, and we find that District Judge has substantially carried out the remand order." Perhaps, for the purpose of dismissing the suit, the amin's findings were sufficient. But for the purpose of ascertaining the precise land claimed by the defendant the findings are abortive and useless. And as their Lordships hold that the suit should not be dismissed, and that it is necessary to ascertain the lands claimed, there must be a fresh inquiry.

The result is that the plaintiffs are entitled to a decree for possession of the land included in the lease of 1877 except the 34 bighas 3 cottahs 8¾ dhoors, in which the defendant should be declared to have a right of occupancy, and the decrees and order of the Courts below ought to be reversed and the suit remanded to the High Court to have an inquiry made as to the situation and boundaries of these last mentioned lands, and also of the remaining lands included in the said lease, and thereupon to make a decree for possession to the plaintiffs of the remaining lands and mesne profits thereof, with costs to the parties in the Courts below in proportion to the result. Their Lordships will humbly advise Her Majesty accordingly.

In the special circumstances of this case their Lordships are of opinion that the appellants should have the costs of this appeal.

Appeal allowed; suit remanded.

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

Solicitors for the respondent: Messrs. *Sanderson, Holland & Adkin.*

8th February 1888.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Lord Hobhouse, the Right Hon. Lord Macnaghten, the Right Hon. Sir Barnes Peacock, and the Right Hon. Sir Richard Couch.

On Appeal from the High Court for the North Western Provinces of Allahabad.

JUGAL KISHORE AND OTHERS* ... } *Plaintiffs,*

and

GIRDHAR LALL AND WILLIAM MARTIN ... ... } *Defendants.*

Evidence—Plaintiffs failed to prove their case.

Plaintiffs sued Defendant Martin, and other Defendants for a balance of an account which they say there was between their firm and the Defendants as commision agents in respect of certain transaction of trading in indigo, grain, &c. The defence of Defendant Martin was that, as regards the transactions which followed the contract for indigo seed,

* From the folio edition of P. C. Judgments.

they were not entered into by the Plaintiff as commission agent for him, but that Ram Pershad, a member of the Plaintiff's firm, had entered into a contract for the supply of 100,000 maunds of seeds, and that there was an agreement between him and Martin that Martin should purchase 40,000 maunds for the purpose of carrying out that contract. Plaintiffs failed to make out their case as against the Defendant Martin, the evidence rather shows that Martin's contention is correct. Plaintiff's appeal dismissed as regards Defendant Martin also.—

The Judgment of their Lordships was delivered by

THE RIGHT HON. SIR RICHARD COUCH:—

THE plaintiffs in this suit, the Appellants before their Lordships, claim to recover from the two Defendants a balance of an account which they say there was between their firm and the Defendants as commission agents in respect of certain transactions of trading in indigo, grain, &c., between January 1878 and March 1879. The Defendants separated in their defence, that of Girdhar Lal being that excepting in respect of a contract for indigo seed he was not a partner at all with the other Defendant, and there was no other claim against him; and that as regards the transaction of the indigo seed the balance was in favour of the two Defendants, and nothing was due to the Plaintiffs as agents in respect of that transaction. The Subordinate Judge found that this defence was true, and that Girdhar Lal was not liable to the Plaintiffs upon the account, the balance as far as regarded that transaction being in his favour. Upon appeal by the Plaintiff to the High Court that finding was affirmed. The consequence was that the learned counsel for the Appellants, Mr. Cowie, admitted that he could not contest the propriety of that decision. As regards Girdhar Lal, therefore, the appeal must be dismissed, and the decision of the High Court affirmed, Girdhar Lal having the costs of this appeal.

There then remains the question with regard to the other Defendant, Martin. His defence was that, as regards the transactions which followed the contract for indigo seed, they were not entered into by the Plaintiffs as commission agents for him, but that Ram Parshad, a member of the Plaintiffs' firm, had entered into a contract for the supply of 100,000 maunds of seeds, and that there was an agreement between him and Martin that Martin should purchase 40,000 maunds for the purpose of carrying out that contract. Upon the case of the Plaintiffs it would be necessary for them to show that a balance was due to them, which they claim in respect of damages which they had sustained as commission agents; but the evidence which Ram Parshad gives, so far from showing that, rather shows that the contention of Martin is correct, and that the damages which are claimed were really damages sustained in consequence of the transactions with regard to the 40,000 maunds. There is nothing to show that the case of the Plaintiffs, which they were bound to prove, has been made out; and in the absence of other evidence, the entries in the account books would not be sufficient to sustain the claims of the Plaintiffs. It is possible that those entries may be consistent with the transaction which Ram Parshad spoke about. The result is that the Plaintiffs have failed to prove their case, that they have a claim on balance of account against Martin in respect of losses which they have incurred as commission agents on purchases which they made on his account. The case has entirely failed, and there is no ground for considering that the decision of the High Court, by which they reversed the decree of the Subordnate Judge, is not perfectly correct.

The appeal as regards Martin should also be dismissed, and their Lordships will humbly advise Her Majesty to dismiss the appeal as against both the Respondents, and to affirm the decrees of the High Court. The Appellants will pay the costs of Girdhar Lal of this appeal.

APPENDIX

TO

PRIVY COUNCIL JUDGMENTS.

13th June 1872.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Sir James W. Colvile, the Right Hon. Lord Justice James, the Right Hon. Sir Montague E. Smith, the Right Hon. Sir Robert P. Collier, and the Right Hon. Sir Lawrence Peel.

BHUGWAN DOSS ... *Plaintiff,*

and

HUNNOOMAN PERSHAD SAHOO AND OTHERS } *Defendants.*

*On appeal from the High Court in Bengal.**

Evidence—Suspicion of Court inconsistent with cases of both parties.

In a suit for money due on a mortgage-bond, Defendant denied the execution of the bond. First Court held Plaintiff's case proved. High Court in appeal agreed with the first Court that Defendant has perjured himself in denying the execution of the bond, but held on suspicion on a bare inspection of the document, that the document was originally given, *i. e.* signed, in blank, and that the amount of it originally intended was Rs. 5,200, which was fraudulently altered into Rs. 16,200. *Held* that it is the duty of the courts to act upon the issues, and upon the proofs in the case, and not upon a suspicion after throwing aside the whole evidence in the case, more specially when the suspicion acted on is wholly inconsistent with the case alleged and sworn to by the person in whose favour it has decide.

THEIR Lordships are of opinion that the decree of the High Court of Calcutta reversing the decree of the Zillah Court can not be supported.

The plaintiff's case was *primâ facie* a very simple and plain one. He sued the defendant upon a mortgage-bond, which he annexed to his plaint within a very short time indeed after the bond became due. The defendant's case was that he had never borrowed any money at all from the plaintiff; that he never had any transaction which would justify the bond; that he had never put his name to the bond; and that it was an entire forgery. This was the sole issue which he tendered in the Court below; that is what he puts in his answer; and that is what he stated in his deposition when he was examined as a witness in his own behalf. Upon this the plaintiff calls witnesses; he calls the writer of the bond, and all the attesting witnesses; he puts in evidence a *mooktearnamah* to authorise the registry of the bond, and he proves his case as completely as it was possible for a case to be proved by evidence. Unless the whole of that evidence is to be put aside at once as utterly false from beginning to end, the plaintiff's case is a case not admitting of controversy. On the other hand there is this: that the defendant maintained and persisted on oath in the assertion that the signature was not his, and he is found by both Courts, both the first Court and the Appeal Court, in this to have been guilty of deliberate perjury. Moreover, both Courts agree in this, that for the purpose of giving more effect to his false statement, for the purpose of giving more color to his perjured evidence, he signed his name to his deposition in a feigned hand, in order that, upon comparison of that signature with the signature to the bond, the Court might be

* From the judgment of Norman and E. Jackson, JJ., dated 9th January 1864.

induced to come to the conclusion that that signature was, as he alleged, a forged signature. Both the Courts have arrived at the same conclusion with respect to the defendant's contention and the defendant's conduct.

Their Lordships further observe that the plaintiff, upon being called upon so to do, put in evidence his own books and the entries of the transactions which were connected with the bond, thus enabling the defendant to cross-examine the plaintiff, and to put him to give any explanation of anything which appeared on the face of the books. As far as their Lordships can see upon these proceedings, no attempt was made to cross-examine the plaintiff with respect to the books, nor was there any suggestion made with reference to them such as has been made at their Lordships' bar to-day by counsel, that there is something in the books themselves which amount to suspicion and to evidence of something wrong, from which the corollary is that the bond itself was wrong and a fabrication.

The Judge of the first instance came to the conclusion upon the evidence, seeing the witnesses and having an opportunity of seeing the books, that the plaintiff had established his case, and gave a decree accordingly. From that there was an appeal to the High Court; and there, without any fresh evidence, the High Court, agreeing as to the fact that there was a loan for Rs. 6,200, part of the Rs. 16,200, the sum for which the bond was given, agreeing as to the fact that the signature was a genuine signature, took upon themselves to follow a course which their Lordships are bound to say they have noticed with great surprise and great regret. They took upon them selves, sitting in error from the Court below, not to deal with the case, upon the issues and evidence that had been before the Court below, not to deal with the case upon any fresh materials, or any fresh evidence that was before them, but on a mere inspection of the document, and a suggestion that there was an alteration apparent in an endorsement made by the obligor of the bond, to frame out of their own minds the following theory, *viz.*, that the bond was originally given in blank, so far as the body of it is concerned, and that the real thing which the defendant had signed, and intentionally signed, was the marginal portion of it in the *mohajunee* character; that he hed given that with a limit, limiting it to Rs. 6,200; that then it was filled up by fraud with Rs 16,200, instead of the genuine Rs. 6,200; and that then, or as connected with that, without the knowledge or assent of the defendant, there had been a fraudulent alteration of the endorsement, from Rs. 6,200 to 16,200; and that, therefore, the whole thing was to be treated as a forgery, this being a theory wholly inconsistent with the case ever made by the defendant himself. It was a case which the Court took upon itself to imagine and to declare proved by the mere inspection of the document. If, upon the inspection of the document, it had appeared to that Court that there was something on the face of it which required explanation,—and it does seem to some of their Lordships that there is something which might properly have been inquired into,—it was the obvious duty of the Court to have summoned the parties, to have examined the witnesses, and to put the thing in train for investigation by the examination and cross-examination of the plaintiff, by the examination and cross-examination of the defendant himself, and by the examination and cross-examination of the witnesses. The Judges, in corroboration of their theory, observe that there is a line which appears to have been thrown out of its proper place by the signature of a witness, from which they infer that the bond must have been written after the signatures of the witnesses. But no question was put to the writer of the bond or to the witness, nor was any explanation sought as to this assumed displacement.

Their Lordships cannot but think this to be a grave misapprehension of the duties of a Court, either of first instance or of appeal It is their duty to act upon the issues and upon the proofs in the case. Of course, they must receive all evidence with careful scrutiny; if necessary, with suspicion; but they must after all decide the rights of people according to the matters which are proved before them; and it never can be allowed that a Court is, simply upon a suspicion derived from its own notion of what is the habit of the people or anythnig else, to throw aside the whole evidence and give effect to their mere suspicion as if it were legal proof. This obviously applies with great additional force to a case where the suspicion acted on is wholly inconsistent with the case alleged and sworn to by the person in whose favor they have decided.

Their Lordships think it right to make these observations, because one or two cases have come before them recently in which there seems to have been the same sort of readiness to disregard testimony in favor of suspicion, and because they feel that the plaintiff and his witnesses in this case have great cause of complaint in this, that they were pronounced guilty of an offence, the fraudulent falsification of a bond, on which they were not heard, and not only without evidence but without an allegation. Their Lordships will recommend Her Majesty that this decree be reversed, and the decree of the Zillah Court affirmed; and that the appellant have his costs of the appeal and in the High Court.

12th June 1872.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Sir James W. Colvile, the Right Hon. Sir Montague E. Smith, the Right Hon. Sir Robert P. Collier, and the Right Hon. Sir Lawrence Peel.

BHOOP NARAIN CHOWBEY AND ANOTHER* ... } *Plaintiffs,*

and

RUGHOO NATH GOBIND ROY AND ANOTHER ... } *Defendants.*

On appeal from the Sudder Court at Agra.

Damages—Costs—Parties in Pari delicto.

Two adult brothers sold their shares as well as those of their minor brothers to A and executed an ekrar to him, stating that the said brothers could not come to execute the deed of sale as they were not at leisure. The three minor brothers got their shares back by suit on attaining majority. The suit by A against his vendors for damages was dismissed, as both were dealing with the property of infants, and were found to be in *pari delicto.* No costs allowed to either party.

THE circumstances which give rise to this case are as follows: In 1845 some land was sold which belonged at that time to a joint Hindoo family consisting of five brothers, to the plaintiffs in the suit, who are the appellants. It appears now that at the time of this sale three of those brothers were minors, and therefore incapacitated from being parties to it. The deed of sale is not before their Lordships. It would appear, according to the statement of the defendants in this suit, that it purported to be executed by all the brothers, and there is reason to suppose that it purported to be executed by each on his own behalf, inasmuch as there is a finding in a suit, which will be subsequently referred to, of the three brothers against the present plaintiffs, that "the deed of sale in dispute has "not been executed through a guardi-

* From the folio edition P. C. Judgments.

"an on the part of the minors but by "all the sellers themselves; its execu- "tion, in good faith or otherwise, is "not a point for consideration." At all events it purported to be executed by all the brothers, either each executing on his own behalf or the two executing on behalf of the other three.

It appears that this transaction was regarded by the plaintiffs as well as by the two elder brothers as open to question, for it was thought necessary at the same time to take an ikrarnamah, executed by the two brothers in favor of the plaintiffs, which states,— "We, the two elder brothers, are "owners of the property which is sold;" and further: "We have unconditionally sold our own respective rights "and interests in this state and those "of Balka Gobindroy, Balkurum Go- "bindroy, and Byjoo Gobindroy, to Ram- "dial Chowbey, son of Moteeram Chow- "bey, for Rs. 5,500, and have executed "the deed of sale and receipt for the "sale price on the part of all the five "brothers, and have delivered them to "the purchaser." The reason of the non-execution by the younger brothers is thus explained: "Bulka Govindroy "and others could not come to this city "for the execution of this deed of sale "as they were not at leisure." This is obviously a false excuse for the non-execution by the brothers, whose non-execution was owing to their being incompetent to execute the deed, and probably they were altogether unaware of this sale.

As soon as the younger brothers came of age they instituted a suit against the present plaintiffs to recover their share of this property, and they succeeded in that suit. It may be as well to observe what were the issues which were framed and the judgments which were then given as far as they are material to the present case. That suit was decided on the 6th of December 1861. One of the issues is, "whether "at the time of the execution of the deed "of sale the plaintiffs were minors, "and Rughonath Gobindroy and Balka "Gobindroy were the only two of the "sellers who had attained majority;" and then it goes on: "and the deed of "sale in dispute was executed by collu- "sion of the adult sellers with the inser- "tion of the plaintiffs' names, or whether "at the time of execution of the deed "of sale, all the plaintiffs had attained "their majority and were living together, "and the deed of sale in dispute was "executed without collusion and in "good faith." Collusion between the defendants and the elder brothers appears to have been one of the issues, perhaps not very formally stated. Upon that issue there was this finding: "Whereas the deed of sale in dispute "has not been executed through a "guardian on the part of the minors "but by all the sellers themselves, its "execution in good faith or otherwise "is not a point for consideration. All "that requires to be determined in this "case is whether the plaintiffs, at the "time of the execution of the deed of "sale, had attained their full age or "not, and as their minority has been "proved, the deed as to the sale of "their share is to be considered null "and void, and there is no doubt that "the execution of the sale-deed was "effected collusively by the purchasers "and the adult sellers." Upon an application for a review of this judgment, the Judge, Mr. Swindon, also finds this: "There is no doubt that the sellers, "who were adults, did, in collusion with "the purchasers, sell the plaintiffs' "share with their own." There appear, therefore, to have been findings in that suit, both in the Court of first instance, and in the Court of Appeal, that the sale was fraudulent and collusive on the part both of the vendors and the purchasers. In the present suit the finding of the Court below is very much to the same effect. The principal Sudder Ameen finds that, "although "the defendants' total denial of the "agreement relied on by the plaintiffs, "which is registered and has been

"proved by witnesses, is utterly false "and dishonest, all proceedings of plain-"tiffs also from the first to last are not "free from the taint of bad faith. For "in the first place Ramdial, the plain-"tiffs' father made defendants execute "in his favor a sale-deed in their own "names jointly with those of Balka "Gobindroy and others, three minor "brothers, without making any mention "of the fact of their minority, with "the object of appropriating the whole "village, and took possession of the "whole, in which unlawful act the "defendants took part with him." Then he goes on to say: "He made defen-"dants also execute an ikrarnamah as "a pre-contrivance, and in order to "conceal the fact of minority of the "defendants' brothers he caused the "following clause to be entered therein, "*viz.*, 'that for want of leisure Bulka "Gobindroy, &c., cannot come to this "city to execute and complete the sale-"deed,' whereas the sale was not com-"pleted by registration, while the agree-"ment was registered." He also adverts to this, that instead of registering the deed of sale in the ordinary manner, a fictitious suit was instituted against all five brothers, and that what may be called a fictitious confession of that suit appears to have been given in the names of all five.

Such is the finding of the Court below in this case, a finding which is in substance confirmed by the Court above. The main difficulty which has pressed upon their Lordships has been this: whether in this suit the question of collusion between the vendors and purchasers with a view to defraud the infants was raised as distinctly as it ought to have been by way of plea or statement by the defendants, or whether at all events it was raised with sufficient distinctness in the issues in the cause. Unquestionably the defence on which the defendants have succeeded, and on which the judgment of both Courts proceeded, is not raised as clearly as would be required in pleadings in this country by the statement of the defendants, nor by the issues which were framed in the cause. The only issue at all referring to this question appears to be the second, which is in these terms: "In the event of the "plea in bar being overruled, are the "plaintiffs entitled to recover from the "defendants Rs. 3,300 principal, and "Rs. 3,300 interest, being the portion "of the purchase-money due on account "of three-fifths share of Byjoo Gobind-"roy, and other brothers of defen-"dants, under the ikrarnamah dated "3rd June 1845; or, as pleaded by "defendants, is the ikrarnamah alleged "by plaintiffs false, and did the plain-"tiffs cause a sale-deed to be executed "by defendants and their brothers "without any mention of the minority "of the latter?" It is only under those words that, according to their Lordships' view, this question, if it could be raised at all, was raised in the suit below. At the same time it is to be borne in mind that the learned Judge of the Court below does appear to have considered that this question was in issue, and it is further to be observed that in the grounds of appeal the plaintiffs do not contend that his finding was beyond his powers on the ground that it was not. If they had so contended, it is possible that the High Court might have framed an issue distinctly raising it.

Under those circumstances, although their Lordships undoubtedly cannot regard as satisfactory the form of the issue in this case, they are not disposed to take upon themselves to reverse the finding of the two Courts upon a question of fact, which both appear to have supposed to be before them, and which neither party seems to have denied to be before them.

With respect to the evidence in support of this finding, it is not for their Lordships to deal with the case as a Court of first instance. It is enough for them to say that they are unable to declare that the Courts below were

not justified by the evidence in coming to the conclusion at which they arrived. It appears certain that the present respondents, at the time of the transaction in question, in 1845, were minors. It is probable that the present appellants knew this. It is certain that they knew that the transaction was one liable to be impeached, otherwise they would not have thought it necessary to take an indemnity. That indemnity shows that they themselves had notice that three of the brothers were unable for some reason to execute the deed of sale. If they knew that they were minors, they must have been aware that the reasons alleged for their non-execution of the deed of sale was a false one; and the further proceeding of obtaining a fictitious judgment against five brothers, and getting the three minors to confess that judgment, instead of the ordinary course of registering the deed, is certainly a proceeding of a suspicious character.

Their Lordships therefore are unable to say that there was no evidence to support a finding, which appears to be in fact a finding of four Courts. In the ejectment suit two Courts have found that there was collusion between the vendors and purchasers. In the present suit the Court below and the Court above have found substantially to the same effect, though not precisely in the same language.

Under these circumstances it appears to their Lordships that the decree of the Court below ought to be supported. It is not for the public benefit that a party engaged in transaction such as this must now be taken to be, wherein both vendors and purchasers are aware that they are dealing with the property of infants, who have not by law the power of sale, and that they are obtaining possession of this property in a manner calculated to injure those infants, should be able to sue another party to the transaction for damages.

For these reasons their Lordships will advise Her Majesty that this appeal should be dismissed; but considering the circumstances which have been alluded to, the nature of the defence, the absence of a distinct plea raising this question, and above all the fact that both parties must be considered *in pari delicto*, their Lordships are of opinion that neither party should have the costs of this appeal.

The 15th June 1872.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon'ble Sir James W. Colvile, the Right Hon'ble Sir Montague E. Smith, the Right Hon'ble Sir Robert P. Collier, and the Right Hon'ble Sir Lawrence Peel.

BABOO LALL* ... *Plaintiff,*

and

LUTTOO RAM ... *Defendant.*

On appeal from the High Court at Agra.

Power of agent—New point—Not allowed to be raised.

The question raised in the Courts below being whether Mahomed Khan the overseer of the Defendant had signed the Plaintiff's account or not, the question as to whether the said Mahomed Khan had authority or not from the Defendant to sign it was not allowed to be raised by the Privy Council.

THIS was a suit by a sub-contractor against a contractor with the Government for work and labour done. The defence was that the defendant had been fully paid, and indeed overpaid. The questions raised were all questions of fact, and those questions of fact have been found in the plaintiff's favor by the Court of the first instance, and by the Appellate Court in India.

Under these circumstances the rule of their Lordships not to interfere with a decision of two Courts in India on a question of fact at all events *prima facie* applies.

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* From the folio edition P. C. Judgments.

It is, however, contended that this case does not fall within the rule, or is taken out of the rule upon the following grounds:—First, it is said that certain documents, which purport to be an allowance of the plaintiff's accounts by one Mahomed Khan, the overseer of the defendant, were improperly received in evidence. The objection to their reception is that Mahomed Khan was not shown to have had any authority from the defendant to make a statement of accounts binding upon him. It is to be observed, however, that this defence was not taken in either Court. The sole question raised in the Court below was this, whether or not the documents referred to were in point of fact signed by Mahomed Khan, and the defendants put Mahomed Khan in the box to deny his signature. The Judge, however, disbelieved him, and believed the witnesses who affirmed the documents to be genuine, and now it is not contended but that that finding is right. It is further to be observed that, in the reasons given for the appeal which was preferred to the superior Court in India, none is to be found to the effect that Mahomed Khan had not authority from the defendants to bind them, but the same issue is again raised, namely whether or not Mahomed Khan actually signed these documents? If the question of Mahomed Khan's authority had been raised, then it is possible that the plaintiff might have been prepared with evidence for the purpose of supporting that issue, but his attention was not called to that, and it certainly would appear to have been understood by the Courts, and it probably was understood by both sides that if, in fact, Mahomed Khan signed these documents, he had authority to sign them on the part of the defendants, for whom undoubtedly he was acting, and whose overseer he was

Secondly, it is contended that there was a miscarriage in the rejection of a document put in by the defendants. In order to contradict the rate of charges which are allowed by Mahomed Khan in these documents which must now be taken to be genuine, the defendants put in what they declared to be the original agreement, under which these works were executed, whereby a different rate of charges is agreed upon; and they contended that that being taken as the rate of charges, the plaintiff had been paid in full. Whether that be so in point of fact, supposing the document proved, does not distinctly appear. The plaintiff's case, on the other hand, was that the original agreement had been fraudulently abstracted by Mahomed Khan, and that the document produced and sworn to by him and one or two other witnesses was a fabaication. The Judge below has adopted that conclusion. Undoubtedly the defendant called one or two of the witnesses attesting that document to prove its genuineness, and they gave evidence to that effect. But it appears that the document purported to be attested by Mr. Brown, an Englishman; the defendants called two witnesses to prove his signature: one of them gives no clear evidence on the subject, and the other, Captain Whish, gives his opinion that the signature which appears in that document as that of Mr. Brown is not his. It is to be observed that, assuming the accounts signed by Mahomed Khan to be correct, which they must now be assumed to be, and that Mahomed Khan was the agent of the defendants, and therefore not probably disposed to allow the plaintiffs a higher rate of charges than they were entitled to, undoubtedly some suspicion is raised against a document which places the rate of charges on a different footing from those agreed to by Mahomed Khan. On the other hand, an observation was made by the learned counsel for the appellants entitled to a great deal of weight, that it does not appear that the Court below called upon the plaintiff, or that the plaintiff put himself forward or his witnesses to prove that this document was false. Undoubtedly, this issue can

scarcely be said to have been tried quite satisfactorily; and if this board were sitting as a Court of first appeal from the decision of the Court below, it is possible that their Lordships might have thought it necessary to remit the case for further investigation. But it is to be observed that this finding of the Court below upon the question of fact that this agreement put in by the defendants was a fabrication is in substance, though not in precise terms, affirmed by the judgment of the Court above. The Court above, dealing generally with the evidence, say that they see on reason to believe the defendant's witnesses more than the plaintiff's, and in fact did not think it necessary to interfere with the judgment of the Court below, which proceeded upon the general ground that the plaintiff's case was substantially correct, and that the defendant's case was a false one. It must be assumed now as clear that the defendant's case, as far as regards the signature of those documents by Mahomed Khan, was entirely a false one.

But then, thirdly, it is said that even, assuming these documents, purporting to be signed by Mahomed Khan, to be genuine, and putting aside the agreement, there was no evidence whatever on the part of the plaintiff of the rest of his demand. If that were so, the question would become one of law. Their Lordships, however, without saying that the evidence on this subject was of a satisfactory character, are unable to say that there was no evidence upon which the Court below was justified, if it thought fit, in acting with respect to this part of the claim.

Three witnesses are called, who speak in general terms, certainly, not in a manner most satisfactory, to the whole of the work which the plaintiff claims as having been done, and to the prices which he charges for it. And it is to be observed that, as far as their Lordships understand, the actual measurements are not disputed. It is further to be observed that the Judge of the Court below appears to have come to a conclusion, as a question of fact, that the plaintiff's charges were reasonable, and he refers to a comparative account prepared in his office showing the amount of profit the plaintiff would derive, and therefore having some bearing on the reasonableness of the charge. It would appear that the Judge of the Court below did enter into some investigation of this case, and that some account was prepared, which is not before their Lordships. It would also appear that Mahomed Khan himself in his evidence speaks of some work to the value of upwards of Rs. 5,000 done by the plaintiff before December, and it is only after December that his certificates apply.

Under these circumstances, their Lordships are not able to say that there was no evidence upon which the Court below was justified in coming to the conclusion that the plaintiff had made out the whole of his demand; and inasmuch as the High Court have affirmed the judgment of the Court below on what, after all, does appear to their Lordships to resolve itself into a question of fact, their Lordships have come to the conclusion that this appeal must be dismissed.

6th July 1872.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague E. Smith, the Right Hon. Sir Robert P. Collier, and the Right Hon. Sir Lawrence Peel.

GOURMONEE DASSEE ... *Defendant,*

and

JOGUTINDRONARAIN ... *Plaintiff.*

*On appeal from the High Court in Bengal**

* From the judgment of Loch and Seton Karr, JJ., dated 9th January 1865 Misc. Rule 20.

Transfer of a decree for execution—Striking off the execution case.—Jurisdiction to entertain subsequent application for execution.

The contention being that, when the Principal Sudder Ameen, to whose file a decree was transferred for execution by the Judge, struck off the execution proceeding from his file, thereupon his jurisdiction to deal with the decree altogether ceased, and that he could not deal with it again until a subsequent order had been made by the Judge of the Zillah Court, sending it back to him again and that the subsequent applications for execution were made to a Court without jurisdiction :—*Held* that in the absence of any evidence to shew what this striking off the file amounted to, *i. e.*, whether for non-prosecution or for default or from inadverture or on account of a practice of the Court, not keeping upon the paper causes not immediately before it, the order of the Court referring the decree to the Principal Sudder Ameen for execution could not be got rid of; that the order having been in force, it was for the appellants to shew that for some good reason it had ceased to be so and that in the absence of any clear proof of those propositions the applications to the Principal Sudder Ameen were to a Court of competent jurisdiction and therefore the execution was valid.

In this case the sole question was whether an execution of a judgment taken out in January 1862 was or was not barred by the statutes of limitations applicable to India. Those limitations depend, in the first place, upon the third Bengal Regulation of 1793, Section 14, whereby "the Zillah and "City Courts are prohibited hearing, "trying, or determining the merits "of any suit whatever against any "person or persons, if the cause of "action shall have arisen 12 years "before any suit shall have been com-"menced," which Regulation has by subsequent constructions been applied to decrees. The construction of April 1802 is to the effect that "a decree "not carried into execution at the time "of its being passed, or within a year "from the time, may be executed on "application being made for that pur-"pose within 12 years from its date, "after the opposite party has been called "upon to show cause, and so on." Twelve years from its date has been further construed to mean 12 years from the date of the last application made to a proper Court to enforce it. Again, by Construction 136 of the 28th October 1813, it was laid down by analogy to the 12 years rule of limitation that, "If the application be not made within "12 years, it cannot be entertained "unless the applicant satisfies the Court "that there has been good and sufficient "cause for the delay."

By a statute passed in the year 1859, number 14, it was enacted that, "No "process of execution shall issue from "any Court not established by Royal "Charter to enforce any judgment, "decree, or order of such Court, unless "some proceeding shall have been taken "to enforce such judgment, decree, or "order, or to keep the same in force "within three years next preceding the "application for such execution."

Section 21 is :—"Nothing in the pre-"ceding Section shall apply to any judg-"ment, decree or order in force at the "time of the passing of this Act, but "process of execution may be issued "either within the time now limited by "law for issuing process of execution "thereon, or within three years next "after the passing of this Act, which-"ever shall first expire." The application in January 1862 was within three years of the passing of the Act, and the only question is whether it was within 12 years of the application to a Court having jurisdiction to enforce the decree.

The facts material to the decision of this case may be very shortly stated. The decree in the original suit was obtained on the 26th June 1837, in the Court of the Judge of the Zillah Rungpore. On the 10th November 1838 this decree was referred by the Judge of Rungpore to the Principal Sudder Ameen of the Zillah Rungpore, to be executed in pursuance of Act V of 1836, which is in these terms :—"It is hereby "enacted that it shall be competent to "the Zillah and City Judges, within "the presidency of Fort William in "Bengal, to refer to the Principal Sud-"der Ameens subordinate to them, ap-

"plications for the enforcement of "decrees, to be executed by the said "Principal Sudder Ameens, under the "rules prescribed in the general regula-"tions applicable to such cases."

It appears that an order was made in pursuance of this Section directing the Principal Sudder Ameen to execute this decree. The order is not before their Lordships; but it must be assumed, in the absence of any impeachment of it on the part of the appellants, to have been regularly and properly made upon the proper petition and proper application, whatever that may have been, to the Judge of the Zillah Court.

It appears that various applications have been made to the Principal Sudder Ameen in pursuance of this order for execution of this decree. One appears to have been made in 1839, another appears to have been made in 1849, one in 1853, and another in 1861, and, possibly, there may have been others. Their Lordships infer, though it is not very clearly stated, that some of these executions have been partially successful in levying the goods of the defendants, but to what extent does not very distinctly appear.

It would seem that the Principal Sudder Ameen has, as it is called, struck this case off his file on several occasions. He struck the case off the file in the year 1839, after the application for execution at that time; and it appears from the copy of his order on the 2nd June 1864 that he struck it off on several occasions, for he says it was "executed and struck off" consecutively on the 2nd June 1849, 7th January 1853, 2nd May 1861, 2nd January 1862, and so on. As far as their Lordships are able to infer, in the absence of any information on this subject, which the appellants were bound to furnish if they relied upon it, the Principal Sudder Ameen appears from time to time when an application has been made for execution of this decree and that execution has been issued and whatever was leviable has been levied, to have struck the case off the list of the current business before him, and on a fresh application being made for execution to have restored it.

The contention of the appellants, and their sole contention is this, that when he first struck off this proceeding from his file (as it is called) in 1839, thereupon his jurisdiction to deal with the decree altogether ceased, and that he could not deal with it again until a subsequent order had been made by the Judge of the Zillah Court, sending it back to him again. On that ground they say that these applications were made to a Court altogether without jurisdiction.

The appellants have not shown what this striking off the file amounts to. They have not shown the grounds on which the case was struck off the file, whether for non-prosecution, whether for some default on the part of the decree-holders, whether from inadverture, or whether from the business of the Court being so conducted that causes which are not immediately before it are not kept upon the paper. Without affording any information on these subjects they have called upon their Lordships to infer that by the proceeding of the Principal Sudder Ameen in 1839, striking off the case from the file, without any explanation of the meaning of this proceeding or the cause of it, the order of the Court referring the decree to the Principal Sudder Ameen for execution was got rid of.

The order having been in force, it is for the appellants to satisfy their Lordships that for some good reason it has ceased to be so. Their Lordships are not disposed to infer that a valid order has ceased to be valid, or that a Court of competent jurisdiction having jurisdiction over this subject matter has ceased to have it unless some clear proof is given of those propositions.

In the absence of such proof, their Lordships have come to the conclusion that the applications to the Principal Sudder Ameen, including that of 1862, were to a Court of competent jurisdic-

tion, and, therefore, that the execution was valid.

Taking this view it becomes unnecessary to determine another question which was raised, *viz.* whether assuming the Principal Sudder Ameen not to have jurisdiction in 1862, that jurisdiction could be conferred on him by the retrospective effect of an order made by the Judge in 1864.

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the High Court be affirmed, and this appeal be dismissed with costs.

5th November 1872.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Sir James W. Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague E. Smith, the Right Hon. Sir Robert P. Collier and the Right Hon. Sir Lawrence Peel.

KHAJAH HABEEB OOLLAH AND OTHERS ... } *Defendants,*

and

KHAJAH GOUHUR ALLY KHAN ... } *Plaintiff.*

*On appeal from the High Court of Judicature at Fort William in Bengal**

New case in appeal—Principle of Mahomedan Law as to legitimacy of children—Credibility of witnesses.

When a new case is attempted to be made in appeal at the last stage, it must be looked at with disfavour.

The presumption of Mahomedan Law as to legitimacy of children followed.

Witnesses who come deliberately to prove a case which is shown to be false, cannot be much relied upon with regard to any particular question in the case.

THE single question raised by this appeal is whether the respondent was the son of Wazeer Jan, by which their Lordships understand, either his legitimate son in the strictest sense of the term, or a son capable of inheriting from him under the Mahomedan law.

The case made by the appellants, who were plaintiffs in the suit, was that he was not in any sense the son of Wazeer Jan, who, they alleged, was incapable of procreating children, that he was a stranger brought in by means of a conspiracy to defeat their rights to the succession of Mahomed Ibrahim, the elder brother of Wazeer Jan, and in fact the original plaint appears to have gone so far as to allege who the real and natural father of the respondent was.

Now it is admitted that that case has entirely broken down. The effect of the findings of the two Courts upon the remand appears to be what is thus stated in the judgment of the High Court now under appeal:—"The case has again "been tried by the present Judge, Mr. "Ainslie, who has arrived at the conclu-"sion that Gouhur Ally is really the son "of Wazeer Jan and Allah-rukkee, but "that he is not legitimate, and that "though his father and mother did coha-"bit, the cohabitation was not that of "man and wife."

The only qualification which their Lordships think might be put upon this summary of the Judge's finding is this that the Judge has rather found, after ascertaining the paternity of Wazeer Jan, that the respondent was not *proved* to be legitimate, and that although his father and mother did cohabit, the cohabitation was not *proved* to be that of man and wife.

Upon appeal from the decision of the Zillah Judge, the High Court came to the conclusion that, upon the evidence, the respondent must be taken to have been legitimate, and that conclusion their Lordships are disposed to think was the only correct conclusion which they could draw from the evidence, considering the manner in which the case was presented before them.

It has been very fairly admitted at the bar that it is hardly open for the appellants here, both Courts having concurred in the finding upon that fact, to dispute

* From the judgment of Loch and Seton-Karr, JJ., in Regular Appeal No. 401 of 1864, decided 16th January 1865.

any longer the paternity of the respondent. It is admitted that he must be taken to be the natural son, at all events, of Wazeer Jan. It will have no doubt to be considered what is the effect of that conclusive finding as to the paternity, not only in reference to the consequences immediately to be deduced from it, but also in reference to the credibility of the witnesses for the appellants, in so far as they attempt to prove, not merely that the respondent was in no sense the son of Wazeer Jan, but that in fact there never was a marriage between Wazeer Jan and the mother of the respondent.

It was argued by the learned Counsel for the appellants, particularly by Mr. Doyne, that it did not by any means follow that, because many of those witnesses had expressed an opinion as to the incapacity of Wazeer Jan for the procreation of children, a fact which is now conclusively found against him, they were not to be believed on the other part of the case. Their Lordships, however, deem it right to observe that those witnesses were not merely giving an opinion upon an isolated fact in the cause, but they came into Court to prove a case—the whole case made by the plaintiffs; and that that case was, as I have before stated, a very special case, referring to the introduction of this boy into the family to a conspiracy, and undertaking to prove that it was impossible that he should be the son of Wazeer Jan, and he was the son of somebody else. It, therefore, seems to their Lordships very difficult to say that, if those witnesses have been conclusively shown to have come to prove a false case—a case false in its material features—much reliance can be placed upon their evidence as to any particular questions in the cause.

Another consequence of the manner in which the appellants have presented their case in the Courts below, is, that the question which has been chiefly argued to-day at the bar seems never to have been fairly put into a course of trial. They say:—"True, we must admit "now that the respondent was the natu-"ral son of Wzeer Jan; but the evidence "for the respondent,—the direct evidence "as to the marriage between Wazeer Jan "and Allahrukkee,—is not to be believed, "and all the other facts proved in the "case, the continuous cohabitation be-"tween them—including the birth of "other children—are all consistent with "the supposition that the respondent "was an illegitimate son, and was never "recognized by his father, and was at last "put forward, as we say, in consequence "of this conspiracy to defeat the rights "of the claimants."

Upon the case thus made, it is to be observed that, if it were the true case, the plaintiffs would hardly have set up that which must now be taken to have been a false case; and further, that the case now relied upon not having been made the real issue between the parties either when the case was first launched or at any time during the long period through which this litigation has lasted, we have not that evidence which might have been given as to the state of the family, as to the manner in which the child was treated in the family, as to the circumstances of the birth, and possibly as to the recognition, by Wazeer Jan, of the respondent as his son.

It appears, therefore, to their Lordships that it is extremely difficult to place any reliance upon the case made by the appellants, so far as it affects the case made by the other side; and the only remaining question is whether there was sufficient evidence on the part of the respondent, from which the High Court was justified in inferring that the legitimacy was made out. And in considering this question, their Lordships will assume that the appellants had made a case sufficient to cast upon the respondent the burden of giving some proof of the marriage between his parents.

Their Lordships think it is a very strong circumstance that, upon or immediately after the death of Nawab Jan, *alias* Mahomed Ibrahim, this boy was produced and placed upon the *guddee* by

Fatima. That is a fact which, as the High Court has observed, admits of no doubt. Fatima seems then to have been the head of the family. She was an old lady, and, as the event proved, near the end of her life. It is difficult to see what interest she could have had in putting a spurious child, or even an illegitimate child of her son, in that position, and treating him as the heir of the family; because the effect of recognizing him as a legitimate grandson was to introduce him as one of her own heirs, and therefore to affect the interests of her own brothers and sisters, her own relations for whom she might be supposed to care more than for the illegitimate child of her son.

But however that may be, the fact is sought to be met by the suggestion that this was not the act of Fatima, but the act of Ismael Khan (a person who certainly does not appear upon this record in a manner which entitles him to any respect or credit, since he seems to have sided first with one party, and then with the other); and that it was a contrivance on his part to avoid being called upon to render his accounts as manager of the estate. But their is really no evidence to show that Fatima in what she did was not a free agent. The suggestion seems to be mere speculation, founded upon the proved bad character of this man, and the circumstance that he was steward of the estate.

It is supported by no evidence to which a Court of Justice can give credit.

Then, how does the case stand? There is a considerable body of direct evidence as to the fact of the marriage, though it may not be of the highest character. There is the evidence of the barber who had performed the rite of circumcision when the child was treated as a child born in the house of Wazeer Jan and the Begum. There is the evidence of various persons, the respectability of some of whom is admitted, as to the fact of this boy having been seen in the house, and having been recognized, not only by Wazeer Jan as his son, but by Mahomed Ibrahim as his nephew.

It is said that all these witnesses were not credited by Mr. Ainslie, the Judge in the Court below. They appear to have been credited by the Court above, and to some extent, no doubt, they were credited by the Court below. That being so, the evidence, if not so strong as one could desire upon such a question, is at least fortified by those presumptions which the Mahomedan law draws in favor of legitimacy and against bastardy.

The law is stated, and very strongly stated, by Dr. Lushington in the case which has been cited from the 3rd Vol. of Moore's Indian Appeals *; and although in the case in 8Moore†, the Court did not think the legitimacy of the claimant was made out, yet the language of their Lordships shows that their Lordships were careful to avoid throwing any doubt upon the doctrine as to the principles of the Mahomedan law which had been laid down in the former case.

Under these circumstances, considering that the case originally made by the appellants must be taken to have entirely broken down, and considering that there is evidence as to the legitimacy of this child, credible in itself, and fortified by the presumptions of Mahomedan law, their Lordships are of opinion that they would not be justified in disturbing the judgment of the High Court.

They will, therefore, humbly advise Her Majesty to dismiss this appeal with costs.

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* Khajah Idayut-oollah *v.* Rai Jan Khanum.

† Mahamed Bauker Hossain *v.* Shurfoonissa Benguem.

18th December 1872.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Sir James W. Colvile, the Right Hon. Sir Barnes Peacok, the Right Hon. Sir Montague E. Smith, the Right Hon. Sir Robert P. Collier, and the Right Hon. Sir Lawrence Peel.

GIRJA KANTO CHOWDHRY... *Plaintiff,*

and

HURRISH CHUNDER CHOWDHURY } *Defendant.*

Churland—Possessory award—Onus of proof—Importance of evidence of possession.

*On appeal from the High Court in Bengal.**

Question being as to whether the Chur lands now claimed by the Plaintiff were identical with those covered by a possessory award confirmed by the Civil Court in his favour:—*Held* that in questions of this kind where the natural boundaries and landmarks have disappeared, and where there are no fences to mark what is the extent of the property, evidence of possession is very important. And that satisfactory evidence of long possession of the Defendant coupled with want of proof of alleged actual dispossession on the part of the Plaintiff, and the fact of his having claimed a larger quantity of land than what he had previously obtained by the award are important circumstances against the claim of the Plaintiff, upon whom according to their Lordships, lies the burden of proof, which he has failed to sustain.

IN this case the appellant brought his suit to recover a large tract of chur land, which he claimed as parcel of his Mouzah of Jogdash. The defendant is the zemindar of a zemindary which includes a mouzah called Ghoogoomaree; and he asserts that the piece of chur land claimed by the plaintiff is parcel of his Mouzah Ghoogoomaree. The single question in the case is,—parcel or no parcel, whether this land belongs to the plaintiff's Mouzah Jogdash, or the defendant's Mouzah Ghoogoomaree?

The opening of this appeal by the learned Counsel, Mr. Leith, presented a simple and apparently consistent case in favor of the appellant. It seems that about the year 1830, a large tract of land was diluviated by the river Chutol within the mouzahs belonging to the plaintiff and the mouzahs belonging to the defendant,—and that after a reformation of some part of it in 1837, a proceeding was taken under Act XV of 1824 by the plaintiff before the Magistrate, under which he was ordered to be put in possession of a considerable tract of such newly-formed land. It was declared by the decision of the Magistrate that he was to have possession of that land; and the Magistrate laid down the boundaries in this way:—"By the papers of the "nutthee, the boundaries of Mouzahs "Jogdash, Singhessur, and Besh Malun-"cha are found to be situated as follows: "—A canal to the east of Mouzah Jog-"dash running from east to west; Dao-"koba, *i. e.*—the river Chutol, to the "south," and it may be observed here that this has turned out to be a doubtful boundary, because there were two channels of the river Chutol,—"the house of "Mothura Moody to the east, and a dry "branch to the west; and the culturable "lands of Murad Numdul are situated to "the west of Mouzah Singhessur."

That decision having been given, there is some evidence that the appellant was put into possession of the land so described. After a period of nearly twelve years, *viz.*, in 1849, the respondent's father brought a suit in the Civil Court to set aside the order of the Magistrate. The reason of the suit was, as stated in the plaint, a fear that that decision of the Magistrate might be used to disturb the respondent's father in the possession of land which clearly belonged to him. The result of that suit, in which final judgment was given in 1852, was in favor of the appellant. An issue was raised in it as to the fact of the actual possession of the land from the time of the Magistrate's order; and upon that issue the ultimate finding was that the appellant

* From the judgment of Bayley and E. Jackson, JJ., in Regular Appeal No. 392 of 1864, decided 5th December 1865.

had been in possession of the land described in the Magistrate's order from and since the date of that order in 1837. The issue as to possession was distinctly raised, and a distinct and explicit judgment given upon it. Their Lordships are of opinion that the parties are precluded by that judgment from now averring that the appellant was not in possession of the land described in that decree from the time when the Magistrate's order was passed in 1837 up to the time of the suit of 1849. So far the plaintiff's case is clear. That decree must be taken to have established that the plaintiff was in possession of the land described in the Magistrate's order, and had remained in such possession. The question in the present suit is whether or not the lands which are now claimed by the plaintiff are identical with the lands so described.

Now, undoubtedly, that issue lies upon the plaintiff, because the foundation of his suit is that he, having been in possession of the land, was shortly after the decree of 1852 dispossessed of it by the respondent, as a sequel or a consequence of certain measurements which had been made by the surveying officers of the Government, which resulted in the lands being measured into the respondent's Mouzah of Ghoogoomaree. The proceedings on that survey appear to their Lordships to be entitled to considerable weight. The Government officers, of course, went on the ground, and, when on the ground endeavoured to ascertain the boundaries as they had been laid down in the Magistrate's order. It appears that the appellant had first obtained from the surveying and measuring officers a measurement of the land now in dispute into his Mouzah of Jogdash. There was then a complaint made by the respondent to the superior officer of that measurement, and other officers were sent down to ascertain whether the first measurement had been properly made or not; and after conflicting reports from two officers successively sent upon the land, the appellate tribunals from them decided in favour of the report of the first officer, namely, that this land belonged to the respondent's Mouzah of Ghoogoomaree. The report of the surveying officer who decided in favour of the appellant is very explicit on the point of possession. He examined witnesses, and he came to the conclusion that the land then and now in dispute had been for many years in the possession of the respondent, and he declared himself to be unable, upon the ground, by comparison of the maps with any landmarks that he could find there, to ascertain that the land then and now in dispute formed a part of that described in the Magistrate's decision. Mr. Leith pointed out that that report was not entitled to great weight, inasmuch as the officer had mistaken the position of the river Chutol; and there is undoubtedly force in that observation; still their Lordships cannot but think that in a question of this kind, where so much must depend upon local investigation, the opinion of that officer, confirmed by his superior officers, is entitled to great weight. It must be remembered that the appellant had first obtained the measurement in his favor, and therefore that the officer was called upon to displace that which had been already done; and it certainly would appear from his report that he had, at all events, endeavoured to execute his duty carefully, for he made a full and long report, going into the circumstances of the ground, the appearances which it exhibited, and giving reasons, and very full reasons, for the opinion at which he arrived. These measurements having been made, this land was assigned to the respondent's mouzah. This was in the year 1852. The appellant avers that at that time, or about that time, he was dispossessed by the respondent. If he were so dispossessed, he certainly did not take very prompt measures to obtain redress; for, although then, as he alleges, dispossessed of what he now contends he had been for many years in possession of, he takes no step to reverse what had been done by the measuring officers until the year 1859,

when this suit is commenced.

In this suit, which has been brought by the appellant to annul the orders of the measurement officers, and for possession, the inquiry as to the identity of the lands has been fully gone into, with the result that the Principal Sudder Ameen found in favor of the appellant; but his judgment was reversed by the High Court.

Their Lordships have felt the extreme difficulty of arriving at a decision satisfactory to their own minds in this case. The appellant has relied, and principally relied, upon the boundaries which are given in the decision of the Magistrate and upon the map called the sketch map prepared at that time, and also upon a map which was prepared in the year 1851; and by comparing those maps with the Government map of 1853, he has endeavoured to establish the identity of the boundaries described in the Magistrate's decision with the lands which are now in dispute. It was difficult for those who went on the ground to ascertain, by these means, the boundaries which the Magistrate's decision had pointed out. Indeed, they were unable to do so. The difficulty is certainly not less when the comparison has to be made, not upon the land itself, but with reference to a map which—assuming it to be a correct representation of the ground—is on a very small scale, and does not contain one of the important landmarks upon which the appellant relies, *viz.*, the canal to the north, which forms the northern boundary. As far as their Lordships were able to conjecture from an examination of the maps, there was a great deal to support the contention that a portion of the chur in question was in the situation or near the situation which was contended for on the part of the appellant, and that it was not to the south of that which was asserted by the appellant to be the Chutol stream. But no firm conclusion can really be drawn from such an examination. The maps prepared in India by the native authorities are extremely unsatisfactory. The sketch map has straight boundaries which cannot exist naturally upon the ground; it marks a square block, and gives very few bearings beyond it. Their Lordships, therefore, have felt that they cannot place such firm reliance upon any inference to be drawn from these maps as to satisfy them that they would do justice between those parties by assenting to the conclusions which the appellant draws from them

The great strength of the arguments on the part of the appellant has been drawn from the maps; and the important element on which the defendant mainly relies, *viz.*, the evidence which was given as to the actual possession of this land, was not only not repelled by any anticipatory argument on the part of the appellant, but in the opening of the case that evidence was not adverted to further than that the learned Counsel told us the number of witnesses, and point out the pages where the evidence might be found. On coming to the respondent's case, their Lordships must observe that this evidence came upon them with rather sudden force. There is a great body of it, and great consistency in it. It shows, if it is believed, that from the time when the chur land now in dispute was formed, the respondent and his father were in possession of it. The witnesses who were called were tenants who had paid rent, and other persons who knew the land; some of them, who knew it before it was submerged, say that it was the land which belonged to the village of Ghoogoomaree.

The evidence of possession on the other side is extremely slight. It was pointed out by Mr. Doyne that no witnesses were called who had ever lived upon this particular land, and those who were called came principally from Joneally, a place beyond the southern stream of the Chutol.

In questions of this kind, where the natural boundaries and landmarks have disappeared, where there are no fences to mark what is the extent of the property, evidence of possession is very important and very satisfactory. Their

Lordships, on looking at this evidence, see no reason to discredit the witnesses for the respondent. The Principal Sudder Ameen has apparently disregarded the testimony altogether; but he has given no reason for so doing, and afforded no assistance to those who have to consider the weight to be attached to the witnesses. If the principal Sudder Ameen had found that the witnesses were not entitled to credit, their evidence might be disregarded; but there is no intimation whatever that these witnesses are not speaking the truth; and if they are speaking the truth, then it is plain that the respondent has been in possession of this ground, or of parts of it, ever since it became habitable or culturable after the waters had subsided. Assuming then that there is evidence which can be relied upon that the respondent has been long in possession of the land now in dispute, the effect of it upon the judgment which ought to be given in this case appears to their Lordships to be very strong. An estoppel must be mutual, and both parties must be bound by the finding in the decree of 1852. Now, assume that the appellant was in possession from the date of the Magistrate's order of the ground described in it up to 1852, as conclusively found by the decree in that year, and also supposing the conclusion is right that the respondent has always been in possession of the land now in dispute, the consequence is inevitable that the land now in dispute, of which the respondent has been in possession, is not the land described in the suit of 1852, of which, on the hypothesis, the appellant has been in possession. The appellant has in truth given no satisfactory evidence that he was really in possession of the land now in question.

Again, if the appellant had been in possession of the land now in dispute, and had been dispossessed, the mode of dispossession might have been shown; and it is reasonable to expect that, if there had been an actual dispossession it could have been shown. Proof of actual dispossession would have greatly helped to establish the fact of a real possession capable of being so disturbed. But the manner of the alleged dispossession is left entirely unexplained. That there was a constructive dispossession, as the result of the action of the measuring officers, may be clear, but no actual dispossession is at all shown by the evidence.

There are other circumstances in the case which also weigh against the appellant. The quantity of land the appellant now claims is larger than that which was found for him by the judgment of the Court in 1852. The judgment finds that the Mouzah of Jogdash contained 50 or 60 khadas of land. The plaintiff now claims 71 khadas out of 250, of which he says his Mouzah Jogdash consisted. There has been a question whether the Judge, in saying that the Mouzah Jogdash was composed of 50 or 60 khadas, was not speaking of the cultivated land only, and whether there was not beyond the cultivated land a portion of chur land which he did not mean to include in that quantity. But, upon looking at his judgment, it is by no means clear that he did not mean to describe the whole quantity which belonged to the mouzah, and that, in fact, he was not describing the entire mouzah. The inference would rather be that he considered the 50 or 60 khadas as the total quantity of which the mouzah consisted. If this be so, in the claim which the plaintiff now makes, he has exceeded the quantity which was declared to belong to him, wherever it was, by the decision of 1852.

It is also to be observed that, with regard to the nature and quality of the land, there is considerable difficulty in the appellant's case. The land with which the Magistrate's order of 1837 dealt appears to have been at that time inhabited and cultivated land. It is singular that, if the land now claimed be the same as that which was the subject of that order and the former suit, it should have degenerated between 1837 and 1864, when the Ameen sent down by the Court in this suit surveyed it. He des-

cribes it as at that time sparsely inhabited by two or three Mahomedans only, and destitute of habitations and trees. It is a description of the land extremely different from that with which apparently the Magistrate was dealing, and affords some indication that the land now in dispute in the present suit is not identical with the land which was the subject of his order and the decree in 1852.

Their Lordships do not think it necessary to go minutely into the evidence. They are perfectly aware of the difficulty of arriving at a decision in cases of this kind,—where the boundaries shift, the rivers change their course, and where nothing naturally on the ground, or artificially placed there, remains in the same state so that old descriptions can be followed and compared. They were desirous, in order that complete justice might be done, that, if there was any real doubt whether sufficient care had been exercised in ascertaining the rights of the parties, a further inquiry should be made. But upon a suggestion of that kind being made, the Counsel on both sides pointed out that there would be considerable expense, great prolongation of this already protracted litigation, and, after all, difficulty, perhaps insurmountable, in discovering exactly where lands were. Their Lordships, therefore, have felt, upon consideration of all the circumstances of this case, that they best exercise their own duty and really best consult the interests of the parties, by arriving at a decision which will put an end to this litigation, which has been for so many years going on between these parties.

On the best opinion they can form upon the materials before them, their Lordships have come to the conclusion that the appellant, upon whom the burden of proof lies, has failed to sustain it. He has not satisfied their Lordships that the land he now claims is identical with that of which he was put into possession by the Magistrate's order, and consequently has failed to establish his right to obtain possession of the land, and to reverse the orders of the surveying officers.

Their Lordships desire to say that they do not concur in all the reasons which were given by the learned Judges of the High Court for their judgment. They think they did not give sufficient effect to the decree of 1852 as a conclusive judgment upon the possession of the land then in dispute; but whatever the effect to be given to that decree, the High Court came to the right conclusion that the plaintiff had failed to establish his right to the land he now claims.

They also desire to express their satisfaction that their present decision will establish the title of the respondent in accordance with, as they believe, the long and actual possession of the land itself. They think that, if the evidence of possession stood alone, and they had to determine the case upon the issue whether the appellant or the respondent had been in possession of this chur land since its reformation, their verdict must have been in favor of the respondent.

Their Lordships are of opinion that substantial justice will be done by the conclusion at which they have arrived; and they will humbly advise Her Majesty to affirm the decree of the High Court with costs.

19th July 1872.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon'ble Sir James W. Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon'ble Sir Montague E. Smith, the Right Hon'ble Sir Robert P. Collier, and the Right Hon'ble Sir Lawrence Peel.

LALL BEHAREE LALL ... *Plaintiff,*

and

MUSSUMAT GOPEE BEEBEE AND OTHERS. ... } *Defendants.*

Concurrent Judgments.—Credibility of witnesses.

On Appeal from the Sudder Court at Agra.

The Privy Council is reluctant to disturb the concurrent judgments of two Indian Courts upon a pure question of fact. When a man is a professional witness, his credibility may be properly objected to, but to disbelieve a witness because he gave evidence in other cases is improper, and has a tendency to render respectable people of India reluctant to come to Court as witnesses, which is a great evil in that country.

THEIR Lordships are of opinion that no special ground has been shown on which this case ought to be excepted from the general rule against disturbing the concurrent judgments of two Indian Courts upon a pure question of fact; that if this were treated as an exceptional one it would be difficult to apply the rule to any future case.

The appellant brought his suit to oust the parties in possession on the ground that he became entitled to the property, as next heir, on the death of one Bowanee Pershad, who died in August 1855. To make out his title he had to establish two facts: first, that he stood to Bowanee Pershad in the relationship that he alleged; and, secondly, that being joint in state with Bowanee Pershad his title as nearest male heir overrode the rights of the respondents, the widows of Bowanee Pershad, and of his two brothers who predeceased him.

The first issue has alone been tried, and both Courts have found that upon it the appellant failed to prove his title, which was found on the allegation that he and Bowanee Pershad were descended from a common ancestor, one Lalloo Mull, the former being the grandson, the latter the great-grandson of that person.

It may be observed that the appellant came into Court with a considerable presumption against him, arising from the fact that he had slept on his alleged rights, and failed to bring his suit for twelve years after the decision of the Collector in the proceeding for the mutation of names, wherein this question of heirship was raised.

Both Courts have concurred in treating the oral testimony adduced by him as untrustworthy. They have weighed the effect of the proceeding before the Magistrate in 1844, and of the circumstances proved concerning the dwelling-houses of the parties, and have come to the conclusion that these ought not to turn the scale in the appellant's favour. It is obvious that the weight to be given to the latter circumstances is a question which Judges in India are far more competent than their Lordships can be, to determine.

Their Lordships, moreover, are prepared to say that, if they were trying the case as a Court of first instance, they would have thought, upon the evidence before them, that the appellant had failed to prove his title as alleged, though they might have hesitated to assert that there was no relationship between the parties, or that the case of the defendants on that point was wholly true.

In these circumstances they can only humbly advise Her Majesty to dismiss this appeal with costs.

They wish further to observe, with reference to the elaborate and ingenious criticism to which the judgment of the Principal Sudder Ameen has been subjected in this case, that the only objection to that judgment which they would be inclined to take, is to the generality of his observations as to certain witnesses having given evidence in other cases.

It is no doubt a legitimate objection to a man's credit that he is a professional witness; but to state broadly and generally that a witness has given evidence in other cases, and therefore becomes unworthy of credit, can only tend to increase that indisposition of respectable persons to come into Court as witnesses, which is one of the social evils of India.

19th December 1872.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Sir James W. Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague E. Smith, the Right Hon. Sir Robert P. Collier, and the Right Hon. Sir Lawrence Peel.

MUSSUMAT USHRUFOONNESSA BEGUM ... ... } *Defendant,*

and

BABOO GRIDHAREE LALL ... *Plaintiff.*

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Evidence.—Examination of Plaintiff in the Appellate Court—Admission of the factum when not that of the validity of a deed of conveyance.

The question is as regards the factum and validity of a deed of conveyance alleged to have been executed by Azeemun to plaintiff in the name of Sun Lall. The factum of the deed is established but the *bonâ fides* of the deed and the passing of the consideration money have not been established. The High Court considered the evidence to be unsatisfactory, but thought it proper to exercise their power to examine the plaintiff who was examined, and the High Court relying on that evidence decreed the plaintiff's claim. *Held* that it is dangerous to allow a plaintiff, a pleader, who has not thought fit to give evidence in his own behalf, to be subsequently called to support his case, when the evidence he had already adduced had broken down, and that the testimony of the plaintiff so given is not satisfactory. *Held* also that the admission in the statements contained in some earlier proceedings is an admission of the factum of the deed, and not of the *bonâ fides* and validity thereof.

THIS was a suit instituted for the recovery of possession of a certain portion of the talook called Umbai, together with mesne profit.

The case of the plaintiff was, that he purchased this portion of the talook on the 27th August 1859 from one Mussumat Azeemun. In order to make the case intelligible, it is as well to observe that Azeemun was a sister of Mussumat Khairoonnessa; that Mussumat Khairoonessa claimed this property through her son Velayet Hossein; and that the defendant Ushrufoonessa was a daughter of Khairoonessa, and a sister consequently of Valayet Hossein. There was a question whether Khairoonessa obtained this property from Velayet Hossein by devolution or by a deed executed by him; but it is now admitted that she must, for the purposes of this suit, be taken to have obtained it by a deed. And indeed some other questions which were raised seem now to have been disposed of, leaving the sole question in the cause whether or not the plaintiff obtained this property by a valid deed of sale from Azeemun.

The circumstances under which this deed of sale was made may be shortly stated to be these. The plaintiff is a pleader, and on the 15th of February 1859 he had instituted a suit on behalf of one Ameeroonessa, who was a representative of Belkeesoonessa, and a lady of the name of Parbutty his own step-mother, against Ushrufoonnessa, as the heiress of Velayet Hossein; in which suit he endeavoured to establish that Velayet Hossein had no title whatever to this property, the property having been altogether bought by the money of Belkeesoonessa, who was the wife of Velayet Hossein. It appears, therefore, that while a suit was in progress, in which, on behalf of his step-mother and another client, he contended that Velayet Hossein had no property at all in this mouzah, he obtained a conveyance of a portion of the mouzah from this lady Mussumat Azeemun, whose sole title was derived from Velayet Hossein. It is also an undisputed fact in the case that this conveyance, being nominally made to one Sunt Lall, was never asserted by the plaintiff until seven years after, when he commenced this suit, to have been in reality made to him; but he seems, according to his own showing, to have concealed the case which he now sets up.

Their Lordships have perused and con-

* From the judgment of Kemp and E. Jackson, JJ., in Regular Appeal No. 78 of 1867, decided 12th February 1868.

sidered the evidence of the witnesses who were called for the purpose of proving the execution of this deed and the payment of the consideration-money; for it is to be observed that the plaintiff in this case has not merely the burden of proving the execution of the deed; he has to prove further that Sunt Lall was really his own benameedar, and that he advanced the money which was duly paid to the vendor. The evidence of these witnesses their Lordships consider altogether unsatisfactory. As far indeed as the execution of the bill of sale is concerned, from other evidence their Lordships have come to the conclusion that it was in fact executed; but as for the payment of the consideration-money, if it rested alone on the evidence of these witnesses, their Lordships would not rely upon it. That appears to have been the view of the Principal Sudder Ameen, who dismissed the suit; and that appears also to have been the view of the High Court, for they appear to think the evidence below of so unsatisfactory a character as to make it necessary that they should exercise the power, which undoubtedly they possess of summoning the plaintiff before them and examining him.

Their Lordships cannot help here observing that in a case like this it does appear to them somewhat dangerous to allow a plaintiff, a professional man, who has not thought fit to give evidence in his own suit in his own behalf, upon the failure of evidence which he has adduced, to be subsequently called for the purpose of supporting the case, which had broken down. The High Court undoubtedly attach credence to the evidence of the plaintiff; but upon that subject their Lordships are unable to concur with the view taken by the High Court. As far as the payment of the consideration money is concerned, which is necessary to support the reality of this transaction (for the question really comes to this—was it a real transaction or was it a colorable one?), the evidence of the plaintiff appears of a very unsatisfactory character. He does not speak at all directly to the payment of it, but says that he procured it, that he sent it; he speaks of an agreement as to the purchase-money having been made with the son of the Mussumat; and at the last, when questioned by the Court, he says that he saw the lady coming back in her carriage which he had sent for her, and he saw the bag of money in her hand before her as she was going away. That is an account which does not appear to their Lordships of a very satisfactory character.

But their Lordships have been referred to a deposition of this witness made about a month after the occurrence of the transaction, which it appears very material to consider. It should be observed that in his last examination he lays the scene entirely at the godown of Sunt Lall, the nominal purchaser. He represents that he saw the transaction from his own house, which was at some distance from it, and he represents the transaction to have been entirely his own; and, as far as would appear from his last deposition, Mosaheb Khan, to be hereafter referred to, had nothing whatever to do with it. It appears that he was examined on the 21st of September 1859. His examination was taken in a proceeding of this kind. The present plaintiff, Mussumat Ushrufoonnessa, brought a criminal charge against Mosaheb Khan, her own mooktear, for various acts of alleged malversation, one of which was the obtaining this very deed from Azeemun to Sunt Lall; and in the course of this case Gridharee Lall is called as a witness, seemingly for the prosecution. The account he gives of the transaction in substance is this. On it being put to him whether he knew of any collusion between Mosaheb Khan and Azeemun, he says:—"I do not know whether the aforesaid Mussumat had made the sale in the name of Sunt Lall in collusion with Mosaheb Khan or not;"—the notion in the mind of Ushrufoonnessa at that time appearing to be that there was collusion between Azee

mun and Mosaheb Khan. The question does not point to her having suspected Gridharee Lall of having had anything to do with it at that time. He says, he does not know whether this sale was made in collusion with Mosaheb Khan, but he says "on the day the sale was "made, Mosaheb Khan also went to "my house along with the said Mus-"sumat;" and he subsequently says, "on the day of the sale the aforesaid "mookhtear went to my house to make "the conveyance." Now, this does appear an entirely different story from that which he told before the High Court. If his story told before High Court were true, he could have had no difficulty whatever in answering the question with respect to the collusion of Mosaheb Khan and Azeemun. His answer would have been, "there was no collusion whatever "between Mosaheb Khan and Azeemun "Mosaheb Khan had nothing to do with "the transaction. It was entirely my "own; I bought the property; I sent "the money. It was conveyed to Sunt "Lall entirely for me, and Mosaheb "Khan had nothing to do with the tran-"saction. There was in fact no collusion "with anybody." And one does not see why, if he were an honourable man, and the truth were what he has told the High Court, he did not come forward when Mosaheb Khan was charged with fraud in connection with this transaction, and tell the story which he tells now. But so far from that, he does not give the slightest hint of the story which he now brings out for the first time in this suit, but he gives a totally different version of the transaction. He represents scene to be a different one, namely, in his own house instead of that of Sunt Lall; and he speaks of Mosaheb Khan as the party to the transaction, entirely concealing that he himself had anything to do with it.

Looking at the nature of the transaction, at some of the admitted facts which have been before referred to, and to the two accounts which have been given by the plaintiff, which appear to their Lordships to be at variance, their Lordships are unable to give credence to the latter account which has been given by the plaintiff; and in their opinion, he has not given that proof, which under the circumstances he was called upon to do, of the genuineness of the transaction and of the payment of the money.

It is not necessary to speculate upon the precise nature of the transaction, their Lordships having come to the conclusion that it was a colorable one. It may be, as has been suggested in some proceedings in the cause, that some parties, Gridharee Lall among them, may have thought it convenient or useful for the purposes of the litigation to obtain a conveyance from Azeemun to Sunt Lall. They may have thought it more convenient to put him forward as the party possessing the property than her; and further it may have been their object to obtain a more complete control over the suit by having the property in his name than they would have had if it had been in hers. But, whatever be the real nature of the transaction, their Lordships are of the opinion that the plaintiff has failed to establish a *bonâ fide* conveyance to himself for value.

It only remains to notice one or two observations which have been made on the part of the Counsel for the respondent. It has been suggested that inasmuch as Azeemun has not appealed, therefore it is not open to Ushrufconnessa to contest the validity of this deed. It may be that Azeemun might, if she had chosen, have been able to avail herself of certain equities against the plaintiff, which it would not be open to Ushrufoonnessa to do; but their Lordships are of opinion that it is open to Ushrufoonnessa to contest the validity of the transaction, and to maintain that it is colorable, not real. It has also been contended that the effect of some other proceedings has been to establish an admission on the part of Ushrufoonnessa of the validity of this deed. The proceedings relied upon chiefly are a suit which she instituted against Azeemun and Sunt

Lall for the purpose, among other things, of setting aside this deed, her case then being that she obtained the property from her mother by a tumlicknamah executed upon her mother's death-bed, and that therefore Azeemun could have nothing to dispose of. That suit was finally decided against her upon the ground that this tumlicknamah, alleged to have been given by her mother upon her death-bed, was not valid; but that does not, in their Lordships' opinion, dispose of the validity of the deed. The most that can be alleged is that in that suit Ushrufoonnessa admitted the execution of the deed. Their Lordships are of opinion that, as far as that part of the case is concerned, it must be taken that she did admit the actual execution; and, indeed, upon other grounds—among others, the fact of the registration of this deed—their Lordships are of opinion that the mere *factum* of the deed is proved. But, for the reasons which they have given, they have come to the conclusion that this was not a real transaction, and that the property was not *bonâ fide* conveyed, and therefore that the decree of the High Court must be reversed.

Under these circumstances their Lordships will humbly advise Her Majesty that the decree of the High Court be reversed, and that the decree of the Principal Sudder Ameen be affirmed, with costs.

20th November 1872.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Sir James W. Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague E. Smith, the Right Hon. Sir Robert P. Collier, and the Right Hon. Sir Lawrence Peel.

SHEIK TORAB ALLY ... *Plaintiff,*

and

SHEIK MOHAMED TUKHEE AND OTHERS ... } *Defendants.*

*On appeal from the High Court in Bengal**

Suit for declaration of title—Suit dismissed for want of satisfactory evidence, but without prejudice to any question of title in any future suit.

Held that looking at the case as it stands, the nature of the suit and the evidence that has been given, the Court cannot make an affirmative declaration of the Plaintiff's title. The Decree of the High Court dismissing the suit is allowed to stand, but without prejudice to any question of title between the parties in any future suit or proceeding.

THIS was an appeal from a decree of the High Court of Calcutta dated the 2nd June 1864, affirming a decree of the Judges of Behar dated the 3rd October 1863.

The plaint stated that the plaintiff (the appellant) sued for relief from injury and for confirmation of possession of 10 annas and a fraction being his property, and 1 anna and a fraction being the right of lease and sub-lease of a certain mouzah, and that some of the respondents had instituted proceedings under Act IV of 1840 as mentioned in the judgment of the Judicial Committee. As to the 10 annas and a fraction, the appellant claimed to have bought them with other property for Rs. 15,000 from Bebee Jan, who, on the 29th Bysack 1258, executed a deed of sale to him, and, on the same day, a deed of remission of the balances of the purchase-money remaining after the appellant had paid off a mortgage of about Rs. 1,500. The deeds of sale and remission were not produced in the suit, but were alleged to have been filed by a pleader on behalf of the appellant in some previous proceedings in the Moonsiff's Court at Behar, and burnt there during the mutinies in 1857.

Of the respondents, the two first (two of the appellant's brothers) admitted his title. The third, fourth, fifth, sixth, and seventh (his other brothers and sisters), and some of the others claiming under

* From the judgment of Kemp and Glover, JJ., In Regular Appeal No. 574 of 1863, decided 2 June 1864.

them, alleged that the 10 annas and a fraction had been purchased benamee in the name of Bebee Jan by her husband Mahomed Afzul, and therefore was not hers in absolute right; on the contrary they alleged that she executed an ikrarnamah (which was not produced) to the effect that on her death the property should go to her husband's heirs. The remaining respondents claimed proprietary right in the 1 anna and a fraction.

Among the depositions of the appellant's witnesses were those of the writer of the alleged deeds, of eight attesting witnesses, of the pleader who alleged that he filed both deeds in the Moonsiff's Court, and of six other witnesses who deposed to the existence of the deeds and to their destruction as above. The Zillah Judge on the 3rd of October 1863 dismissed the suit with costs. The High Court on appeal upheld the decision of the Zillah Judge. In the judgment of the High Court dated the 2nd of June 1864, the points for consideration were thus stated:—(1) Did the property belong to Bebee Jan in sole right? (2) Is the sale by her to the appellant proved? (3) This appellant being undoubtedly a shareholder in the state, was the Civil Judge right in dismissing his claim entirely? On the first question, after laying down that secondary evidence could not be given of the contents of the ikrarnamah, the judgment proceeded as follows:—

"Taking, however, all the circumstances into consideration, we think that there is sufficient proof that the property in question did not really belong to Bebee Jan, but to her husband Sheik Afzul. But were it otherwise, we think there is no proof of the appellant's allegation in the second issue. Sheik Torab Ally bases his claim on purchase from Bebee Jan. He must prove this before he can recover. Now his statement is that Bebee Jan sold the property to him, and executed a deed of sale on the 29th of Bysack 1258 Fuslee. The kobala is not produced, nor have any of its attesting witnesses been examined. It is said to have been burnt during the mutinies in 1857, whilst in the Moonsiff's record-room at Gya; and a witness, Sheik Meher Ally, formerly employed as a pleader by Torab Ally, deposes that he filed it in a case before the Moonsiff in which the said Torab Ally appeared as intervenor. This witness, an old man of 75, remembered exactly the date of this kobala, the names of the parties, and the precise thing sold; but though he put in on this occasion no less than seven other deeds of sale on the part of his client, he could not call to mind a single particular about any one of them. This is the only direct evidence of the existence of the kobala, and it is, we think, open to suspicion for various reasons. There is no satisfactory evidence that the deed in question was ever filed in the Moonsiff's Court,—equally none that it was ever destroyed in the mutinies. The only thing in support of it is the testimony of a single witness, whose statements are irreconcilable with the circumstances of the case and with each other. It appears moreover from the list of documents said to have been filed by Meher Ally, and for which he states that he gave a receipt, that amongst them was a mafeenamah executed by Bebee Jan on the same day as kobala, by which she excused her vendor from payment of the consideration-money on account of the sale. This, next to the deed of sale, was the most important document entrusted to Meher Ally, but, strange to say, he does not even mention it in his deposition. Under such circumstances, we think that the secondary evidence of the existence of the kobala adduced by the appellant is inadmissible. But were it not so, what are the circumstances of this case? The date of the alleged kobala is the 29th of Bysack 1258 Fuslee, the very day we observe on which Bebee Jan died. The mafeenamah, granting for the sake of argument that there was such a document, is dated the same day; so that admitting for the moment that Bebee Jan on the day of her death executed these documents in

favor of Torab Ally, there would still be a difficulty in the latter's way on the well-established rule of Mahomedan law, which restricts death-bed gifts to certain narrow limits; the whole matter must stand, or fall together. If, that is, Bebee Jan sold the property to the appellant, she likewise forgave him the purchase-money, her conveyance therefore was an ordinary gift; and as the donor died on the very same day, the gift became a death-bed gift, and consequently illegal to the extent claimed. So much for the only direct evidence adduced in support of the kobala. On the other hand, there is very respectable testimony to show that Bebee Jan, although the nominal owner of the property, was not the real one; and that after her death, Torab Ally was in possession merely as manager and trustee for the younger members of the family; none of the documents filed prove her sole or absolute possession any more than Bebee Jan's before him. Taking, therefore, all the circumstances into consideration, we think that the appellant has not proved either Bebee Jan's absolute ownership in the disputed property, or her conveyance under a kobala to himself; and that as this forms the basis of his claim, he cannot recover."

On the third question the High Court held that, as the respondent admitted the appellant's right to a share of his father's property and that he had always been in possession of it, and as the amount of such share is settled by the principles of Mahomedan law, there was no need for the Court to declare it.

Mr. Bell for the appellant contended (1) that the evidence was not sufficient to justify the finding of the High Court, that the property did not belong to Bebee Jan in absolute right; (2) that the High Court were totally wrong in saying that there was only one witness to the existence of the deed of sale, and that none of the attesting witnesses had been examined, inasmuch as the writer of the deed and all the attesting witnesses had been examined, and there was a mass of respectable testimony to the existence of the deed; (3) that Bebee Jan died in the month of Jeit, as deposed to by appellant's witnesses, and not on the 29th Bysack; (4) that there was no issue raising the invalidity of the deed of sale and remission looked at as a death-bed gift.

Mr. J. Cutler for the principal respondents, after stating that he did not appear for the respondents claiming the proprietary right in the 1 anna and a fraction (as to which nothing had been said in argument on behalf of appellant,) contended (1) that nothing had been shown to induce their Lordships to overrule the finding of the High Court, negativing the absolute ownership of Bebee Jan, founded as it was upon the testimony of thirteen witnesses that she was a benameedar; (2) that even if the High Court had overlooked the depositions of some of the witnesses, there was sufficient other evidence to justify them in finding that the existence of the alleged deed of sale was not proved; (3) that as both Courts had found the 29th Bysack as the date of Bebee Jan's death, the deeds of sale and remission were void as a device to defeat the Mahomedan law of death-bed gifts, and that this contention was tenable upon the first issue in the suit; (4) that the appellant being, as he alleged, in possession, was not entitled to a declaratory decree, because he could not ask for any consequential relief (Rooke *v.* Lord Kensington, 2 Kay *&* Johnson, 761); (5) that to entitle the appellant to a declaratory decree, he must establish his title affirmatively, the *onus probandi* being on him (Rossonada Raya *v.* Sitharam Pillai, 2 Mad. H. C. Rep., 171), and that he had not done so in this case. The improbabilities of his story must be looked to, and regard had to the fact that Bebee Jan was a *purdanasheen* (Grish Chunder Lahoree *v.* Bhuggobuttee Debia, 13 Moo. I. A., 431); that she was alleged to have executed these deeds on the day of her death when she could not be supposed to

be in possession of her full faculties (Kermaroonissa Begum *v.* Mirza Syfoolah Khan, 5 W. R., C. R., 198); and that the inadequacy of the consideration showed that, if anything, it was a gift (Doe *v.* Routledge; Cooper, 705.)

Mr. Bell in reply admitted that the appeal must be dismissed as regarded the respondents claiming the 1 anna and a fraction, but urged the importance to his client of a declaratory decree; and that if the appeal were dismissed at all, it should be without prejudice to any future proceedings.

Sir Barnes Peacock delivered the following judgment:—

This is a suit brought for confirmation of possession.

It appears that Sheik Mahomed Afzul had three wives. By his wife Mussumat Wujeeha he had several children, namely, the appellant and the respondents in this suit. His wife Bebee Jan had no issue. Sheik Torab Ally, the appellant in this suit, claims to be entitled to certain property which he says belonged to Bebee Jan, who he says conveyed it to him by a bill of sale, and afterwards remitted to him the whole of the purchase-money, with the exception of a small portion which he paid off to a mortgagee. The respondents, his brothers and sisters, say that the property did not belong to Bebee Jan in her own right, but that it was purchased by Mahomed Afzul, her husband, in her name benamee for him; and consequently that upon his death, it became vested in the respondents and the plaintiff, as his heirs.

The two main questions in the suit were—first, whether Bebee Jan bought the property for her own benefit, or whether it was purchased by her husband in her name benamee for himself; and, secondly, whether assuming that the property belonged to Bebee Jan in her own right, and that she did not hold it benamee for her husband, she conveyed it by bill of sale to Sheik Torab Ally.

Now this is a suit not for relief, but for confirmation of possession. The plaintiff says that he sues on a claim for relief from injury and for the confirmation of his possession. He then states that the defendants commenced a proceeding against him under Act IV of 1840, claiming that he was about to injure them, and that if the Magistrate did not interfere, a riot would take place; that the Magistrate did interfere and decided in favour of the plaintiff. The Magistrate had no right whatever to enter into any question of title. He was simply to decide as to who was the person in possession. The plaintiff says:—"He decided that I was in possession, and that I was to be retained in possession;" but, subsequently, that decision of the Magistrate was reversed by the Sessions Judge. Then he says:—"From that date the defendants have been practising various frauds and raising disputes against my possession. The cause of action arose from the passing of the said decision of the Court of Circuit. I pray that by issuing summons to the defendants, and making investigations required by the Court, my possession of the property claimed may be ordered to be confirmed," that is, he asked not merely that he should be retained in possession, but that the Court should declare affirmatively that his possession was accompanied by title. This involves the necessity of determining the two questions to which I have referred.

Now the evidence upon both those points was exceedingly unsatisfactory. If the plaintiff meant that the Court should declare that the property belonged to Bebee Jan, it was necessary for him in a suit of this nature, in which he asked for an affirmation of his title, to show affirmatively how the property became vested in Bebee Jan, and out of whose money the property was purchased. But he has failed to do that, and their Lordships are of opinion that he has not proved affirmatively that the property did belong to Bebee Jan in her own right.

Then, with regard to the bill of sale,

some of the witnesses prove that a bill of sale was executed by Bebee Jan on the 29th of Bysack 1258. Both the Judge in the Court below, and the Judges of the High Court, have found as a fact that Bebee Jan died on that very day; and it certainly is very inconsistent with the whole of the evidence that, if she died on the 29th of Bysack 1258, she should have executed a deed on that very day in the manner in which the witnesses depose that it was executed.

The deed is not forthcoming, and the excuse for not producing it is that the plaintiff intervened in a suit in the Moonsiff's Court between other parties; that he gave this deed and another deed, to which we shall presently advert, to his pleader; that that pleader gave him a receipt for the two deeds and filed them in the Moonsiff's Court; and that during the mutiny, the records of the Moonsiff's Court having been destroyed by the mutineers, those two deeds are not forthcoming.

It is a very important fact that there being two deeds, namely, the deed of sale and the deed of remission, and the pleader having given his receipt for those two deeds, the only deed which in the record of the Moonsiff is stated to have been lodged in his Court is the deed of sale. There is nothing on the records of the Moonsiff's Court to show that the deed of remission was lodged. We have, therefore, only the evidence of the pleader that he lodged that deed as against the fact that, in the record of the proceedings of the Moonsiff as to the documents which were lodged in his Court, no notice whatever is taken of the deed of remission.

If that deed of remission existed and was not lodged in the Moonsiff's Court, it would not have been destroyed with the other records of the Moonsiff, and it ought to be forthcoming. If it existed, and was not destroyed, it would have been very important that it should be produced to the Court, because in all probability that deed would have recited the bill of sale. The remission is said to have been executed under these circumstances:—The plaintiff was to pay to Bebee Jan Rs. 15,000 as the purchase-money of the property; he says that he paid out of the purchase-money to the holder of a zur-i-peshgee lease about Rs. 1,400, and that then Bebee Jan excused him by this deed from paying the remainder of the purchase-money. It is most extraordinary that all this should have taken place on the day of the lady's death; that, in the first place, she should have executed to him an absolute bill of sale, treating Rs. 15,000 as the purchase-money; that on that same day she would have executed to him a remission of the remainder of the purchase money, giving him credit only for that portion which he had paid off to the holder of the zur-i-peshgee. If he did pay off the zur-i-peshgee or mortgage, there is no reason given why the zur-i-peshgee holder has not been called as a witness. His evidence would have been most important. If the case is true, he would have said, "I was the holder of a zur-i-peshgee "lease. I was paid off the amount of "my mortgage by the appellant, and I "delivered up my zur-i-peshgee lease to "him;" but neither the holder of the zur-i-peshgee lease, nor the lease itself which was paid off, is produced.

Under those circumstances the Court cannot say that they are so satisfied affirmatively of the plaintiff's title that they can declare, not only that he has possession, as he says he has, but that he has that possession in consequence of a valid and good title. The Court cannot make such an affirmative declaration of title upon the evidence which has been given in the cause.

Their Lordships are therefore of opinion that the decision of the Court below is substantially correct, and that the suit ought to be dismissed. But they cannot help remarking that, as regards the deed of sale, the learned Judges of the High Court, in expressing their opinion regarding the bill of sale, do not appear to have had before their minds the whole of the evidence in the cause.

Looking, then, to the case as it stands,

the nature of the suit, and the nature of the evidence that has been given, their Lordships think that the appeal ought to be dismissed, and the judgment of the the High Court affirmed, which dismisses the suit; but that the dismissal of the suit ought not to be treated as a binding adjudication of title between the parties.

Their Lordships, therefore, will humbly recommend to Her Majesty that this appeal be dismissed, and the judgment of the High Court affirmed, with costs, but with a declaration that the judgment and decree in this suit do stand without prejudice to any question of title between the parties in any future suit or proceeding.

There was one point I should have mentioned that the suit proceeds for 10 annas odd as the plaintiff's property, and 1 anna odd as his right of lease and sub-lease. Mr. Bell has admitted that he cannot maintain the decision as to that 1 anna odd; consequently as to that there will be a simple dismissal, without any declaration as to its being without prejudice.

2nd April 1873.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Sir James W. Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Montague E. Smith, and the Right Hon. Sir Robert P. Collier.

PROTAB CHUNDER BURROOAH ..*Plaintiff,*

and

RANEE SURNOMOYEE AND OTHERS ... ... } *Defendants.*

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

* From the judgment of Bayley and Macpherson, JJ., in Regular Appeal, No. 65 of 1864, decided 5th February 1866.

Evidence—Long possession of Defendant—Two conflicting local investigations.

In a suit by Plaintiff Appellant to recover possession of chur land and to impeach the Thakbust award, *Held* that he has failed to establish the boundary line on which he relies by evidence on which a Court of Justice ought to disturb the possession of the Respondent since 1852, and probably for a much longer period.

Held, also, that, where the results of two local investigations are conflicting, the earlier is to be preferred, since in the interval between the two investigations, the features of the locality may have changed, and evidence of possession may have been lost.

THE question which their Lordships have to determine on this appeal is whether the plots Nos. 1, 2, 3, and 4 of chur land delineated on the map which, in the judgments of the Courts below, and throughout the argument at the bar, has been called map No. 3, belong to the appellant's zemindary Jumeera, or to the respondent's zemindary Bahur Bund. The suit originally embraced the land marked as plot No. 5 on the same map; but that parcel was claimed by the appellant (the plaintiff in the suit) as a reformation on the site of a diluviated village called Chalitabarree; and it is now admitted that he failed to identify the site in question as that of his lost village, if the latter ever existed and formed part of his zemindary.

The lands which remain in dispute are admitted to have been in the respondent's possession since the year 1852, when, in the course of certain thakbust proceedings, which will be more particularly considered hereafter, they were determined to lie within the limits of Zillah Rungpore and the estate of Bahur Bund, and not within limits of Zillah Goalparah and the estate of Jumeera. The correctness of this determination, and the anterior possession of the lands, are questions contested in the cause.

The difficulty, and it is always considerable, which their Lordships feel in determining appeals of this description, is, in this particular case, increased by the conflicting opinions concerning the title to the land in dispute which have been expressed in India. This suit to

impeach the thakbust award in favor of the respondent, and to recover possession of the lands, was commenced by the appellant in May 1855. For some unexplained reason, it was not brought to a hearing until October 1863, when Mr. Fowle, the Zillah Judge, made a decree dismissing it. In March 1865, a Division Bench of the High Court, consisting of two Judges, reversed that decree, and remanded the cause for retrial on certain specified issues, with a direction that there should be a further local investigation. The Sudder Ameen, who was deputed to make that investigation, made, on the 10th of June 1865, a careful and elaborate report, which was in favor of the appellant as to the four plots now in dispute, but against him as to the fifth. Mr. Robinson, however, who had succeeded Mr Fowle as Zillah Judge, did not adopt or act upon that report; but, coming to the conclusion that the plaintiff had failed to establish a title to any of the parcels claimed, again dismissed the suit by a decree dated the 8th of July 1865. The appeal against his decision came before the Judges of the High Court who had directed the remand, but they were divided in opinion; and according to the then existing practice of the Court in such cases, the decree under appeal was affirmed. For the appellant, therefore, we have the officer who made the last local investigation, and one of the Judges of the High Court; whilst for the respondent, we have the other Judge of the High Court, the two Zillah Judges, and the officers who conducted the thakbust proceedings.

Their Lordships now proceed to consider more particularly the case made by the appellant. He does not claim all the four plots of land by precisely the same title. It appears that, as early as 1810, the then zemindars of Jumeera and Bahur Bund, and a third party, the zemindar of Bheetur Bund, were all litigating the title to a large chur which had formed between two branches of the Burrumpootur.

The facts found in the case, as shown by the report in 2 S. D. A. Reports, p. 269, and the rude map thereto annexed, which in these proceedings has been called map No. 1, were the following:—The Burrumpootur flowed on all sides of the disputed land; the plaintiff's zemindary (Jumeera) lay on the east and north sides thereof, and on the west side extended as far south as the river Suntose (in these proceedings called Sunkosh); the zemindary of Bahur Bund extended from the river Sunkosh to the river Isamuttee; and the zemindary of Bheetur Bund, from the river Isamuttee to the southward beyond the limits of the contested chur. The Judge who tried the cause in the first instance declared his inability to decide with certainty from whose lands the chur had been formed; and accordingly made, what he termed, an equitable division of it between the contending parties.

His ruling is stated in the report as follows:—"He was, therefore, of opinion that the most equitable mode of decision would be to give to the parties respectively the land adjoining to their respective estates; and ordered that the land to the northward of a line drawn east and west from the river Suntose to the plaintiff's boundary should be taken by the plaintiff (the zemindar of Jumeera); that the remaining portion to the southward of that line should be divided by a line drawn from north and south; and that the land to the eastward of that should belong to the plaintiff, and that the land to the westward should be taken by the zemindars of Bahur Bund and Bheetur Bund, according to their respective boundaries." This decision, after going through all the Courts, was finally affirmed by the Sudder Dewanny Adawlut on the 9th of September 1818.

This decree, though admitted to be a binding adjudication of right, failed to determine the disputes between the parties. We find them in 1827 again disputing as to the direction and position of the boundary lines defined by the decree. And in that year, Dr. Scott, a gentleman holding a high civil office in the Zillah of

Goalparah, went upon the land, laid down the boundaries as he conceived them to run according to the decree, and put the parties in possession accordingly. On that occasion he also made a map, of which that produced by the appellant, and marked No. 7, purports to be a true copy. The correctness of this copy is, however, disputed by the respondent, and has not been proved. According to map No. 7, a considerable change has taken place in the course of both the Sunkosh and the Burrumpootur between the years 1818 and 1827; the western branch of the latter having travelled considerably to the eastward.

It is, however, clear that, whatever were the precise boundaries laid down by Dr. Scott, plots Nos. 1 and 2 are the only parcels of the land now in dispute which formed part of the land which was apportioned by him, and was the subject of the decree of 1818. For both parties are agreed that what was in 1818 the western branch of the Burrumpootur, and, therefore, the western boundary of the chur then in dispute, is shown on map No. 3, by the old channel running from A to B; and we have therefore now to consider what is the title which the appellant asserts to lots Nos. 3 and 4.

The zemindary Jumeera contains two mouzahs called Takeemaree and Patwamaree. Bahur Bund contains two mouzahs called Balar Hat and Konearmutty. In 1832 or 1833, a dispute arose between the then zemindars whether certain chur land ultimately ascertained by survey and measurement to consist of 1,478 beegahs, 15 cottahs, and 5 doors, which had been thrown up by the river Sunkosh, was a reformation of parts of the two former, or of the two latter mouzahs; and, therefore, whether it belonged to Jumeera or to Bahur Bund.

This question was, in the first instance, fought in the Fouzdary Courts, and the result of the proceedings there was that the Magistrate, on the 17th July 1835, made an award in favor of the appellant, which was affirmed by the Commissioner on the 31st of December following. The map No. 6, which is in evidence in this suit, was made in the course of those proceedings. In 1843 the zemindar of Bahur Bund brought a suit in the Civil Court to set aside the Magistrate's award, and recover the land comprised therein; the map No. 5 was made on the occasion of a local investigation ordered in that suit; and, on the 20th March, 1845, a decree was made in the plaintiff's favor by the Principal Sudder Ameen. That decree was, however, reversed, and the suit dismissed by a decree of the Sudder Dewanny Adawlut on the 26th of September 1847. The result, therefore, of that litigation was to affirm the title of the zemindar of Jumeera to the land in question in that suit, whatever it may have been. And in this suit the appellant claims lots Nos. 3 and 4 as the land so decreed to him in 1847.

By the decree of the High Court directing the remand, against which neither party appealed, the title to all the four plots of land was made to depend on the determination of a single issue; and, in order to see how that came about, it is desirable to consider briefly the judgment of Mr. Fowle and the first judgment of the High Court.

Mr. Fowle found that the whole face of the country had been changed since 1818 or 1810, when the decision, on which the title to plots Nos. 1 and 2 rests, was passed; that the statements of neither party in respect of the different changes were supported by any evidence worthy of credit; and, consequently, that the only thing for the Court to do was to compare the different maps, and on that comparison, he came to the conclusion that the plaintiff (the appellant) had failed to prove his case. Both parties, however, seem to have admitted before him (or if not before him, before the High Court on the first appeal) that, whatever had been the changes in the course of the Sunkosh, its true channel in 1810 or 1818 was identical with that which is traced on maps Nos. 5 and 6 as its dry channel, and the southern boundary of the land then in dispute. From

this admission it followed that, if the true site of that channel could be ascertained, it would determine the title to all the four plots of land, since all that was north of that line would belong to Jumeera, and all that was south of it to Bahur Bund. And their Lordships think that both parties must be taken to have agreed to be finally bound by the finding on the issue directed by the High Court, *viz.*, whether the line F G or the line P P on map No. 3 was the old bed of the Sunkosh.

It does not, however, appear to their Lordships that the effect of the remand was to shift or affect the burthen of proof, or to prevent a failure to determine the true line of the old bed of the Sunkosh, if such should take place, from being fatal to the appellant, who had to make out his title to disturb the possession of the respondent.

The earlier judgments in this cause, and their own examination of the maps, have satisfied their Lordships that the attempt to determine the issue above stated by a mere comparison of these so-called maps is hopeless. None of them, unless it be map No. 4, have been made by scale or compass. They are rather rude diagrams than maps in the proper sense of the term To fix by a comparison of them a disputed line in a country of which the face had never changed, would not be easy. But it is admitted that, during the half century which they cover, the locality embraced in them has been the subject of frequent, and more or less violent, changes, and has probably been affected by almost every annual flood. And their Lordships must express their surprise and regret that suitors in India, who obviously do not shrink from carrying on litigation of this kind at enormous cost, should not be at the pains of causing the maps, which are supposed to be essential to its right determination, to be prepared on something like a scientific principle.

The cause went back after the remand. A Sudder Ameen was deputed to make the local investigation directed to be made; he filed his report; and the argument of the learned Counsel for the appellant may almost be summed up in the proposition that it was the duty of the Courts below, and will be the duty of their Lordships, to adopt and act on that report.

The Sudder Ameen, after admitting that, by means of the alteration in the features of the country, it had become "most difficult to arrive at any correct conclusion in the matter," reported that, on a careful comparison of the maps with the disputed locality, he had come to the conclusion that F G was the old bed of the Sunkosh, and then proceeded to give in detail the grounds on which he had come to that conclusion.

It is obvious that the special value of his opinion must depend on the degree in which the comparison of the maps has been aided by actual observation of the locality, and of undisputed landmarks within it. So far as it rests on mere comparison of maps, or inferences drawn from former proceedings, it is of less weight than the judgment of the Judge, who is, presumably, as competent as the Sudder Ameen to compare the maps, and must speak with greater authority as to the effect to be given to the documentary evidence in the cause.

The reasoning contained in his first ground seems to depend almost wholly on a comparison of the maps, particularly maps Nos. 2, 5, and 6; on the assumed admission by the respondent of the correctness of the two latter maps; and on the effect to be given to the replication of her predecessor in title in the suit of 1844.

The correctness, however, of map No. 2, as a copy of that from which map No. 1 was made, has been directly impugned in this suit, and has not been established by the appellant. The delineation therein of Chalitabaree, of which there is no trace in map No 1, certainly casts considerable suspicion upon it. And even if it were authentic, it would, in one important particular, fail to support the appellant's case. For it places the con-

fluence of the Sunkosh with the western branch of the Burrumpootur north of Kaladangah, which is marked as north of Bullabhur Kas; and even a little to the north of the Konearmutty Dara, or, at all events, in the immediate vicinity of that dara. And so far it seems to be in favor of the proposition that P P, rather than F G, indicates the site of the old bed of the river.

Again, the principal argument founded on maps Nos. 5 and 6 is that both place, the Konearmutty Dara considerably to the north of that which each represents to be the old bed of the Sunkosh forming the southern boundary of the land then in dispute. But it is admitted that the place assigned by these maps to the house of Neemchund Sircar (an undisputed landmark) cannot be reconciled with the place assigned to the Konearmutty Dara; and the Sudder Ameen assumes that the maps are accurate as to the site of the dara, but inaccurate as to the site of the house. It seems, however, to their Lordships that, if inaccuracy in one of these particulars is established, little dependence can be placed upon the maps. It is mere matter of speculation whether one site or the other is misplaced; it may be that both are misplaced.

Of these two maps, it is further to be observed generally, 1st, that, where they differ (and the Sudder Ameen has found that they do differ from each other in some respects), greater credit should be given to the Magistrate's map No. 6 than to the Ameen's map No. 5, because the final decree of the Sudder Dewanny Adawlut in 1847 upheld the Magistrate's award against the Ameen's report; and, 2ndly, that the principal question then in controversy, and with reference to which these maps were made, was not so much what was the southern boundary now in dispute, as whether the Sunkosh, higher up in its course, had not shifted its bed, so as to give the present appellant (the plaintiff in that suit) a right to claim land to the west of the then flowing river as parcel of his village Takeemaree—a question which was ultimately decided in his favor.

The latter observation affords an answer to the argument of the Sudder Ameen, which is founded on the statement made by the plaintiff in that suit in his replication to the effect that the river Sunkosh had not changed its course for thirty to thirty-five years. For the question here is not what case the respondent or her predecessors in title may heretofore have put forward, but where, in fact, was the old bed of the river; and the final decree of 1847 is inconsistent with the proposition that the Sunkosh had not then shifted its course, and must be taken to be a finding against it.

Map No. 4, so far as it bears upon the present question (a point which will be afterwards considered), is treated by the Sudder Ameen as being in the respondent's favor.

In his second ground the Sudder Ameen relies on a supposed admission in the answer of the respondent in this suit. But Mr. Kay showed, as their Lordships think successfully, that this argument of the Sudder Ameen is founded on a misconstruction of the term "the western stream of the Burrumpootur mixed up with the Sunkosh," which he treats as indicating the actual point of confluence of the two rivers; whereas, it may, and probably does, mean merely the course of the Burrumpootur after it has received the waters of the Sunkosh.

Another part of the Sudder Ameen's report, which is extremely unsatisfactory, is his attempt to explain the great difference between the quantity of the land comprised within plots 3 and 4, *viz.*, 5,431 beegahs, and that decreed to the appellant in 1847, *viz.*, something less than 1,479 beegahs. This fact affords a strong argument against the identity of the two parcels. Yet almost all that the Sudder Ameen says of it is:—"Moreover, there seems no reason why the lands to the northward of the line F G should not belong to the plaintiff because they

exceed the quantity before," by which he probably means the quantity formerly claimed. Again, the Sudder Ameen has either failed to identify the Isamuttee of the decrees of 1810 and 1818, or he has placed its site so near the line F G as to make it difficult to see how, between the confluence of the Sunkosh and that of the Isamuttee with the western branch of the Burrumpootur at that time, there could have been lands of Bahur Bund *ex adverso* to the disputed chur sufficient to support the assignment to Bahur Bund of so much of that chur as the decrees of 1810 and 1818 gave to that zemindary. This circumstance was strongly pressed by the learned Counsel for the respondent, and there appears to their Lordships to be much weight in the argument.

A more material consideration is the following:—It is clear, as the Zillah Judge, Mr. Robinson, has pointed out, that whether the old bed be at P P, or at F G, the true line, if prolonged nearly due west, ought to strike the northern extremity of the boundary line drawn (speaking roughly) from south to north, by Dr. Scott, in 1827. Therefore, how far that boundary line extended in a northerly direction is a question most material to the determination of the present issue. And it is upon that point that the report of the Sudder Ameen seems to be most directly in conflict with the result of the earlier local investigation in 1852. Their Lordships cannot but think that a strong case is required to destroy the effect of those thakbust proceedings. The investigation involved the fixation of the boundaries not merely of the two zemindaries, but of two conterminous zillahs, Rungpore and Goalparah. It appears to have been made by the Revenue department with considerable care; the Collectors of both zillahs being parties to it. Their award seems to have been the subject of appeal to the Board of Revenue, which confirmed it; but the grounds of that appeal, which might have thrown some light on the present controversy, are not found in the record. Mr. Bedford's map, No. 4, is by far the most scientific of those produced. He appears to have gone upon the ground, to have mapped it, to have ascertained what lands were in dispute between the rival zemindars, and to have referred those disputes to the Collectors of the two zillahs. Several parcels of land, besides those in question in the cause, were then in dispute. The two Collectors went upon the spot and determined the boundary wherever it was disputed. Their investigation was treated in the argument as perfunctory, but their Lordships do not think it deserves that character. They seem to have examined the ryots on the ground; and as to one of the disputed points (not however one of those now in question), they differed in opinion, and had to refer that case for determination to higher authority. The remarkable thing is that, according to the concurrent statements of both Collectors, the zemindar of Jumeera almost gave up his case as to the parcels of land which are the subject of this suit. It was argued that the suit itself is an answer to those statements. But it seems to their Lordships to be more probable that the zemindar should, as an after-thought, have determined to disavow his agents, and try the chances of a civil suit, than that the Collectors should have so grossly misapprehended what had passed before them. The result of these proceedings was that the boundary was fixed by prolonging the admitted boundary line of Dr. Scott to the north-east, as is shown in map No. 4. Again, from the Collector's report it may be inferred that evidence was thus forthcoming to show that the zemindar of Bahur Bund was actually in possession of the land in question. And this is confirmed by the finding of Mr. Fowle (Appendix, p. 1053) on the evidence before him as to the anterior possession.

Their Lordships are of opinion that the report of the Sadder Ameen made 13 years afterwards does not afford a sufficient answer to their thakbust proceedings. They are not satisfied of the correctness of his assumption that the tree which he found standing, whether asoodh or pykar, marked the northern extremity of Dr.

Scott's boundary line. It may have been merely a point in that line, and the Revenue officers may have been correct in prolonging that line as they did.

Their Lordships have not been insensible to the difficulty, so strongly urged by Mr. Joshua Williams in his reply, of finding any land to correspond with C in map No. 1, consistently with map No. 4. But considering that C was in 1810 the extreme portion of a chur surrounded on all sides by the Burrumpootur, they do not think that its disappearance in the course of half a century would be altogether unaccountable. Nor can they lay much stress on the attempt of the respondent's mooktear to identifiy it with kaem land. A native mooktear is very apt to clutch at a false explanation, rather than admit his inhability to explain a circumstance which seems to militate against his case.

On the whole, their Lordships have come to the conclusion that the report of the Sudder Ameen fails to establish that the line of the old Sunkosh was at F G. They do not feel that, in coming to that conclusion, they are departing from what has been laid down in other cases touching the weight to be given to a report made by an officer deputed to make a local investigation, and stating conclusions drawn from what he has actually found and observed on the ground. Enough has been said to show that the report of the Sudder Ameen, in this case, is not exactly of that character. But if it were, their Lordships, in treating it as insufficient to destroy the effect of the thakbust proceeedings, would be only applying in favor of the respondent the *ratio decidendi* which was applied in favor of the appellant by the Sudder Dewanny Adawlut in 1847, *viz.*, that, where the results of two local investigations are conflicting, the earlier is to be preferred. The principle is reasonable; since in the interval between the two investigations, the features of the locality may have changed, and evidence of possession may have been lost.

If it were necessary for their Lordships, in dealing with this voluminous record, to determine affirmatively where the line of the old Sunkosh was, they would be disposed to prefer the line P P to that of F G. But it is not necessary for them to do this. It is sufficient for them to hold with Mr. Justice Macpherson that the appellant has failed to establish that F G was the true line, by evidence on which a Court of Justice ought to disturb the possession which the respondent has had of the lands in question; certainly since 1852, and probably for a much longer period.

Being of this opinion, they will humbly advise Her Majesty to affirm the decree under appeal, and to dismiss this appeal with costs.

17th December 1875.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon. Sir James W. Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague E. Smith, and the Right Hon. Sir Robert P. Collier.

THE COURT OF WARDS ... *Plaintiff,*

and

RAJA LEELANUND SING ... *Defendant.*

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Remand—Court incompetent to go beyond the remand order—Evidence.

On a prior appeal to England, the case which was one of boundary dispute, was finaly decided on some points, and remanded as to the rest. The broad, if not the sole, issue left to be determined after remand was—What portion of the land in dispute was comprised in Mr. Piron's settlement of Havelee with the defendant? The propriety or otherwise of that settlement was not left open for adjudication, the settlement being held to be a proper one. On the adjudication of the case after remand and after a further enquiry, the case

* From the judgment of Norman and E Jackson, JJ. dated the 2nd March 1870.

was again appealed to England. *Held* that the High Court was not competent to go behind the remand order and to adjudicate on question as regards the propriety or otherwise of Mr. Piron's settlement, and should have confined itself solely to the question which it was directed to try. The finding of fact of the High Court as regards the land not included in that settlement and its decree to the Plaintiff for the same confirmed, but its finding as regards the impropriety of that settlement with regard to some land on fresh evidence and the consequent decree regarding the same are set aside.

THIS appeal and cross-appeal are the close of a litigation in which the parties, or those whom they represent, have been engaged for more than twenty years concerning the ownership of a large tract of land lying between lands admitted to form part of their respective zemindaries, and consisting, for the most part, of hills and forests.

The dispute is essentially one of boundary. The facts out of which it arose, and the earlier history of the litigation which has been the consequence of it, are very fully stated in the report of the case on the former appeal to Her Majesty in Council, to be found in the 10th volume of Mr. Moore's Indian Appeals. And their Lordships, to avoid an unnecessary recapitulation, will, whenever it is requisite to do so, refer to that statement as if it were incorporated in the present judgment.

The first, and not the least, material question to be now determined is—what was decided by the judgment of the Judicial Committee on that former appeal, and the order of Her Majesty in Council made thereon; and what issues were left open for the determination of the Indian Courts under that order, so far as it was one of remand.

The appeal was that of Raja Leelanund Sing, the plaintiff in the suit. By his plaint he had parcelled out the disputed land in definite areas, treating them as appurtenant to different mouzahs which had been recorded as forming part of the Nizamut or settled mehals, and claimed to recover them as lying within the boundaries of those mouzahs. He had never, as is now admitted, been in possession of any part of the land which is now in question. He adduced a considerable body of evidence in support of the case made by his plaint. The Judge of first instance, however, held that he had entirely failed to make out that case, or to establish a title to disturb the possession of the defendant, and dismissed the suit. On appeal, two of the Judges of the then Sudder Court affirmed that decree of dismissal. They, too, were clear that the plaintiff had failed to prove his title as alleged. On the other hand, they seem to have admitted that the defendant could have no title to anything that was not included in the settlement of Havelee. They considered, however, that that settlement did include something in excess of the lands comprised in Captain Ellis' map, and within the disputed territory; that the extent of such excess was undetermined; and that it lay on the plaintiff to show what he was entitled to recover, which he had failed to do. The third and dissentient Judge, Mr. Sconce, would have given a decree in favour of the plaintiff. But his *ratio decidendi* was not so much that the plaintiff had proved his case as alleged (though he seems to have thought that some of the specified mouzahs had been shown to have lain, if not still to exist, wholly or partially in the disputed territory), as that the plaintiff, as purchaser of the Nizamut Mehals, was presumably entitled to all that was not included in the settlement of the resumed Pergunnah Havelee; and that no part of the disputed territory, nothing in fact beyond the confines of Ellis' map, had been included in that settlement. The Committee that determined the former appeal in 1864 clearly affirmed the findings of the two Indian Courts as to the insufficiency of the plaintiff's evidence to establish the case made by him. The judgment at page 111 of Mr. Moore's report says distinctly:—

"We agree, indeed, with the majority "of the Indian Judges, that the appel- "lant has failed to prove that no part of "the disputed territory was included in

"the settlement, and that he has failed "to prove, by independent evidence, his "right to recover the mouzahs as speci-"fied in the plaint."

It is important to remark upon the concurrent judgments of the two Indian Courts, and of the Committee of 1864, on this particular point; because the judgment of Mr. Justice Norman, which is now under appeal, whilst it admits (p. 644) that the new evidence taken on the remand did not carry the plaintiff's original case any further, proceeds almost entirely on the effect of the old evidence, and thus seems to re-open a question concluded by the former judgments.

If there is one thing more clearly expressed than another in the judgment of the Committee of 1864, it is that "the "decision of the suit depended on the "question whether the land claimed, or "any, and if any, what defined part of it "was included in the Havelee settle-"ment" (10 Moore, pp. 87-88).

Upon this question the Committee had to pronounce between the joint judgment of the two Judges of the Sudder Court and the conflicting judgment of Mr. Sconce. To that end it addressed itself to a careful examination of the settlement proceedings, particularly those of Mr. Piron. In the course of that, it found that two mouzahs, named the one Gormaha or Kormaha, the other Ghorakhore, which lay partially, if not wholly, within the disputed territory, had been advisedly relinquished by the revenue authorities pending the resumption proceedings, as part of the Nizamut Mehals; and accordingly that so much of the disputed land as was appurtenant to these mouzahs belonged to, and ought to be adjudged to, the plaintiff. On the other hand, it came to the conclusion that the final settlement of Havelee, under the head of "Bunkur and Boondee "Mehal, besides the putwarrie's papers, "whatever came to light by the deposi-"tions of farmers and persons informed, "and by perusal of pottahs, &c., S. R. "1,116" did include the revenue arising "from Ghauts Marug Kurrailee, and "other ghauts" (10 Moore, I. A., p. 103). The Committee next proceeded to consider "what was this property, and "whether the ownership of it implied "the ownership of any land in excess of "the measured area, and beyond the "confines of Ellis' map."

Upon this point they appear to have satisfied themselves that the ghauts in question, or some of them, were geographically beyond the confines of Ellis' map, and within the disputed territory; but to have felt unable to come to a clear conclusion as to the nature and character of the Bunkur and Boondee Mehals, and of the revenue arising from the ghauts, and upon the question whether the rights included in the settlement involved the proprietorship in the soil of any, and what, part of the lands in dispute. It accordingly, finally deciding some of the questions in the cause, but leaving others open to further inquiry, recommended Her Majesty to make the order under which the subsequent proceedings have taken place.

That order declared, first, that the plaintiff was entitled to Mouzahs Kormaha and Ghorakhore and the lands comprised therein and belonging thereto, and to all such other parts of any of the lands in question in the suit as were not included in the settlement of Havelee; secondly, that the settlement of Havelee comprised only the measured area of 123,207 beegahs, and so much of any of the land in dispute as upon the inquiries after directed might appear to belong, or be properly attributable to, the Bunker and Boondee Mehals in the pleadings mentioned, or to the ghauts, of which the same in part consist; and that the rights of Havelee in respect of Bakum did not extend beyond a certain quantity of land there specified. It then directed an inquiry "what was the nature and "character of the Bunkur and Boondee "Mehals, and of the ghauts comprised "therein respectively which were includ-"ed in Piron's settlement, and were "therein estimated at 1,116 sicca rupees; "and whether the same or any and which

"of them included any and what part "of, or any and what right or interest "in, the land in question in the suit. "And it finally declared that so much "of land in question as might upon "such inquiry appear to be comprised "in the said Bunkur and Boondee "Mehals or ghauts belonged to Havelee, "and that the plaintiff was entitled to "recover the residue of the land in "question."

It appears to their Lordships that the broad, if not the sole, issue which this order left to be determined between the parties was what portion of the land in dispute was comprised in Mr. Piron's settlement under the item already set forth. It has, however, been strenuously argued at the Bar that even if the terms of Mr. Piron's settlement import that he included therein some part of the disputed land, it was open to the parties under this order of remand to show that such inclusion was unintentional or improper; in other words, to question the propriety of the settlement and its binding force upon the plaintiff. Their Lordships cannot so construe the order. That it was not the intention of the Committee of 1864 to leave any such questions open plainly, as their Lordships think, appears from several passages in the judgment. It is said at p. 89 of Mr. Moore's Report, "in considering what was included in "Havelee the Court below could only "deal, as we upon this appeal must deal, "with the Havelee settlement as it "stands. For the purposes of this suit "that settlement must be considered as "valid and subsisting." Again, at p. 99, "we think, indeed, that the settlement "of 1844 affords the only safe criterion "for determining what belongs to "Havelee, and what to the Nizamut "Mehals." And at p. 103 of the same "report it is said, "it must be taken, "then, that Mr. Piron not only included, "but properly included, the revenue "arising from Ghauts Marug, &c., in his "settlement."

It is said that this conclusion of the Committee was, as a passage in the preceding page indicates, partially at least, founded on a misconception, arising from an error in printing the former record, to the effect that certain village papers, which were in fact part of the defendant's evidence, had been put in by the plaintiff. The judgment, however, seems to their Lordships to treat these documents rather as corroborative of the conclusion to which the Committee had come than as the foundation on which it rested.

Again, that the Committee of 1864 may reasonably have determined to conclude the question of the propriety and binding nature of the settlement appears from this consideration. The plaintiff, if entitled to impeach that settlement, could only do so by proving clearly that it covered lands included in the perpetual settlement of the Nizamut Mehals. He had failed to do this, because he had failed to establish his title to the lands in dispute. The Committee, however, said in ease of him,—"You shall not be "concluded by your failure to prove the "title alleged against the defendant in "possession. He cannot be entitled to "anything that is not included in the "settlement of Havelee; and you shall "have the benefit of the presumption "that what is not so included belongs to "the Nezamut Mehals." The rights of the parties being thus stated, the issue between them necessarily becomes, "What was in fact included in the settlement of Havelee." Their Lordships, however, do not rest upon expressions in the judgment of the Committee as conclusive. If there be any inconsistency between them and the terms of Her Majesty's order in Council, the latter, which is in the nature of a decree, ought to prevail. On the other hand, if that has concluded the question now under consideration, neither the Courts in India, nor their Lordships sitting here, can go behind it And looking to the terms of the inquiry directed, which assumes that the Bunkur and Boondee Mehals and the ghauts are included in Piron's settlement, and seeks only to ascertain their character and

nature, and what they covered; and also to the final declaration that so much of the land as should be found to be comprised in these mehals and ghauts belongs to Havelee, their Lordships are clearly of opinion that the question of the propriety of Piron's settlement and of Piron's intention in making that settlement, are no longer open to the plaintiff in this suit; and that the only question between the parties is what that settlement as it stands included in fact. This view of their Lordships necessarily disposes of a considerable portion of the argument addressed to them at the bar and of Mr. Justice Norman's judgment.

Under the order in Council, as construed by their Lordships, the task of the Indian Courts upon the remand was plainly limited. They had to ascertain, first, whether the Bunkur and Boondee Mehals and the ghauts included in Piron's settlement, or any and which of them lay beyond the confines of Ellis' map and within the disputed territory; second, whether the rights so settled involved the proprietorship of the lands over which they were exercised; and, if so, third, what portions of the disputed territory represent such lands, and are, therefore, to be taken to be included in the settlement. For the purposes of these inquiries, they were at liberty to direct such local investigations as they might consider desirable, and were bound to give due effect to what had been laid down by the Committee of 1864 concerning the general burthen of proof.

Unfortunately, however, the Indian Courts have not thus restricted their action; they have allowed the parties to enlarge the scope of the fresh litigation by re-opening questions that have been decided; and it now becomes necessary to consider more particularly how the case stands on their conflicting judgments.

The cause was first heard on the remand by Mr. Craster, the Officiating Judge of Zillah Bhaugulpore. In his judgment he states that the main questions for the consideration of the Court were, first, were the Bunkur and Boondee Mehals and Ghauts, which form the subject of the present suit, included in Mr. Piron's settlement of Pergunnah Havelee; and second, what was the nature of those mehals, and did they include any, and (if any) what portion of the land now in dispute. The first issue does not precisely accord with the terms of the inquiry directed by the order in Council: but if we are to understand the term "mehals and ghauts which form the subject of the present suit," to import mehals and ghauts within the disputed territory, the inquiry was legitimate, because the order in council had not conclusively determined the geographical positions of all the ghauts, of which the revenue made up the sum of S. Rs. 1,116 mentioned in Piron's settlement; and, in fact, as will be shown hereafter, some of those ghauts now turn out to be within the confines of Ellis' map.

Upon these issues, however, the plaintiff seems to have succeeded in re-opening and re-arguing at great length upon the former as well as upon the fresh evidence, the original question of title. Mr. Craster's opinion on this part of the case was in favour of the defendant. But with that opinion, and the reasons on which it is founded, their Lordships, for the reasons above stated, have on the present occasion little concern. Mr. Craster next proceeded to dispose of the contention before him that Mr. Piron not only did not intend to include "the mehals and ghauts in question" (meaning it must be assumed mehals and ghauts in the disputed territory) in his settlement, but was apparently not even aware of their existence, certainly had no knowledge of them as assets of Havelee.

On this point, again, he found in favour of the defendant that the ghauts mentioned in the proceedings were included, and rightly included, in the settlement of Havelee, and that they were situated beyond the limits of Ellis' map, and within the disputed territory.

He then addressed himself to the inquiry as to the nature of the property,

and whether the ownership of it implied the ownership of any land in excess of the measured area, and beyond the confines of Ellis' map. And for the reasons stated at pp. 608 and 609 of the new record, he came to the conclusion that the Bunkur and Boondee Mehals comprised in Piron's settlement included the full proprietary right and interest in the lands from which the revenues appertaining to those mehals was derived,—that is to say, of the lands situated within and about the ghauts comprised within those mehals. And applying this principle, he held that, inasmuch as the positions of the ghauts had been determined to be beyond the confines of Ellis' map, and within the disputed territory, it followed that "the land within and about them were those in question in the suit."

A new element of confusion appears to have been introduced into the cause whilst it was before Mr. Craster by an understanding or arrangement between counsel that, as to that portion of the disputed land which is south of the Karmeg Hill, there should then be no trial of title; the plaintiff intending to rely on his right to recover it as part of the village of Gormaha in the execution-proceedings to be taken in order to enforce that part of the order in Council which had adjudged to him that mouzah. Mr. Craster's decree dismissed the suit, so far as it sought to recover any of the property claimed, except that portion of it to which the plaintiff had been declared by the order in Council to be entitled.

The cause then went on appeal to a Division Bench of the High Court, consisting of Mr. Justice Norman and Mr. Elphinstone Jackson. Those learned Judges arrived at different conclusions; but, according to the course of practice, the judgment of the senior Judge prevailed, and the result was the decree which is under appeal.

In his long and elaborate judgment, Mr. Justice Norman appears to their Lordships to treat the case sometimes as open to him upon all the original issues; and at others, as partially concluded by the order in Council.

At page 631, line 34, he says, "And first, I think it must be assumed that notwithstanding anything Piron might have done, nothing can be said to have belonged to, or to have been properly attributable to, the Bunkur and Boondee Mehals settled with Maharanee Wuhjonissa, which can be shown to have been comprised in the perpetual settlement of Pergunnah Purbutparah, and to have been held or enjoyed as part of such perpetually settled estate down to the time of the plaintiff's purchase."

"Secondly. That when the bunkur and boondee rights are to be enjoyed over lands which would appear to have formed part of the lakhiraj estate of Havelee, and not to have been comprised within Pergunnah Purbutparah, the settlement of bunkur rights would show, or assume the existence in the person with whom the settlement was made, of a title to possession of the soil itself, subject only to such rights as the Government may have had on the expiration of the settlement for twenty years, to demand an increased jumma in respect of the rights to the soil.

"Thirdly. That when the Bunkur and Boondee Mehals, mentioned in Piron's settlement, are found to exist in tracts in which there is nothing to show that the land was not part of Pergunnah Purbutparah, according to the decree of Her Majesty in Council, the property in the soil and the right to the rents and profits of any portions of it, cultivated, or to be cultivated, must be taken to belong to the plaintiff as appertaining to Pergunnah Purbutparah, and the Bunkur and Boondee as effectually settled with Havelee under Piron's settlement."

Having thus defined the *ratio decidendi* which he proposed to adopt, the learned Judge, after reviewing the whole of the evidence in the cause, and particularly that taken before the remand, came to the conclusion that the accounts and other documentary evidence produced by

the defendant on the original hearing of the cause, were false and fabricated (an opinion then for the first time expressed), and that, on the contrary, the evidence for the plaintiff was trustworthy, and established that from the time of the Decennial Settlement down to the time of the resumption of Havelee, there was within Pergunnah Purbutparah a Bunkur Mehal called the Bunkur of Morekhurt and Tetroun; that the owner of this mehal was entitled to, and either personally received the profit, or leased out the right to take the jungle products over all the hill tracts lying to the east of the cultivated lands of Tuppeh Lodhweh; that the settlement of Purbutparah in 1790, amongst the assets of which the Bunkur Mehal was set down, included the right to the absolute property in the soil in the entirety of the hills in question; that the Government retained no right or interest in the land in question at the time of Piron's Settlement, and that no right or interest in this portion of land in dispute passed, or could be passed, to Maharanee Wuhjoonissa under that settlement.

He found, moreover, secondly, that as regarded the land to the north and east of the road through the Amjhur Ghaut, the plaintiff was clearly, and in any view of the case, entitled to a decree, because neither the Bunkur Mehal of the Amjhur Ghaut, nor the Boondee Mehal of Bhorekund Chuckabore, were included in Peer Khan's pottah, and consequently could not be taken to be included in Piron's settlement. These findings were confined to that portion of the disputed land which the plaintiff claimed as appurtenant to Tuppeh Lodhweh.

The learned Judge next proceeded to deal with the claim of the plaintiff to recover possession of Soogee, and the land to the north and west of the village marked by that name in Captain Shrewill's map. He held that the plaintiff's evidence had made out no title to recover this; that, on the contrary, the evidence that Soogee as far as Ghaut Marug was really part of Havelee was very strong; and, consequently, though unable to account for its not being included in Ellis' map, he awarded this portion of the land in dispute to the defendant.

He next proceeded to consider the defendant's title in respect of the ghauts west of Soogee and south of Simroun, *viz*, Gooreya, Sehla Mela, Sikhole, and others. The portion of the land in dispute which belonged to, or is represented by, those ghauts, had been claimed by the plaintiff as appurtenant to Tuppeh Simroan.

He failed, however, in Mr. Justice Norman's judgment to give any trustworthy evidence that the land ever formed part of Tuppeh Simroun, or that the farmers of that Tuppeh ever exercised any dominion over the land, or that the profits of the ghauts in question were ever included in the collections of Simroun. He produced no pottahs or kubooleuts relating to the bunkur of the ghauts, nor any accounts whatever of bunkur and boondee in respect of Simroun. On the other hand, the learned Judge thought that the defendant had failed to show affirmatively by trustworthy evidence that Ellis and Farquharson were wrong in excluding this tract from Havelee. He observed that if he could have given full effect to his own impressions he would have ruled that the inclusion of the bunkur and Boondee Mehals in Piron's settlement was effected by means of fraud; but that, giving effect to that part of the judgment of the Committee of 1864 which threw upon the plaintiff the burthen of proof, and taking the Bunkur, Boondee, and Phulkur Mehals to be included, and rightly included, in Piron's settlement, he thought that, in the absence of any proof that the tract in question had been previously included in the settlement of Purbutparah, or that the owner of that pergunnah had ever exercised any ownership over the land, he was bound to say that the Bunkur, Boondee, and Phulkur Mehals of the tract in question included all the profits derivable from the soil; and

if so, then the property of the soil was, at the date of the resumption, vested in the owner of Pergunnah Havelee as an integral part of that estate. The learned Judge added, "If the plaintiff has "any right to this portion of the land, it "appears to me that, under the direc- "tions contained in the judgment of "their Lordships, I must say that he has "failed to prove it."

He then proceeded to deal with that portion of the disputed territory which lies south of the Kurmeg Hill, otherwise called the Khurwa Dalan. The title to this, as has been already stated, was, by the arrangement before Mr. Craster, left to be determined in the execution-proceedings to be thereafter taken. The High Court, however, thought that the question should be determined on the appeal before them; and gave to the Counsel for the defendent an opportunity of producing any evidence which, but for the arrangement in question, they would have produced on this part of the case. Of that opportunity they did not avail themselves, but relied on the failure of the plaintiff under the general burthen of proof that lay on him, to show that this portion of the land was not included in Posun Pasee's lease. The High Court, however, held that it was the duty of the defendant to produce Posun Pasee's lease; and that, in its absence, the land immediately in question must be pronounced not to be included in Piron's settlement; and, therefore, under the the terms of the order in Council, to belong to the plaintiff.

Mr. Justice Norman gave effect to his findings by defining on a copy of Sherwill's map by the course of a stream and two red lines the boundaries of the land which he proposed to leave in the possession of the defendant; and by awarding to the plaintiff the rest of the land in dispute.

Mr. Justice Elphinstone Jackson, as has already been stated, did not concur with his colleague. He agreed, that the land south of the Kurmeg Hill ought to be adjudged to the plaintiff; but, as to the land north of that hill, he felt that the High Court was bound by the order in Council, and that Mr. Justice Norman's judgment was in consistent with that order. His own views are thus expressed:—

"It has been argued before us that the "decision of the Privy Council leaves the "whole question open as to whether any "portion of the disputed land is attri- "butable to, or is conveyed by, the "settlement of the bunkur and boondee "rights. If the plaintiff could show even "now that the ghauts or hills, the bunkur "and boondee rights of which were set- "tled with Havelee, were situated in "Havelee proper, as measured by Cap- "tain Ellis, I think he might still obtain a "decree for the whole land in dispute. But "there is no longer any attempt to do this. "It is admitted, or, if not admitted, it is "quite clear that those bunkur rights "extended over a large portion of the "disputed land. There is no doubt or "mistake as to the position of the ghauts "in which those bunkur rights existed. "If the bunkur rights of Hursa Totya, "Baromussia, Kallythan, Marug, Kur- "railee, &c., are rightly included with "Havelee, they convey also the bunkur "rights of the whole tract of land situ- "ated between them and Havelee. If "the bunkur rights carry the land, then "they carry with them the right to the "whole of the disputed land from the "spot where the survey boundary of "Lodhweh has been laid down. The sole "exception is that portion of the land "to the north of the Hursa Totya Ghaut, "which is described in the map as Am- "jhur Hill and Bhorekhund Chuckabo. "The Amjhur Hill is not mentioned in "any of the pottahs on which the settle- "ment was founded. The road through "it does not lead to Havelee. Both the "plaintiff's evidence and that of the "defendant, as given in the original "trial, point to this portion of the hills "as constituting the position of Morek- "hut, which is one of the mouzahs of "Tuppeh Lodhweh. Plaintiff has, I "think, clearly shown that the settle-

"ment of Piron conveys no rights over "this portion of the hills. But as regards "the remaining portion of the hills, *viz.*, "that between Hursa Totya on the "north, and the hills surrounding Marug "on the south, the plaintiff does not "attempt to show that they are not at-"tributable to the bunkur rights settled "with Havelee. It is certainly argued "that bunkur rights do not convey the "land. But in such a case as this, "where land is wholly jungle and uncul "tivated, the right to bunkur would be "*prima facie* proof of the right to the "land. I think the Judge was quite "correct in this view of the case."

And after some further observations to the effect that the land to which the bunkur rights attached must go with the bunkur right; that the plaintiff had failed to show that he could separate any portion of the disputed land from the land to which the bunkur rights attached, and had not, indeed, attempted to do so; that it was no longer open to him to dispute the settlement, or to contend that the bunkur included in it belonged to Tuppeh Lodhweh, the learned Judge came to the conclusion that the plaintiff's suit to recover the land situated to the north of the Karmeg Hill, and claimed by him as a portion of his Tuppehs Simroun and Lodhweh, should be dismissed, except as to the Amjhur Hill, which should be decreed to the plaintiff.

It is, no doubt, true that this learned Judge proceeded to intimate that had the whole question as to the right of the plaintiff or the defendant to bunkur rights, as well as the land of the ghauts, been open to his consideration, he would have concurred with Mr. Justice Norman in decreeing to the plaintiff the hills north, as well as south, of the Karmeg Hill, with the exception of the portion of the disputed land about Soogee; which, but so far only as it lay at the foot of the hills, or extended up the slope of the Marua Mountain, he thought, had been proved to have always belonged to Havelee.

The formal decree was, of course, drawn up in accordance with Mr. Justice Norman's Judgment, and has given rise to the present appeal and cross-appeal; the defendant claiming by the former to have the decree of the High Court reversed, and the decree of the Zillah Judge affirmed; the plaintiff claiming by the latter to have the decree of the High Court varied in so far as it relates to Soogee and the other lands left in the possession of the defendant, and to have a decree for the whole of the disputed territory

It is to be observed that upon the inquiry as to the nature and character of the Bunkur and Boondee Mehals and of the ghauts, comprised in Piron's settlement, and the right which they included in the land attributable to them, these judgments are all one way. That of Mr. Justice Norman may seem, in some passages of it, to give an uncertain sound; but he, too, came to the conclusion, as in the case of the ghauts west of Soogee and south of Simroun, and the lands about them, that the Bunkur, Boondee and Phulkúr Mehals included all the profits derivable from the soil, and, if so, carried with them the property in the soil. This general conclusion seems to their Lordship to be indisputable. The existence of an incorporeal right in the nature of an easement to be exercised, *in alieno solo* implies a grant to the owner of the easement from the owner of the soil. And inasmuch as the resumed pergunnah of Havelee and the Nizamut Mehals, up to the time of the commencement of the dispute, belonged to the same person, it is not easy to see how any such easement can ever have been created.

Again, the effect of the judgment is to divide the disputed territory into two large portions, *viz.*, that which is south, and that which is north, of the Kermeg Hills. The northern portion is again subdivided, by Mr. Justice Norman's judgment, into three portions, *viz.*, that which he has left in the defendant's possession; that which lies north and east of the road through the Amjhur

Ghaut; and that which lies between the two other portions. Mr. Justice Jackson, on the other hand, makes but two subdivisions of the northern portion *viz.*, that which belongs to the Amjhur Hills; and that which does not fall within that description.

Their Lordships propose to deal first with the land south of the Karmeg Hills. As to that they see no ground for disturbing the decree under appeal.

The title of the defendant rests on the the conclusion of the land immediately in question in the settlemant of Piron. That settlement, so far as it related to the disputed territory, was founded generally on the depositions and pottahs of Peer Khan Soubadar, Durshun Singh, Posun Passee and others. There is nothing to connect this southern portion of the disputed territory with the holding of Peer Khan.

The holding of Durshun Singh would now seem, from the further evidence which has been elicited on the remand, to have been wholly within the measured area of Ellis' map. This evidence appears to their Lordships to be fairly summed up by Mr. Elphinstone Jackson at p. 676 of the new record. In any case, there is nothing to show that Durshun Singh's pottah covered any of the disputed land south of the Karmeg Hills.

Again, neither Posun Passee's pottah, nor his kubooleut, is forthcoming; nor is there any evidence which satisfactorily connects the holding by him which was the subject of Mr. Piron's settlement with this southern portion of the disputed territory.

On the other hand, the order in Council has already affirmed the plaintiff's title to Gormaha; *i. e.*, to an indeterminate part of this tract of land. It has also limited the defendant's interest in Mouzah Bakum to the small area lying within the confines of Ellis' map. In this estate of the evidence, their Lordships are clearly of opinion that there is no proof that this southern portion of the disputed territory, or any part of it, was comprised within the Bunkur and Boondee Mehals or ghauts settled as part of Havelee; and consequently, that under the order in Council, the plaintiff is entitled to recover it, whether it is in fact wholly or only partially comprised in Mouzah Gormaha.

As to the northern portion of the disputed territory, their Lordships have already intimated that, in their opinion, the proper *ratio decidendi* is that which Mr. Justice Elphinstone Jackson thought himself bound to adopt, and not that which was in fact adopted by Mr. Justice Norman.

Again the question what was included in the settlement seems to be almost identical with what at that date was held by Peer Khan Soubadar. Mr. Elphinstone Jackson held that, in the absence of evidence on the part of the plaintiff to show what parts of the disputed territory were not attributable to the ghauts about which they lay, the possession of the defendant must prevail; and that, with the exception of the Amjhur Hill, which will be hereafter considered, the whole of the northern portion of the disputed territory must be taken to be included in the settlement, and to belong to Havelee.

Their Lordships are of opinion that this view is correct. The ghauts scheduled in Peer Khan's pottah, from Hursa Poteeah, or Hursa Tootees, in the north to Sikhole or Sehla in the south, are all traceable in this tract of land. And, indeed, the conclusion that, on the construction which their Lordships have put on the order in Council, all the land last mentioned must be taken to belong to Havelee, may be said to be common to all the Judges, since it is implied in the second finding of Mr. Justice Norman at p. 658 of the new record. The only difficulty that arises concerning it is that which is suggested on the cross-appeal in respect of Soogee. And, oddly enough, that is the very portion of the land in dispute as to which all the Judges have found that the defendant has a good title independent of the settlement—a title which Mr. Elphinstone Jackson says was

hardly disputed by Counsel for the plaintiff (p. 676). It may be remarked, moreover, that this fact is inconsistent with the plaintiff's theory that the possession by the defendant of any land beyond the measured area of Ellis' map was an encroachment upon the Nizamut Mehals; and the result of a conspiracy between the original defendant, the former owner of the whole Khurruckpore zemindary, and is some slight evidence of what was alleged to be the original rights of Havelee.

The difficulty suggested is, however, this:—Soogee was not included in Peer Khan's pottah of the ghauts. In his deposition before Mr. Piron (old record, p. 345, in writing) he speaks of it as held by a separate pottah. There is no clear proof that that pottah was afterwards produced before Mr. Piron, or that what it covered was included in his settlement. The rent received by that pottah does not appear to enter into the sum of S. Rs. 1,116 mentioned in the settlement. It is therefore urged that, under the strict construction of the order in Council, Soogee and its appurtenances not being included in the settlement, must be adjudged to the plaintiff.

On the other hand, it is argued that the intention was obviously to include in the settlement whatever was held by Peer Khan under lease from the proprietors of Havelee; that his second pottah is mentioned in his deposition; that all the evidence shows that he did so hold Soogee and its appurtenances, and that the expression of Mr. Piron in the passage so open quoted from his report is whatever was found by the depositions of Peer Khan and others, &c. Mr. Cowie has also contended, and his contention seems to be borne out by the schedule to the original plaint, that the plaintiff has never claimed Soogee as such. In these circumstances, their Lordships think that they would not be warranted in giving the plaintiff a decree for Soogee and its appurtenances against the defendant, who is shown to have had from the beginning of the suit both the possession of, and title to that village; and that he must be treated as virtually included in the settlement.

The only remaining question is the right to the land lying north and east of the road through the Amjhur ghaut. The Amjhur Ghaut is not amongst those mentioned in the schedule to Peer Khan's pottah. *Primâ facie*, therefore, it was not included in Piron's settlement. The land about it has clearly nothing to do with Soogee. The learned Counsel for the defendant referred their Lordships to a kuboolent of Peer Khan's at p. 193 of the new record, in which Ghaut Amjhur is specified as leased to him; but that document was not before Mr. Piron. It bears date the 15th of March, and was registered on the 18th March 1844; whereas the pottah, which was before Mr. Piron, appears to have been executed in January 1840 (25th Maug 1247 F.), and to have been registered on the 13th of January 1842. It is possible that, in the interval, those interested in enlarging the borders of Havelee may have advanced further into the disputed territory. The defendant's Counsel have also called in aid an old kuboolent of 1211 F., at p. 462 W., and a pottah of 1228, at p. 469 W. of the old record. But to say nothing of the discredit thrown upon the defendant's documentary evidence by Mr. Justice Norman, and to some extent by his colleague also, it is sufficient to remark that the same rule which their Lordships have on another part of the case applied to the plaintiff must also be applied to the defendant, and that these old documents, tendered to prove the original title of Havelee, have no bearing on the question of what was, in fact, included in the settlement as held by Peer Khan. Reference has also been made to certain proceedings of the revenue officers subsequent to the settlement, particularly to Mr. Quintin's letter, at page 249, O. R., which, referring to a report of Mr. Piron, states that Amjhur Ghaut was included in the settlement. This letter, however, was written in 1849, when Peer Khan seems to have got into possession of Am-

jhur Ghaut; and what he then held may easily have been confounded, or assumed to be identical, with what he held under the pottah of 1840, which, in this very letter of Mr. Quintin's, is treated as the basis of the settlement. Subsequent statements of the revenue officers as to the effect of the settlement, cannot, in their Lordships opinion, avail to supply the evidence which the settlement-proceeding itself, and the pottah on which it purports to be founded, fail to afford. A more important document is the proceeding of Mr. Piron of the 11th of May 1844, which was had before his signature of the final settlement proceeding on the 20th of June 1844, though after the grant to Maharanee Wujhoonissa of a lease of Havelee on the basis of the contemplated settlement on the 9th of April 1844. In that proceeding, which was at the instance of the Maharanee complaining of a disturbance by Resaz Ali of her possession of the ghaut included in the settlement, mention is made of Ghaut Amjhur as one of those ghauts. It is to be observed, however, that that mention is only in the abstract of her petition; and that it is possible that, when Mr. Piron reported to the Magistrate that all the ghauts so mentioned were settled with Havelee, his mind was not directed to Ghaut Amjhur in particular, or to the fact that it was not specified in Peer Khan's pottah. The proceeding is not properly part of the settlement-proceedings, nor an adjudication of right binding upon the plaintiff.

On the whole, then, though not without doubt, their Lordships have come to the conclusion that Ghaut Amjhur, with whatever land it covers, has not been shown to have been included in the settlement of Havelee, and that, under the terms of the order in Council, the plaintiff is entitled to recover the land north and east of the road passing through the ghaut.

The order, therefore, which their Lordships will humbly advise Her Majesty to make, is—

First. To reverse the decree of the High Court, except so far as it reverses the decree of the Lower Court; and, in lieu thereof, to declare the decree that in addition to the villages of Gormahah and Ghorakhore, in the former order of Her Majesty mentioned, the plaintiff is entitled to recover and do recover so much of the land in dispute as lies to the north and east of the road which runs through the Amjhur Ghaut, which road is referred to in the judgment of the High Court at page 658, line 7, of the printed record; and further that, as between the plaintiff and defendants, the former is entitled to recover and do recover as part and parcel of the mouzah of Gormahah all that part of the disputed land which is to the south of the line drawn from Kurwah Nath to Kurwa Dallan upon the map annexed to the judgment of the High Court, and initialled by the said Court on the said map; but that as to all the rest of the land in dispute, the plaintiff's suit should be, and do stand, dismissed.

Secondly. That the defendants do pay to the plaintiff the mesne profits realized by them from Gormahah and Ghorakhore, and from such other lands as are hereby decreed to him, from the date of the commencement of the suit up to the date of the delivery of possession, and that the same be ascertained and assessed by the Courts in India in execution of this decree.

Thirdly That the defendants do refund to the plaintiff, or do account for all costs paid by him, the said plaintiff, to the defendants from the date of the institution of the suit to the date of this decree, so far as such costs have not already been repaid or accounted for.

Fourthly. That the defendants do pay to the plaintiff the costs incurred by him in the Indian Courts in proportion to the amount of the land decreed; and that the plaintiff do pay to the defendants the costs incurred by him in the same Courts in porportion to the land disallowed; and that each party do bear his own costs of this appeal, and cross-appeal, and also of the former appeal to

Her Majesty in Council.

Their Lordships cannot but feel that owing partly to the nature of the subject, and partly to the course which the suit has taken, it is more than usually difficult to make a decree that is perfectly satisfactory to them. They have done their best, however, to bring this long litagation to an end. consistently with what had been decided by their predecessors. They are anxious that the order to be made should leave as little room as is possible for future dispute; and if the learned Counsel on either side wish to be heard on its form, their Lordships are willing that the cause should be mentioned on the minutes on any day before the report is laid before Her Majesty for confirmation.

10th December 1875.

PRESENT:

Members of the *Judicial Committee.*—The Right Hon'ble Sir James W. Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon'ble Sir Montague E. Smith, and the Right Hon'ble Sir Robert P. Collier.

SHAMNARAIN AND OTHERS ... *Appellants,*

and

THE ADMINISTRATOR-GENERAL OF BENGAL ... } *Respondents.*

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Onus of proof in a suit to set aside a deed-Presumption—Evidence.

Plaintiff who sues to set aside a Mokrori is bound in the first instance to give some evidence to impeach its vilidity, and that some *onus* is therefore on him. If that *onus* is satisfied, and *prime facie* case to impeach the validity is made out, the onus is shifted on the Defendant to show by satisfactory evidence that the deed was really executed *bona fide* for a real consideration, and intended to be operative as between the executants thereof.

In this case strong suspicion against the deed arises from the circumstance that the person found fault with is still in the service of the executant, that the deed was not registered nor stamped at the time, the value of the property was considerable, the rent very small, and there was no evidence that any consideration was paid; and the Defendant not having given satisfactory evidence of the execution and the *bona fides* the instrument could not be *held* valid.

THIS suit was brought by the plaintiffs, whom the present respondents represent, claiming under a zur-i-peshgee granted by the Rajah of Ramnuggur, to secure the sum of Rs. 49,000. The zur-i-peshgee included 14 monzahs, and among them a mouzah called Koorkoorcha.

It seems that the Rajah instituted a suit against the mortgagees to set aside the zur-i-peshgee, on the ground that it had been collusively obtained from him, charging Binda Lall, whom the appellants in this suit represent, with colluding with the mortgagees in obtaining the mortgage. Then a cross-suit was brought by the mortgagees under the zur-i-peshgee, being the suit in which the present appeal arises, against Binda Lall, for possession of the mouzah of Koorkoorcha, and to set aside a mokurruree lease alleged to be granted by the Rajah to him prior to the mortgage, under which he claimed the possession of the mouzah upon payment of the rent reserved by the mokurruree of Rs. 41.

The value of the mouzah was Rs. 850 per annum.

Both suits were heard by the Principal Sudder Ameen, who found that the zur-i-peshgee was a genuine instrument, and that it had not been obtained by fraud; and he affirmed the validity of it. He also found in the present suit that the mokurruree set up by Binda Lall was a fraudulent document, intended to prevent the mortgagees under the zur-i-peshgee from getting the full benifit of their mortgage as regards the mouzah Koorkoorcha.

There were appeals to the High Court from his dicision. The High Court reversed the decree of the Principal Sudder Ameen, which affirmed the validity of

* From the judgment of L. S. Jackson and Macpherson, J. J., in Regular Appeal No. 276 of 1860, decided on the 21st June 1871.

the zur-i-peshgee, holding that although it was executed, the consideration had not been paid, and they set the zur-i-peshgee aside. The consequence of their deciding that the plaintiffs had no title under zur-i-peshgee was that, in the present suit, it was held that they had no *locus standi* to set aside the mokurruree.

From these decisions of the High Court there were appeals to Her Majesty, and the result was that Her Majesty was recommended to reverse the decree of the High Court, which had set aside the judgment of the Principal Sudder Ameen, and disaffirmed the mortgage, and to set up his judgment which had held that the mortgage was valid.

That state of things left the question as to this mokurruree undecided, for the High Court had only decided against the mortgagees in this suit upon the ground that having no title in the mouzah they could not be heard to say that the mokurruree was invalid. It was, therefore, necessary, after the decision of this tribunal in the Rajah's suit, that the High Court should hear the original appeal in the present suit as regards the mokurruree upon the merits; and accordingly this direction was given in the order of Her Majesty in this suit:—"It is hereby "ordered that the decree of the High "Court of Judicature at Fort William "in Bengal of the 21st May 1863 be re-"versed, and the cause remitted to the "High Court, with a declaration that the "zur-i-peshgee deed alleged to have been "granted by the Rajah of Ramnuggur to "the appellant and his brother is a valid "instrument, and the High Court is here-"by directed, in case the respondent "does not appear within a reasonale time "to be fixed by the High Court, to dis-"miss his appeal from the Zillah Judge "of Sarun to the High Court, with "costs; and if the respondant does so "appear, then the High Court is to hear "and determine the appeal on its merits, "and in case the respondent shall fail to "appear in the High Court,"—then here are further directions. The "respondent," being the appellant in the High Court, did appear, and the High Court heard the appeal, and gave judgment, affirming the original decision of the Principal Sudder Ameen, to the effect that the mokurruree was a fabricated and fraudulent instrument: and from the judgment comes the present appeal.

Mr. Doyne could not do otherwise than admit that the judgments of both Courts on the question of fact were against him, but the main point which he urged before their Lordships was that both Courts had improperly shifted the *onus*, and that, in consequence of the form of the present suit, it lay upon the respondents, the plaintiffs below, to show affirmatively that the mokurruree was invalid.

Their Lordships, having regard to the form of the suit, which was not only for possession, but for setting aside the mokurruree, and having regard also to the fact that for some time under a Magistrate's order, the appellant, or those whom he represents, were in possession under the mokurruree, think that, in the first instance, it did lie upon the plaintiffs to give some evidence to impeach the validity of the mokurruree, and that some *onus* was therefore upon them; but they are clearly of opinion that this *onus* was satisfied, and a strong *prima facie* case impeaching the validity of the deed made out, and then the *onus* was shifted, and it was incumbent upon the appellant to show by satisfactory evidence that the mokurruree was really executed before the date of the zur-i peshgee and that it was granted *bonâ fide* for a real consideration and intended to be operative as between the Rajah and Binda Lall.

There are strong cimcumstances of suspicion in the case. Binda Lall was the mooktear of the Rajah, and notwithstanding that the Rajah had charged him with having acted collusively with the holders of the zur-i-peshgee in obtaining it from him, he kept him in his service. These facts are pointed out in the judgment of the Principal Sudder Ameen. It appears that the deed was not registered nor stamped at the time, the value of the mouzah was considerable, the rent

very small, and there was no evidence that any consideration was paid. Considering the relation of the parties, and the facts which have been referred to the Principal Sudder Ameen and the High Court seem to their Lordships to be perfectly justified in saying that unless the holder of the mokurruree gave satisfactory evidence of its execution and of its *bona fides*, they could not hold that it was a valid instrument as against the zur-i-peshgee. The High Court do not affirm the judgment of the Principal Sudder Ameen without looking at the case for themselves, and it appears that they did look at the evidence to which Mr. Doyne referred, to satisfy themselves of its weight and effect, and they thought it was not the kind of proof that should be given in a case which, upon the face of it, was so suspicious. They say in their judgment :—" The point for decision really and substantially is, whether the case made out by the plaintiffs, resting as it does upon the zur-i-peshgee deed, which, on the finding of the Privy Council in the several suits between these parties, is a good and valid instrument, has been sufficiently answered by the alleged mokurruree which the defendants set up. Now, besides that we have before us what seems a satisfactory judgment of the Principal Sudder Ameen, Moulvie Mahomed Wuheedooddeen, upon this point, which was in issue in his Court, that decision not being impugned upon what appeared to be any valid grounds ; in point of fact it seems that the defendant gave neither in this case, nor in any of the other cases in which these parties were concerned, anything approaching to direct evidence of the execution of his mokurruree. It is shown that in another case between Rajah Saheb Prolad Sen and the Tewarees, some of the witnesses referred incidentally to this mokurruree, and we are asked to infer from that that those witnesses might, if further examined, have given positive testimony on the point ; and it is suggested that the defendant had not fully present to his mind the necessity of setting up the mokurruree by direct evidence, and upon that suggestion we have been asked, at this time of day, to send this case back to the Court of the Subordinate Judge of Sarun in order that a fresh issue may be framed, and the parties allowed an opportunity of adducing evidence upon it."

The High Court, having referred to the only evidence given by the appellant in suport of the mokurruree, held it to be entirely insufficient for that purpose ; their Lordships think that their judgment is correct, and that the High Court were also right in not putting a case of this description into a train for further inquiry. They will, therefore, humbly recommend Her Majesty to affirm the judgments appealed from.

10th June 1880.

PRESENT :

Members of the *Judicial Committee.*—The Right Hon. Sir James W. Colvile, the Right Hon. Sir Barnes Peacock, the Right Hon. Sir Montague E. Smith, and the Right Hon. Sir Robert P. Collier.

BELCHAMBERS ... *Defendant,*

and

ASHOOTOSH DHUR ... *Plaintiff.*

*On Appeal from the High Court of Judicature at Fort William in Bengal.**

Resjudicata—Person made party on application pending appeal.

Pending a Privy Council appeal, Tiery against Nundo Lall Ghose, the point in dispute in which was as to whether the land in dispute appertained to lot 100 or lot 104, Ashootosh Dhur, auction purchaser at a rent sale of the Ganteedaree interest in lot 100, belonging to Bharut Chunder (who had obtained a decree for possession against the said Nundo Lall Ghose who also claimed the said lot under a Ganteedaree interest) applied

* From the judgment of Garth C. J., and McDonnell J., decided on the 25th April 1878.

for being made, and was made, a respondent in the Privy Council appeal case, and in his presence the said case was decided against him in favor of the owner of lot No. 104. In a suit by Ashootosh Dhur for the said land, *held* that the decision in the Privy Council Appeal case affected only the parties to it, that is the parties to the judgment, of which undoubtedly Dhur was one. Dhur now claims exactly on the same right on which he had claimed before. If the decision had been in his favor, undoubtedly he would have availed himself of it, and the decision being against him he must be bound by it. The suit is therefore barred by *resjudicata.*

APPEAL from a decision passed by a Divisional Bench (GARTH, *C.J.*, and MCDONELL, *J*,) of the High Court of Calcutta.

Leith Q.C., and *Doyne*, for the Appellant.

Graham, Q.C., for the Respondent.

The suit involves a question whether a portion of land, consisting of 8,050 beegahs, belongs to lot 104 or lot 100, which are conterminous lots of land in the Soonderbuns, the northern boundary of one being the southern boundary of the other. The plaintiff Ashootosh Dhor, hereafter called Dhur, the owner of lot 100, claimed the disputed land as part of that lot. The defendant, as the representative of a Mr. Tiery, who appears originally to have been a manager of the Nawab Nazim, claims the disputed land as a part of lot 104. The High Court reversing the decision of the lower Court found in favor of the plaintiff, and from that decision an appeal has been preferred to Her Majesty in Council.

The appellant contends that on two grounds, independently of the merits of the case, the action is not maintainable. The first is *resjudicata*; the second is the Statute of Limitations. Their Lordships have only heard an argument upon the first point, but they have come to so clear a conclusion upon that that it becomes unnecessary to hear the rest of the case. The question of *res judicata* arises in this way. Mr. Tiery, in 1852, acquired lot 104. Inasmuch as no question has ever been raised with regard to his title to it, it is enough to say that he became grantee of it under the Government at that time, and he appears from the begining to have claimed the 8,050 beegahs as part of that lot, to have cultivated and built upon them, and to have improved them and rescued them from the jungle. In the year 1851 the Nawab Nazim, claiming then to be the owner of lot 100, granted a gantidari lease of it to one Bharrut Chunder Ray. In 1853 one Nazir Ally, about whom their Lordships have had very little information, but who appears to have been a kind of agent or manager of the Nawab, claiming, it does not appear how or why, or by what title, this same lot 100, granted another gantidari lease of it to Nund Lall Ghose. Nund Lall Ghose, in the year 1859, instituted a suit against Mr. Tiery, on the ground that Mr. Tiery, trespassing beyond his bounds, had appropriated the 8,050 beegahs, which, in fact, were parcel of lot 100. That failed in the first Court, but succeeded in the second; and Ghose, on the 14th of August 1862, obtained a judgment in his favor, which judgment was appealed against to Her Majesty in Council. But in the meantime Bharut Chunder, who had obtained the gantidari lease which has been before spoken of in 1851, of lot 100, brought an action against Ghose, Ghose's lessor and Tiery, suing Tiery not indeed as the owner of lot 100, but as a manager of the Nawab for the purpose of obtaining possession of lot 100. Tiery disclaimed any interest in lot 100, and was dismissed from the suit. Bharut Chunder succeeded in both courts, and obtained judgment for lot 100, with one or two other lots which are not material, on the 30th of August 1862; so that Ghose apparently derived no great advantage from his judgment which he had obtained a fortnight before, inasmuch as it was decided in that judgment of the 30th of August that he had no title to lot 100. An appeal was preferred by Tiery to the Queen in council from the decision before stated of the 14th August of 1862. Great delays arose in the prosecution of that appeal from various causes. It is enough to say that Tiery died; that he was succeeded by his widow

who married; that she subsequently died; and finally the estate and interest of Tiery devolved upon Belchambers, who is the present appellant. But there probably was another cause for the delay, namely, that Nund Lall Ghose, the respondent, had no interest in pressing on the appeal, because it had been held that he had no title to the lot to which it was alleged that the 8,050 beegahs appertained. During this time Bharut Chunder failed to pay his rent; and upon a suit being brought against him, and judgment obtained, lot 100 was put up for sale, and was bought by the present respondent, Dhur. Bharut Chunder, and after him Dhur, made, it appears, various endeavours to obtain possession of this disputed land in execution of the decree which had been obtained on the 30th of August 1862; but, without going into these proceedings, it is enough to say that the Courts appear to have refused to allow them to obtain possession of the disputed land in execution of the decree, on the ground that the question of parcel or no parcel was pending before the Privy Council in the appeal of Tiery, or his representatives, against the decree obtained by Nund Lall Ghose.

That being the state of things in 1872, Dhur applied to be admitted in that appeal as a party respondent to it, and he filed an affidavit in which, after stating the greater part of the facts which have been related, he averred that the interest of the original respondents in the lands in dispute had ceased. He went on to say; "Bharut Chunder Ray was, and I am now the only person as purchaser of the tenure of Bharut Chunder Roy, interested in lot 100;" and that under the execution orders refered to he was precluded from enforcing his right during the pending of the appeal in the Privy council. Then followed this statement: That owing to the respondents in the said appeal being quite uninterested in the lands in dispute in the said appeal they have not taken any active measure to bring it to a speedy hearing; that the said 8,050 beegahs of land, the subject matter of the said Privy Council appeal, are jungle lands of Soonderbuns, and are likely to relapse into jungle unless properly banded and taken care of. I am informed, and verily believe, that during the "pending of the said Privy Council appeal the clearance and cultivation of the said land are very much neglected, and the greatest portion thereof has relapsed into jungles." Then he said: "I am advised that unless I am allowed to appear in the said Privy Council appeal, and support the judgment of the High Court, my interest in the said land is likely to be materially affected by the result of the said appeal;" and he applied to be heard to support the judgment of the High Court in that case on the ground that his interest would be affected.

His application was granted by this Board; he was admitted as a respondent to the appeal; and he afterwards filed a case in which he alleged as his reasons: "Because the said Lewis Tiery trespassed beyond his boundary, and the land in dispute formed part of lot 100, and not of lot 104." This case he filed jointly with one Gobind Chundra, a representative of Ghose, although Ghose, as he contended, had no interest in the land, and that joined case was argued for both respondents by the same Counsel, who contended that the disputed lands formed part of lot 100, and not of lot 104. Their Lordships, upon hearing the case came to the conclusion that the plaintiff had not proved that the land in dispute belonged to lot 100; and, in fact, their decision was, for that is the effect of it, that the land in dispute belonged to lot 104. Inasmuch, however, as there appeared some obscurity in the case as to the title to lot 100, as Gobind Chundra appeared, who claimed, or who originally claimed at all events under Nazir Ally, and as Dhur claimed by what he alleged to be a paramount title under the Nawab Nazim, their Lordships thought it well to explain that they did not adjudicate upon any question of title either between the respon-

dents or between the Nawab Nazim, or Nazir Ally, or any other persons who might be interested in lot 100. It was enough that in that appeal it was taken, as admitted, that the respondents and the appellants respectively were in rightful possession of lots 100 and 104, and the sole question was to which the disputed land appertained. It was, therefore, that their Lordships observed, " It is scarcely necessary to say that this judgment can only in this case affect the parties to it," that is, the parties to the judgment, of which undoubtedly Dhur was one, " and cannot give any other persons any rights to impose upon them any liabilities." If, indeed, Dhur, in the present action, had claimed, by some superior or paramount title, the 8,050 beegahs, he might have been heard to set it up, but he claims simply and solely in this action the 8,050 beegahs on the ground that they were parcel of lot 100, and not of lot 104. That is the very question on which he invoked their Lordships' decision. If the decision had been in his favor, undoubtedly he would have availed himself of it, and the decision being against him, he must be bound by it.

Their lordships regret that an expression in the judgment, which was intended to prevent misapprehension, should have apparently led to it, and that the High Court should have interpreted the above passage as meaning that their Lordships did not intend to decide the only point which they did decide. The Chief Justice makes an observation that their Lordships did not impose costs upon Dhur. With regard to that, it is only necessary to say that it is manifest that a direction with regard to costs can have no effect whatever upon the judgment given in the issue raised between the parties to the appeal.

For these reasons their Lordships will humbly advise Her Majesty that the judgment of the High Court be reversed, and that the suit be dismissed with costs in both the Courts below. The appellant will also have the costs of this appeal.

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AN

INDEX

TO THE

PRINCIPAL MATTERS.

CONTAINED IN THIS VOLUME.

ABWAB.

Abwabs, Meaning of—Long period of payment of Abwabs—Effect of ss. 54, 55 and 61 of Regulation VIII of 1793.

Payments over and above rent, and described as awabs in the zemindar accounts for which, as abwabs, the tenant was sued, were held to be rightly treated as abwabs, and not as forming part of the rent fixed. They were held not to be recoverable from the tenant, although they had been paid for a period of unknown length and according to a long standing practice, not having been, if payable at the time of the permanent settlement, consolidated with the rent, as they should have been if then payable, under s. 54 of Regulation VIII of 1793. Not having been so consolidated, they could not be recovered under s. 61. If not payable at the time of the permanent settlement, they came under the term of new abwabs, and in that case were illegal under. s. 55. [*Telukdhari Singh* v. *Chulham Mahton*] 408

ACCEPTANCE.

See "MARINE INSURANCE."

ACKNOWLEDGMENT OF LIABILITY.

See "LIMITATION."

ACQUIESCENCE.

See "RATIFICATION OF TRANSFER."

ACTS (BENGAL).

ACT VIII OF 1869, ss. 6, 7.

See "OCCUPANCY RIGHT."

ACT VII OF 1876, s. 7.

See LAND REGISTRATION."

ACT X OF 1879, s. 55.

See "COURT OF WARDS."

ACT (BOMBAY).

ACT VI OF 1862, s. 12.

See "GUARDIAN AND WARD."

ACTS (INDIA).

XIX OF 1844, (ABOLISHING CESSES ON TRADES) CONSTRUCTION OF.

See "CONSTRUCTION" 3.

IX OF 1847, (BRINGING UNDER ASSESSMENT LANDS NOT INCLUDED IN THE PERMANENT SETTLEMENT).

See "ASSESSMENT OF REVENUE."

VIII OF 1859, s. 7 (CIV. PRO. CODE.)

See "RES-JUDICATA."

——— s. 114.

See "CIV. PRO. CODE" 1.

——— s. 264.

See "SALE IN EXECUTION OF DECREE" 1, 2.

X OF 1859, ss. 6 & 7 (TENANCY).

See "OCCUPANCY RIGHT."

XI OF 1859, ss. 13 & 18.

See "SALE FOR ARREARS OF REVENUE."

XIV OF 1859, S. 1, CL. 13. (LIMITATION.)
See "LIMITATION" 5.

I OF 1869, (OUDH ESTATES.)
See "OUDH ESTATES ACT" 2.
——— S. 13, SUB-S. 1.
See "OUDH ESTATES ACT" 3.
——— SS. 2, 13, 20, 22.
See "OUDH ESTATES ACT" 4.
——— SS. 8, 22 & SUB-S. 11 OF S. 22.
See "REGISTRATION OF DOCUMENTS" 1.

X OF 1870, (LAND ACQUISITION) APPLICATION OF, TO MINOR'S ESTATE.
See "GUARDIAN AND WARD" 3.

VIII OF 1871, SS. 28, 64, 65, & 66, (REGISTRATION).
See "REGISTATION OF DOCUMENTS" 1.

I OF 1872, SS. 65 & 66, (EVIDENCE)
See "SPECIAL APPEAL" 1.
——— SS. 65 & 74.
See "EVIDENCE" 1.
——— S. 83.
See "EVIDENCE" 7.

IX OF 1872, S. 56, (CONTRACT).
See "CONTRACT" 2.
——— S. 65.
See "LIMITATION" 6.
——— SS. 103 & 178.
See "SALE AND CONSIGNMENT OF GOODS"

IX OF 1875, (MAJORITY).
See "MAJORITY ACT."

I OF 1877, S. 42 (SPECIFIC RELIEF),
See "DECLARATORY DECREE" 1, 2.
— "SPECIFIC PERFORMANCE OF CONTRACT" 1, 2.

III OF 1877, S. 17 CLS. (*b*) & (*h*) (REGISTRATION).
See "CONTRACT" 1.

X OF 1877, SS. 13 & 43 (CIV. PRO. CODE).
See "RESJUDICATA" 7.
——— SS. 141, 142, 568.
See "EVIDENCE" 5.
——— S. 266.
See "CIV PRO. CODE" 2.

XV OF 1877, S. 10 (LIMITATION).
See "RATIFICATION OF TRANSFER."
——— ART. 11.
See "LIMITATION" 4.
——— ARTS. 9, 11.
See "LIMITATION" 1.
——— ARTS 64, 97.
See "LIMITATION" 6.
——— ART. 91.
See "LIMITATION" 3.
——— ART. 132.
See "LIMITATION" 2.
——— ART 142.
See "LIMITATION" 8.
——— ARTS. 142 & 144.
See "LIMITATION" 10.
——— ART. 180.
See "LIMITATION" 9.

XII OF 1879, S. 6 (AMENDING CIV. PRO. CODE).
See "RESJUDICATA" 1, 7.

XVIII OF 1879, SS. 10 & 40 (LEGAL PRACTITIONERS).
See "LEGAL PRACTITIONERS" 1, 2.

IV OF 1882, (TRANSFER OF PROPERTY).
See "LIMITATION" 7.

XIV OF 1882, S. 13 (CIV. PRO CODE).
See RESJUDICATA" 1, 2, 3, 4, 5, 6, 7, 8.
——— SS 13 & 43
See "RESJUDICATA" 5.
——— SS 18, 102 & 103.
See "RESJUDICA" 11.
——— SS. 30 & 34.
See "LIMITATION" 11.
——— SS. 50 & 53, SUB-S. (*d*).
See "PLAINT."
——— S. 103.
See "CIV. PRO, CODE" 1.
——— SS. 141, 142 & 568.
See "EVIDENCE" 5.
——— S. 266 SUB-S. (*g*).
See "ATTACHMENT" 2.
——— S 278, 280, 283.
See "LIMITATION" 4.
——— S 311.
See "SALE IN EXECUTIVE OF DECREE" 6.
——— S. 549.
See "COST" 1, 2, 3.
——— S. 584.
See "SPECIAL APPEAL" 3, H L.
— "PARTITION" 3, H. L.

XIV OF 1882, (CIV. PRO. CODE.)—*Contd.*

——— ss. 584 & 585.

See "CONTRACT" 1.
See "SPECIAL APPEAL" 1.

——— s. 622.

See "REVISION BY HIGH COURT."

V OF 1844, (AMENDING VI OF 1876 CHUTANAGPORE ENCUMBERED ESTATES ACT).

See "SPECIFIC PERFORMANCE OF CONTRACT." 2.

ACTS (MADRAS).

XX OF 1863, s. 10 (RELIGIOUS ENDOWMENT).

See "JURISDICTION" 1.

ACT (N. W. P)

XIX OF 1873, ss. 94, 97.

See "MUTATION OF NAME."

ADMISSION NOT AMOUNTING TO AN ESTOPPEL.

See "GUARDIAN AND WARD" 2.
— "EVIDENCE" 7.
— "ISSUE."

ADMISSION OF A VAKIL OF HIGH COURT TO PRACTICE IN THE PRIVY COUNCIL.

See "PRACTICE" 2.

ADOPTION.

See "ADOPTION" H. L.

ADOPTION WITH SAPINDAS CONSENT.

See "ADOPTION" 1. H. L.

AGENT, POWER OF.

See "PRACTICE" 6.

AGREEMENT.

See "CONCURRENT FINDING."
— "OUDH ESTATES ACT" 3.
— "SALE AS DISTINGUISHED FROM MORTGAGE."

ALIENATION.

See "IMPARTIBLE ESTATE" H. L.
— "SALE IN EXECUTION OF DECREE."

ALIENATION BY HINDU WIDOW, EFFECT OF.

See "CONSTRUCTION" 1.
— "WIDOW" H. L.

ALLUVIAL LAND REFORMED, NON-LIABILITY OF, TO ASSESSMENT OF REVENUE.

See "ASSESSMENT OF REVENUE."

AMENDMENT OF PLAINT, WHEN NOT ALLOWABLE.

See COMPROMISE."
" "PLAINT."

APPEAL, CONSOLIDATED.

See "PRACTICE" 4.

APPEAL, REJECTION OF, FOR FAILURE TO FURNISH SECURITY.

See "COST" 3.

APPEAL, RIGHT OF.

See "JURISDICTION" 1.

APPELLANT, SUBSTITUTION OF.

See "PRACTICE" 3.

ASSESSMENT OF REVENUE.

Act IX of 1847—Assessment to revenue, finality of, upon land within an estate permanently settled—Non-liability to assessment of alluvial land reformed within such an estate, no abatement having been made on account of previous diluvion—Act IX of 1817, construction of—Jurisdiction of the Civil Courts in regard to orders of revenue authorities

A review of the legislation anterior to Act IX of 1847 shows that whilst it was intended to bring under assessment lands not included in the permanent settlement, whether waste or gained by alluvion or dereliction from sea or rivers, yet all such lands as were comprised in permanently-settled estates were to be rigorously excluded from further assessment.

Lands included in the permanent settlement having afterwards been covered by water, and having then been formed again on the same site, *held* not to be lands

"gained" from the river by alluvion or dereliction within the meaning of Regulation II of 1819, that expression being confined to meaning lands gained since the period of the settlement.

The effect of Act IX of 1847 was merely to change the mode of assessment in the case of land already liable to be assessed under legislation in force when that Act became law. It was not the object of that Act to bring under liability land re-formed on the site of land previously lost, within the area of a permanently-settled estate, the revenue upon which had been paid without abatement since the permanent settlement

Where an order of the Board of Revenue, purporting to be made under Act IX of 1847, subjected land included in the permanent settlement to assessment, *held* that the District Civil Court had jurisdiction (which, therefore, might be invoked as a matter of right) to entertain a suit brought by the land owner contesting that order, and to declare it unauthorised by law. [*The Secretary of state* v. *Fahamidanissa Begum*]...391.

ATTACHMENT.

1. *Attachment—Wrongful attachment—Claim to attached property—Civil prodedure Code, ss. 278 to 283, 483—Attachment before Judgment—Liability of creditor who caused attachment of goods not belonging to the debtor—Damages after sale—Difference between English and Indian law on the subject.*

Orders for attachment in security under s. 483 of the Civil Procedure Code being issued on the *ex parte* application of the creditor, who is bound to specify the property which he desires to have attached and its estimated value, it follows that the attachment is the direct act of the creditor, for which he is immediately responsible. Should the goods be proved not to belong to the debtor, the litigation and delay, and also any depreciation of the goods by an intermediate fall in the market, between attachment and sale, are the natural and necessary consequences of the creditor's unlawful act.

The plaintiff having taken, without success the summary proceeding under s. 278, to get the release of goods attached under s. 487, in a suit to which he was not a party, afterwards, in a suit brought by him in accordance with s. 283, established his right of property in the goods :

Held, that (*a*), in order to entitle him to the full idemnity for the wrongful attachment he was not bound to allege and prove that the defendants had resisted his previous application under s. 278 maliciously, or without probable cause ; and that (*b*), the goods having been sold under the court's order, the difference in market value of the goods at the time of their attachment (November 1883) and their price when they were sold (June 1884), and selling prices having fallen intermediately, must be added to the damages.

Held, also that, without bringing under review the judgment under s. 278, the effect of the judgment in the suit brought in accordance with s. 283, was to supersede the order under s. 278, and to render it inconclusive. The procedure on attachment not being the same in India as in England, where a judgment-creditor is not responsible for the consequences of a sale, under a judicial order, of goods in execution in satisfaction of his debt, that proposition does not hold good under the Indian procedure ; and *Walker* v. *Olding* is inapplicable to the latter. [*Kisoori Mohan Roy* v. *Harsukh Das*] ... ... 472.

2. *Attachment—Civil Procedure Code, 1882, s. 266, sub-section (g)—Political pension—Payments due under the Oudh loans of 1838 and 1843—Exemption from liability to attachment for debt.*

Although it is probable that the enactments of section 266, Civil Procedure Code, 1882, were not meant to cover pensions payable by a foreign State when remitted for payment to their pensioner in India, they certainly include all pensions of a political nature payable directly by the Government of India. A pension guaranteed payable by the latter by a treaty obligation contracted with another sovereign power is in the strictest sense a political pension.

An allowance, payable by the Government of India under an arrangement made between the King of Oudh and the Governor-General in 1842, for the benifit of members of the King's family and household, and their respective heirs, in perpetuity, and payable to one of such heirs, who has inherited it, as his share in the interest in the Oudh loan of 1842, is a political pension within the meaning of section 266, sub-section (*g*) Civil Procedure Code, 1882. The arrangement of 1842 cannot be treated as merely a provision out of the King's private estate for the maintenance of members of his family, there having been in a State like that of Oudh no distinction between State property and private property vested in the

sovereign. [*Bishambar Nath* v. *Imdad Ali Khan*] ... ... 619.
See "SPECIAL APPEAL."

ATTACHED PROPERTY, CLAIM TO.
See "LIMITATION" 4.
" "ATTACHMENT" 1.

ATTACHMENT BEFORE JUDGMENT.
See "ATTACHMENT" 1.

ATTACHMENT OF FUTURE ESTATE.
See "MORTGAGE" 2.

ATTACHMENT, TRUST PROPERTY NOT LIABLE TO.
See "CIV. PRO. CODE" 2.

AUTHORITY TO ADOPT NEED NOT BE REGISTERED.
See "OUDH ESTATES ACT" 3.

BANIAN OF A FIRM, RIGHTS OF.
See "SALE AND CONSIGNMENT OF GOOD.

BENAMI.
See "EVIDENCE" 3.

BEQUEST UNDER RESTRICTIONS CONTRARY TO HINDU LAW.
See "WILL" 1. H. L.

BONAFIDE PURCHASER.
See "SALE IN EXECUTION OF DECREE.

BROTHER, DISQUALIFICATION OF, TO SHARE.
See "INHERITANCE" 3. H. L.

BURDEN OF PROOF.
See "EVIDENCE" 4, 5.
— "LANDLORD AND TENANT.'
— "LIMITATION" 8.
— "ONUS PROBANDI."

BURDEN OF PROVING FATHER'S DEBT BEING FOR IMMORAL PURPOSES IS ON THE SON.
See "SALE IN EXECUTION OF DECREE" 5.

BURDEN OF PROVING PERMANENT TENURE.
See "LANDLORDS AND TENANT."

CARGO SAVED BY JETTISON, LIEN ON
See 'MARINE LAW."

CAUSE OF ACTION, IDENTITY OF.
See "CIVIL PRO. CODE, 1."

CERTIFICATE OF GUARDIANSHIP, ORDER GRANTING, EFFECT OF.
See "MAJORITY ACT."

CESSES ON TRADES, ABOLITION OF.
See "CONSTRUCTION" 3.

CHARGE ON IMMOVEABLE PROPERTY BY WILL, LIMITATION FOR.
See "LIMITATON" 2.

CHURLAND.
Churland—Possessory award—Onus of proof—Importance of evidence of possession.
Question being as to whether the Churlands now claimed by the Plaintiff were identical with those covered by a possessory award confirmed by rhe Civil Court in his favour :—*Held* that in questions of this kind where the natural boundaries and landmarks have disappeared, and where there are no fences to mark what is the extent of the property, evidence of possession is very important. And that satisfactory evidence of long possession of the Defendant coupled with want of proof of alleged actual dispossession on the part of the Plaintiff, and the fact of his having claimed a larger quantity of land than what he had previously obtained by the award are important circumstances against the claim of the Plaintiff, upon whom according to their Lordships, lies the burden of proof, which he has failed to sustain. [*Girjakanto Chowdhry* v. *Hurish Chunder Chowdhry*] ... ... 702.

CIVIL PROCEDURE CODE.

1. *Civil Procedure Code (Act VIII of 1859). s. 114—(Act XIV of 1882, s. 103—Identity of causes of action in two suits, notwithstanding difference of relief claimed.*

To a suit, brought in 1883, for redemption of a mortgage made in 1853, of villages in Oudh, subsequently included in the mortgagee's talukdari estate and sanad, the defence was that the mortgagor, having brought a suit in 1864 to redeem, and not having appeared at the hearing, in person or by pleader, judgment was passed, the mortgagee having appeared to defend against the plaintiff under s. 114 of Act VIII of 1859.

Held, that, although the plaintiff, who had claimed in the prior suit the under-proprietary right in virtue of a sub-settlement, claimed in the present suit the superior proprietary right, the difference in the mode of relief claimed did not affect the identity of the cause of action, which was, in both cases the refusal of the right to redeem; and that under s. 114 of the Act the judgment of 1864 was final. [*Shanker Baksh* v. *Daya Shanker*] ... ... 108.

2. *Attachment—Civil Procedure Code, s. 266—property held by judgment debtor in trust for a specific purpose—Attempt to attach surplus after fulfilment of trust.*

Neither the whole corpus, nor any specific portion of the corpus, of an estate in the hands of a trustee who is a judgment-debtor is rendered liable to attachment in execution of the decree against him because a surplus of income is in his hands for his own benefit after due performance of the trusts; nor does such corpus, or any part of it, come, for that reason, within the meaning of s. 266 of the Code of Civil Procedure, which only authorizes the attachment of property over which the judgment-debtor has a disposing power, exerciseable for his own benefit.

Where a trust had been created for specific purposes *viz.*, the performance of religious and other duties, and the trustee had duly appointed another trustee in his place, the latter being entitled to hold the trust estate: *Held*, that, a decree having been made against the trustee personally, the corpus of the trust estate could not be sold to satisfy the claim of the judgment-creditor, nor could any specific portion of the corpus of the estate be taken out of the hands of the trustee on the ground that there was, or might be, a margin of profit coming to him personally after the performance of the trusts. *Held*, also, that in a suit in which all the parties interested were not before the Court there could be no decision as to the extent of the trusts nor as to whether any surplus profits of the trust estates would or would not, after the performance of the trusts, belong to the trustee personally. [*Bishen Chand Basawat* v. *Nadir Hossein*] ... ... 113.

See "ACT VIII OF 1859."
— "ACT X OF 1877.
— "ACT XIV OF 1882.
— "ATTACHMENT."
— CONTRACT" 1.
— "COST."
— "DECREE."
— "EVIDENCE" 5.
— "LIMITATION" 4, 11.
— "PARTITION" 3. H. L.
— "PLAINT."
— "PRACTICE."
— "RESJUDICATA."
— "REVISION BY H. COURT."
— "SALE IN EXECUTION OF DECREE."
— "SPECIAL APPEAL"

COMMON PROPERTY.

See "VILLAGE PROPERTY."

COMPENSATION.

See "COSHARER."

COMPENSATION TO THE MINOR'S ESTATE FAILING, NO COMPLIANCE UNDER ACT X OF 1870.

See "GUARDIAN AND WARD" 3.

COMPROMISE.

Compromise by official trustee—Insolvent Act 11 and 12 Vic., C. 21, Secs. 28 and 29—Charges with a view to establish fraud—Practice—Pleading—Amendment of pleading—Fraud—The fraud charged in the pleading must be proved, and not fraud of a different kind—Restriction of power to amend.

The account of an estate, formerly in the hands of a derivative executor who became insolvent and died in 1856, having been pending in Court for many years, some of the parties being interested in the original estate and others as the insolvent's creditors, a compromise was effected, under which a suit, brought in 1858 by the official assignees

representing the deceased insolvent, was dismissed by the consent of parties in 1875. Part of a sum of money, paid to the credit of the insolvent's estate in pursuance of the compromise, was made over, upon the passing of the consent decree, with the knowledge of the assignee, but without notice to, or the sanction of, the Court, to a person who had assisted in taking the account. From the representatives of the latter, he being now deceased, the successor in office of the assignee claimed payment

In regard to the facts that he was neither a party to, nor had any control over the compromised suit; that he owed no duty to the Court in respect of it, nor to the creditors of the estate; and that he had taken no unfair advantage of the assignee;

Held, that there were no grounds upon which this repayment could be claimed.

The plaint, as presented, alleged the fraudulent concealment of the payment from the assignee. Afterwards, when all the evidence had been taken, and it had been established that the assignee knew of the payment, this was amended to the statement that if he did know of it he had no power to consent to it, and that his consent would not be binding, the payment being a fraud upon the Court.

Held, that the amendment at the stage when it was made was not permissible

It is a well-known rule, that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged, another kind cannot, on failure of proof, be substituted for it.

The High Court having decreed the claim on a finding of fraud different from either of the above, *held*, that on this ground alone the judgment might have been reversed.

On the latter point, *Montesquieu* v. *Sandays* referred to and followed. [*Abdul Hossein Zenial Abadi* v. *Charles Agnew Turner*]... 25.

CONCURRENT FINDING.

Concurrence of Lower Courts in findings upon questions of fact—Agreement for division of family property in equal shares—Malabar custom.

Two Courts in concurrence found that there had been an agreement between two parties, interested in a family fund, that it should be divided into equal fourth parts among the four branches of the family, but that an unequal division, made under a decree, had resulted from unfair dealing. To contest, upon this appeal, those findings of fact, nothing was stated to make it appear to the Committee that, if they went through the whole of the evidence, they would differ from the Courts below on anything but questions of pure fact. Accordingly, their Lordships were of opinion that the case fell within the rule which makes appellate tribunals reluctant to interfere, and in most cases makes them refuse to interfere, with concurrent findings of the Courts below. [*Puthia* v. *Puthia*] ... ... 455.

Concurrent Judgments.—Credibility of witnesses.

The Privy Council is reluctant to disturb the concurrent judgments of two Indian Courts upon a pure question of fact. When a man is a professional witness, his credibility may be properly objected to, but to disbelieve a witness because he gave evidence in other cases is improper, and has a tendency to render respectable people of India reluctant to come to Court as witnesses, which is a great evil in that country. [*Lall Behari Lall* v. *Gopee Bebee*] ... 706.

See "PRACTICE" 5.

CONFISCATION.

See "OUDH TALUKDAR."

CONSIDERATION.

See "MUSHA" M. L.

CONSIGNOR.

See "SALE AND CONSIGNMENT OF GOODS".

CONSTRUCTION.

1. *Decree—Construction of decree—Construction of order made by Settlement Officer awarding estate to a Hindu widow—Transfer by widow, Effect of.*

The plaintiffs obtained a declaratory decree that they were the reversioners and heirs apparent, expectant on the future death of a widow who at the time of suit had survived two co-widows, and that they, the plaintiffs, would be entitled to inherit at her death the estate that had belonged to the deceased husband. All parties had proceeded, as far as to the present appeal, on the view that the surviving widow had the widow's estate only. But an order made in the course of the settlement operations in 1865 had conferred the estate of the deceased on the three widows

as well as on his mother, in equal shares of one-fourth each.

Held, that there was nothing in this order to show an intention to give to the mother and widows anything more than an interest, such as that which a Hindu widow takes; and that the inheritance would devolve in due course of law, an alienation which the widow had made operating only for her lifetime. [*Munnalal Chowdri* v. *Gugraj Singh* ... ... 452.

2. *Deed, Construction of—Deeds not intended to operate according to their tenor—Nullity of transaction apart from fraud.*

Documents, principally a potta and a kobala, executed between a Mahomedan pardanashin lady and one of her relations purported to represent, the one a putni lease from her of her lands and the other a sale of her house, and ground, from the date of the execution. That she received the consideration was not proved, but had it passed it would have been distributed between the two deeds, which formed part of one and the same transaction. From the acts of the parties it was established that her intent was to deprive her heirs, not herself, and that she had no intention to part with the property *in-præsenti*, as the deeds represented that she did. *Held*, that, the latter not being intended to operate according to their tenor, the whole transaction was a nullity. *Jibun Nissa* v. *Asgur Ali* ... ... 574.

3. *Construction of Act XIX of 1844, abolishing cesses on trades.*

On a question whether a cess of two annas per candy on all cotton bought in, and exported from, Broach, paid by the buyer, according to usage from time immemorial, to a temple in that town, was abolished by Act XIX of 1844 :—

Held, that it was a cess of a mixed kind, local and indirect, upon the trade of a cotton buyer, carried on in Broach, attaching when he bought cotton in that town for exportation, and that it fell within the meaning of that Act, so that the right to claim it had been thereby abolished. [*Shri Kalyanraiji* v. *B. Robb*] ... ... 578.

4. *Decree—Construction of decree—Construction in execution of an order in Council.*

An order of Her Majesty in Council was that a decree-holder should recover what was demarcated by "the thakbust map and proceedings of 1839." *Held*, on the construction of the order, that the latter words meant the proceedings relating to the thakbust map, and did not include a survey map which differed from it. [*Radha Persad Singh* v. *Torab Ali*] ... ... 582.

See "ACTS",
— "CIVIL PROCEDURE CODE."
— "GRANT H. L.
— "LEASE" 1, 2.
— "LIMITATION" 2.
— "MORTGAGE" 2.
— "OUDH ESTATES ACT."
— "TREATY."
— "WILL" 1, 2, 3 H. L.

CONSTRUCTION OF SOVEREIGN POWER.

See "TREATY."

CONTRACT.

1. *Contract—Effect of misrepresentation by a party as to part of the subject-matter of a contract—Registration Act (III of 1877), s. 17, cls. (b) and (h)—Civil Procedure Code, 1882, ss. 584 and 585.*

Where one party induces another to contract on the faith of representations made to him any one of which is untrue, the whole contract is in a Court of Equity considered as having been obtained fraudulently.

Where a tenant had executed a kabulyat containing a stipulation which the landlord had told him would not be enforced, the tenant could not be held to have assented to it, and the kabulyat was not the real agreement between the parties. Where by an ikrarnama tenants conjointly promised that they would sign, and have registered, kabulyats for rents at rates mentioned: *Held* that the document did not come under cl. (*b*) of s. 17 of the Registration Act III of 1877, as operating to create or declare an interest, but came under cl. (*h*) as a document merely creating a right to obtain another document, which would when executed create or declare an interest.

The limitation to the power of the Appellate Court in hearing a second appeal under ss. 584 and 585 of the Code of Civil Procedure, 1882, must be attended to, and the appellant cannot be allowed to question the finding of the first Appellate Court on a question of fact. [*Pratab Chander Ghosh* v. *Mohendra Nath Purkait*] ... 444.

2. *Contract—Contract which had become impossible to perform—Further and other relief—Damages—Contract Act (IX of 1872), s. 56—Novation.*

Money having been advanced, a contract was made to secure repayment of it by a usufructuary mortgage, with possession to be given to the lender, of land, which however had then already been attached under a decree, and had been taken under the Collector's management under s. 326 of the Code of Civil Procedure. To perform the contract by delivery of possession of the land having thus become impossible,, it was *held* that the lender of the money was entitled to compensation, the damages being the amount of the advance, together with interest from the date when, had performance been possible, the land should have been made over to him. [*Seth Jaidayal* v. *Ramsahae*] ... 484.

See "GUARDIAN AND WARD".
— "LIMITATION" 6.
— "MARINE INSURANCE".
— "SALE AND CONSIGNMENT OF GOODS".
— "SPECIFIC PERFORMANCE OF CONTRACT" 1, 2.

CONTRIBUTION, RIGHT TO GENERAL AVERAGE.

See "MARITIME LAW."

COPARCENARY.

See "LIMITATION" 5.

CO-PROPRIETOR'S INABILITY TO REPAIR A COMMON PROPERTY TO THE EXCLUSION OF OTHERS.

See "VILLAGE PROPERTY."

CO-SHARES.

Co-sharers—Suits concerning the joint property—As between tenants in common, refusal of decree for possession, for damages, or for an injunction—Resistance of one co-sharer to another's entering, not in denial of his title, but to prevent his interfering with cultivation by the former—Money compensation.

Land being held by two person in common one of whom was in actual occupation o part, cultivating it as if it had been hi, separate property, the other attempted to enter upon the same land, in order to carry on operations thereon inconsistent with the work already being carried on by the former, who resisted and prevented this attempted entry. *Held*, that the resistance being made by the co-sharer in occupation simply with the object of protecting himself in the profitable use of the land, in good husbandry, and not in denial of the other's title, such resistance was, no ground for proceedings on the part of the other, to obtain a decree for joint possession, or for damages : nor would granting an injunction be the proper remedy.

As the Courts in Behgal, in cases where no specific rule exists, are to act according to "justice, equity, and good conscience," so, on its, being found that, where land was held in common between the parties, one of them was in the act of cultivating a part of the land which was not actually used by the other, it would not have been consistent with this rule to restrain the former from proceeding with his proper cultivation : but money compensation, at a proper rate in respect of the exclusive use by, and benefit to, the one who, though possessing in common, was carrying on cultivation for himself, not unsuitable in itself, was awarded between the parties.

Title made by her transfer of her inheritance, through the daughter and heiress of a deceased member of a joint family of brothers, under the Dayabhaga, although her father had executed deeds dedicating his share of the family property to trustees, for the worship of the family deity; this dedication having been inoperative, because it was neither his, nor his brothers' intention that the deeds should be acted upon, and he had never divested himself of his share. [*Watson* v. *Ramchand Dutt*] ... 535.

See "ANCESTRAL" ESTATE H. L.
— "JOINT FAMILY" H. L.
— "PARTITION" H. L.

COST.

1. *Security for costs—Discretion of Court to to refuse security—Civil Procedure Code (Act XIV of 1882), s. 549.*

An original Court rejected, as insufficient, security offered for the purpose of conforming to an order of the High Court under s. 549 Civil Procedure Code ; and refused to receive other security offered, in lieu, after the time fixed by the order had expired. This was affirmed by the High Court ; *Held*, that as the High Court had a discretion to enlarge the time allowed for finding security,

and to accept other security in lieu of that rejected, or to refuse to do either, it had, under the circumstances, judicially exercised that discretion in refusing. [*Rajab Ali* v. *Amir Hossein.*] ... ... 389.

2. *Security for costs—Civil Procedure, section 549—Power of Appellate Court to extend the time for furnishing security—costs.*

Where the High Court, under section 549, Civil Procedure Code, has demanded security from an appellant, it has power to extend the time for complying with the order on application made, as well after as before the time first fixed has expired; and may nevertheless reject the appeal under that section, if the security is not in the end furnished. *Haidri Bai* v. *The East Indian-Railway Company* overruled.

In this case the Registrar was directed to allow only the costs applicable to the question argued and decided. [*Badri Narayan* v. *Sheo Koer.*] ... ... 493.

3. *Security for costs—Civil Procedure, section 549—Rejection of appeal—Discretion of Court.*

The security for the respondents' costs which the High Court had demanded under section 549 not having been furnished within the time fixed, and the Court, in the exercise of its discretion, having refused to extend the time, the appeal was rejected under that section. *Held*, that this was not a case for interference. [*Modhusudan Das* v. *Adhikari Prapanna.*] ... ... 496.

See "PARTIES IN PARIDELECTO."
— "PRACTICE" 4.

COSTS ORDERED OUT OF THE TESTATOR'S ESTATE.

See "OUDH ESTATES ACT" 1.

CREDITOR, LIABLE FOR, WRONGFUL ATTACHMENT.

See "ATTACHMENT" 1.

CUSTOM.

See "CONCURRENT FINDING."
— "EVIDENCE" 3.
— "IMPARTIBLE ESTATE" H. L.

COURT OF WARDS ACT.

Court of Wards Act (Bengal Act X of 1879), s. 55—Suit rejected when filed on behalf of a minor under the Court of Wards without sanction of that authority to proceed with it.

Where, under section 55 of the Bengal Court of Wards Act, IX of 1879, the manager of an estate authorised the plaintiff, in order to save limitation, to institute a suit on behalf of the Court of Wards, which refused afterwards to sanction the proceeding with the suit, *held* that the Judge rightly ordered that the suit be rejected, as incapable, under the above section, of being prosecuted. [*Bisheswar Roy* v. *Sashi Sikareswar Roy.*] ... ... 501.

DAMAGE.

See "ATTACHMENT" 1.
— "CONTRACT" 2.
— "COSHARER".
— "PARTIES IN PARIDELECTO.".

DECLARATORY DECREE, SUIT FOR.

1. *Declaratory decree, Suit for—Declaratory decree not obtainable by absolute right-Discretion of Court.*

It is discretionary with a Court to grant or to refuse a declaratory decree with regard to the circumstances—*Sreenarain Mitter*, v. *Kishen Soondery Dassee* referred to and followed.

A talukdar died, leaving a widow; also a son who, having succeeded as talukdar, died childless. This son's widow, being in possession, sued for declaration than an adoption by the father's widow, to the father, was void and ineffectual. The ground of suit was that, at some time or other after the death of the plaintiff, the person alleging himself to have adopted might obtain the talukdari, unless his adoption should now be negatived.

With regard to all the circumstances, the refusal of such a declaration was approved by their Lordships. If the person alleged to have been adopted should sue hereafter, the question would be decided whether he was validly adopted or not. [*Pirthe Pal Kunwar* v. *Guman Kunwar.*]... ... 569.

2. *Act I of 1877 (Specific Relief Act) s. 42—Refusal of declaratory decree, the case made for it being defective.*

Under the Specific Relief Act (1 of 1877) s. 42, a suit was brought for a decree de-

claratory of the plaintiff's title to be mutawalis and managers of property from ancient times connected with religious observances, *viz.*, a ghat upon the Jumna with temples adjoining; of their title also to receive a proportion of the offerings; and they also claimed to have the proceeds of a decree obtained by the defendants against third party spent upon repairs.

Held that the suit had been rightly dismissed in the first Court. Even if the evidence had shown that the plaintiffs had some rights in respect of the property in question, they had, nevertheless, so far failed in giving definite proof of their claims that they were not entitled to the decree claimed. No decision was, however, given, nor was any opinion expressed, with respect to other rights, which either of the parties might have, or claim to have, relating to the property. [*Maina* v. *Brijomohun.*]... ... 624.

3. *Suit for declaration of title—Suit dismissed for want of satisfactory evidence, but without prejudice to any question of title in any future suit.*

Held that looking at the case as it stands, the nature of the suit and the evidence that has been given, the Court cannot make an affirmative declaration of the Plaintiff's title. The Decree of the High Court dismissing the suit is allowed to stand, but without prejudice to any question of title between the parties in any future suit or proceeding. [*Sheik Torab Ally* v. *Sheik Mohamed Tukhee.*] 711

DECLARATORY DECREE, DISCRETION OF COURT.

See "DECLARATORY DECREE" 1.

REFUSAL OF.

See "DECLARATORY DECREE" 2.

DECREE.

See "CONSTRUCTION" 1, 4.
— "COSHARER."
— "PRACTICE" 4.
— "TRANSFER OF DECREE."

DECREE, GENERAL.

See "RESJUDICATA" 5.

DECREE FOR POSSESSION.

See "COSHARER."

DECREE-HOLDER.

See "SALE IN EXECUTION OF DECREE" 4.
— "ATTACHMENT" 1.

DECREE-HOLDER, LIABILITY OF.

See ATTACHMENT" 1.

DECREE OPERATIVE.

See "RESJUDICATA."

DEED.

See "CONSTRUCTION". 2.

DEED, NOT INTENDED TO OPERATE ACCORDING TO THE TENOR, NULLITY OF.

See "CONSTRUCTION" 2.

DELIMITATION OF LANDS OF ADJOINING PROPRIETORS.

See "LAND REGISTRATION."

DISABILITY.

See "SPECIFIC PERFORMANCE OF CONTRACT" 2.

DISMISSAL OF SUIT FOR DECLARATION OF TITLE, WITHOUT PREJUDICE TO FRESH SUIT.

See "DECLARATORY DECREE, SUIT FOR" 3.
— "RESJUDICATA" 2.

DISQUALIFICATION OF A BROTHER TO INHERIT.

See INHERITANCE" 3 H. L.

ENDOWMENT.

See "ENDOWMENT" H. L.
— "ENDOWMENT," M. L.

ENCHANCEMENT OF RENT, EFFECT OF.

See "GUARDIAN AND WARD" 2.

ESTOPPEL, ADMISSION NOT AMOUNTING TO.

See "GUARDIAN AND WARD" 2.
— INHERITANCE" 3. H. L.

EQUITY OF PURCHASER TO HAVE A LIEN ON SURVIVOR.

See "JOINT FAMILY" H. L.

EQUITY OF REDEMPTION.

See "REDEMPTION."

EVIDENCE.

1. *Evidence Act (I of 1872), ss. 65 and 74—Secondary evidence of contents of document.*

Secondary evidence of the contents of a document cannot be admitted without the non production of the original being first accounted for in such manner as to bring it within one or other of the cases provided for in s. 65 of the Evidence Act, I of 1872. An *anumatipatra* is not a public document within the meaning of s. 74, nor, if it were, would its being on the record constitute a copy certified as required by s. 76. [*Krisna Kishori Chowdhari* v. *Kisori Lal Ray*]... 13.

2. *Title, Evidence of—Presumption arising from Possession—Issue as to identity of land re-formed on a site formerly submerged*

In a suit for the possession of a chur, formerly carried away and afterwards re-formed upon its former site, the issue was whether the land belonged to the plaintiffs or to the defendants. This issue was found in favor of the plaintiffs by the first Court; and the Appellate Court, finding that the plaintiffs had been in possession for more than twelve years, concluded that, at all events, that had a title by adverse possession. On an appeal, the High Court considered that the latter decision was not upon the issue raised, the plaintiff's claim being founded on an original title to the site of the chur—a title denied by the defendants, and remanded the suit for judgment on this issue, whereupon the Appellate Court maintained the judgment of the first Court in favor of the plaintiffs, finding on the evidence that the land belonged to the plaintiffs.

Upon a second appeal the High Court reversed the decree of the Appellate Court, and dismissed the suit, on the ground that there was an entire absence of evidence as to which party was entitled at the date to which the dispute related. *Held*, that this was erroneous. On a question of parcel or no parcel, when possession has been established for a period, there is not an entire absence of evidence of anterior ownership, because *presumitur retro*. [*Ananga Manjari Chowdharani* v. *Tripurari Chowdharani*]...45.

3. *Evidence—Validity of Transfer—Benami transaction—Wajib-ul-arz.*

A transfer by registered deed, admitted to have been executed, but alleged to have been benami and merely colorable, was held, on the evidence, to have been valid and effective in the absence of evidence showing the contrary.

A settlement officer should not receive for entry in the wajib-ul-arz of a village a mere expression of the views of a proprietor, or enter it upon the recowards relating to the jib-ul-arz being intended to be the official record of local customs. [*Uman Pershad* v. *Gandharp Singh*] ... ... 71.

4. *Evidence—Burden of proof.*

In a suit for money due on a bond between the representatives of the original parties to it, the defendant attempted to reduce the claim on theground that the money had not been received in full, the bond having been given partly in respect of an old debt, and partly in respect of a credit in account, upon which the debtor had not, in fact, drawn certain items.

The Judicial Committee concurred with the High Court, which had reversed so much of the decree of the Court of first instance as disallowed these items; the latter Court not having correctly adjusted the burden of proof, and having acted as if the plaintiff had relied on his own books to prove the debt; besides, having erred in weighing the evidence. [*Rajeswari Kuar* v. *Rai Bal Krishan*.] ... . 80.

5. *Evidence—Burden of proof—Right to begin—Proof of loss, and admission of secondary evidence, of a document alleged to have been executed—Evidence of execution of documents—Civil Procedure Code, ss.* 141, 142, *and* 568.

A suit for possession by right of inheritance was brought by a claimant alleging

himself to be the heir against, the alleged adopted son of the last male owner denying that an adoption, purporting to be made by the widow, had been duly authorised by the deceased. The Court of first instance called upon the defendant to prove his title as a son by adoption, notwithstanding that the plaintiff was out of possession, and could not have succeeded, in the event of the defendant's failure to prove it, without first proving his own title as collateral heir by descent: thus, in effect, proposing to make the establishment of the plaintiff's title depend upon the failure or success of the defendant in proving the adoption.

The High Court pointed out the error of this proceeding and the Judicial Committee affirmed its judgment, concurring also in its finding that the adoption had been proved.

It was found also that the loss of the *annumati patra* had been established; so that secondary evidence of it was receivable. [*Kali Kishore Dutt Gupto Mozoomdar* v. *Bhûsân Chunder Dutt Goopta*] ... 607.

6. *Hindu law—Evidence of partition of joint family—presumption.*

In a suit to enforce an alleged right of one brother against another, to separate proprietary possession of share in joint family estate, the concurrent findings of the Courts below were definitely to the effect that a partition had taken place, after which the brothers had been no longer joint as to their interests.

The Courts had fully gone into the case on either side, receiving the evidence offered by either party, and they had considered the whole of it. Therefore, it could not be effectively urged, as a ground of appeal, that the Courts below, in coming to the above conclusion have erred in putting the burden of proof unduly upon the plaintiff or disregarded the presumption arising from the original state of the family. [*Ram Churn* v *Debi Din*] ... ... 616.

7. *Evidence—Admission in a mortgage as to amount of land excepted from its operation—Evidence Act (I of 1872), s 83—Takbust survey map—Statements recorded on such map.*

Debutter land within the limits of a revenue-paying mouzah, which had been mortgaged by the defendants to a predecessor in title of the plaintiff, was exempted from the mortgage, the deed specifying the number of bighas making the area of the debutter. Against a plaintiff, who made title to the mortgaged mouzah and claimed possession of all of it that had passed by the mortgage, the mortgagors set up that there was more debutter in the mouzah than the deed had specified, the intention of the parties to the deed having been to exempt whatever debutter there actually was:—*Held*, that the statement in the deed as to the quantity of the debutter was a deliberate admission, imposing upon the mortgagors who had made it, the burden of proving that it was untrue, or that they were not bound by it; also that the Subordinate Judge's finding that the defendants had not given proof sufficient to discharge themselves of this, was correct.

Among other evidence, adduced to counteract the effect of this admission, was a takbust map made of a revenue survey. The amin who made it had no authority to determine what lands were debutter, but only to lay down, and to map, boundaries:—*Held*, that this map could not be treated as raising a presumption of correctness with section 83 of the Indian Evidence Act 1872, on the question as to the amount of debutter land in one of the villages mapped.

Statements, also, as to what lands were debutter appeared on the face of the map to have been made according to the pointing out of the agents of the proprioters of the mouzah, and the principal tenants in the presence of the agent of the holders of estates in the neighbouring mouzahs:—*Held*, that these statements were not evidence on the issue now raised. [*Jarao Kumari* v. *Lalonmoni.*] ... ... 628.

8. *Evidence—Plaintiffs failed to prove their case.*

Plaintiffs sued Defendant Martin, and other Defendants for a balance of an account which they say there was between their firm and the Defendants as commission agents in respect of certain transaction of trading in in indigo, grain, &c. The defence of Defendant Martin was that, as regards the transactions which followed the contract for indigo seed, they were not entered into by the Plaintiff as commission agents for him, but that Ram Pershad, a member of the Plaintiff's firm, had entered into a contract for the supply of 100,000 maunds of seeds, and that there was an agreement between him and Martin that Martin should purchase 40,000 maunds for the purpose of carrying out that contract. Plaintiffs failed to make out their case as against the Defendant Martin, the evidence rather shows that Martin's conten-

tion is correct. Plaintiff's appeal dismissed as regards Defendant Martin also. [*Jugal Kishore* v. *Girdhar Lall*] ... ... 687.

9. *Evidence—Suspicion of Court inconsistent with cases of both parties.*

In a suit for money due on a mortgage-bond, Defendant denied the execution of the bond. First Court held plaintiff's case proved. High Court in appeal agreed with the first Court that Defendant has perjured himself in denying the execution of the bond, but held on suspicion on a bare inspection of the document, that the document was originally given, *i. e.* signed, in blank, and that the amount of it originally intended was Rs. 5,200, which was fraudulently altered into Rs. 16,200. *Held* that it is the duty of the courts to act upon the issues, and upon the proofs in the case, and not upon a suspicion after throwing aside the whole evidence in the case more specially when the suspicion acted on is wholly inconsistent with the case alleged and sworn to by the person in whose favour it has dacided. [*Bhugwan doss* v. *Hunnooman Pershad*] ... ... 689.

10. *Evidence—Long possession of Defendant —Two conflicting local investigations.*

In a suit by Plaintiff Appellant to recover possession of chur land and to impeach the Thakbust award, *Held* that the Plaintiff has failed to establish the boundary line on which he relies by evidence on which a Court of Justice ought to disturb the possession of the Respondent since 1852, and probably for a much longer period.

Held, also, that, where the results of two local investigations are conflicting, the earlier is to be preferred, since in the interval between the two investigations, the features of the locality may have changed, and evidence of possession may have been lost. [*Protab Chandra Burrooah* v. *Ranee Surnomoyee*] ... ... 716.

11. *Evidence—Examination of Plaintiff in the Appellate Court—Admission of the factum when not that of the validity of a deed of conveyance.*

The question is as regards the factum and validity of a deed of conveyance alleged to have been executed by Azeemun to plaintiff in the name of Sun Lall. The factum of the deed is established but the *bonâ fide* of the deed and the passing of the consideration money have not been established. The High Court considered the evidence to be unsatisfactory, but thought it proper to exercise their power to examine the plaintiff who was examined, and the High Court relying on that evidence decreed the plaintiff's claim. *Held* that it is dangerous to allow a plaintiff, a pleader, who has not thought fit to give evidence in his own behalf, to be subsequently called to support his case, when the evidence he had already adduced had broken down, and that the testimony of the plaintiff so given is not satisfactory. *Held* also that the admission in the statements contained in some earlier proceedings is an admission of the factum of the deed, and not of the *bonâ fides* and validity thereof. [*Ushrufoonnessa Begum* v. *Babu Gridhari Lall*]... 708.

See "CHURLAND."
— "GUARDIAN AND WARD."
— "INHERITANCE" M. L.
— "LANDLORD AND TENANT,"

EXECUTION OF DECREE.

See "GHATAWALI TENURE, SALE IN EXECUTION OF"
— "LIMITATION" 9.
— "MESNE PROFITS."
— "SALE IN EXECUTION OF DECREE" 1, 2, 3, 4.

EXECUTION OF JUDGMENT FOR THE RFLIEF OF INSOLVENT DEBTORS.

See "LIMITATION" 9.

EXECUTION SALE.

See "MORTGAGE" 1.
— "SALE IN EXECUTION OF DECREE" 1, 2, 3, 4.

FATHERS DEBT, SALE FOR.

See "SALE IN EXECUTION OF DECREE" 5, 7, 8.

FRAUD.

See "COMPROMISE" 1.
— "LIMITATION" 3.
— "PLAINT".

FRAUD AS ALLEGED MUST BE PROVED.

See "COMPROMISE."

FRAUD, NULLITY OF TRANSACTION WITHOUT.

See "CONSTRUCTION" 2.

FRESH SUIT BARRED BY THE DISMISSAL OF THE FORMER SUIT FOR DEFAULT.

See "CIVIL PROCEDURE CODE" 1.

GHATWALI TENURE, SALE IN EXECUTION OF.

1. *Ghatwali tenure—Ghatwali tenure in Bhagulpore—Ghatwal's right of alienation—Sale of ghatwal's estate in execution of decree against him.*

Ghatwali tenures are rendered by their origin and incidents distinct in some particulars from other inheritances, and to them the law of the Mitakshara, to its full extent, is not entirely applicable; yielding, in their case, to a custom, though only to the extent of the custom proved.

On a question whether the sale of a ghatwali tenure in the Kharagpore zemindari, in Bhagulpore, in execution of a decree against the ghatwal, had transferred the inheritance as against the ghatwal's son: *Held*, in regard to a proved custom, that the ghatwali was not inalienable, but might be aliened by the ghatwal, or sold in execution of a decree against him, if such alienation was assented to by the zeminder, this power of alienation not being limited to the life-interest of the ghatwal for the time being, but forming part of his right and title to the ghatwali. [*Kali Pershad* v. *Ananda Ray*]. ... ... 121.

GIFT.

See "GIFT" H. L.
— "GIFT" M. L.
— "OUDH TALUKDAR."
— "WILL" 2, 3 H. L.

GIFT BY HUSBAND.

See "STRIDHUN" H. L.

GIFT OVER OF LIFE INTEREST.

See "WILL" 2. H. L.

GIFT TO ONE OF TWO DONEES PROVING INVALID, THE OTHER MAY BE VALID.

See "GIFT" H. L.

GIFT TO PERSONS AND HEIRS MALE OF THEIR BODIES, CONSTRUCTION OF.

See "WILL" 2, H. L.
See "SALE IN EXECUTION OF DECREE" 1, 2, 3, 4.

GIFT TO WIFE.

See "STRIDHAN" H. L.

GRANT TO UNBORN UPON IMPOSSIBLE CONDITION, INVALID.

See "GRANT" H. L.

GRANTOR, RESTRAINT UPON THE POWER OF ALIENATION OF.

See "GRANT" H. L.

GROUND OF SPECIAL APPEAL, WANT OF EVIDENCE A.

See "SPECIAL APPEAL" 2.

GUARDIAN AND WARD.

1. *Guardian and ward—Inability of guardian to contract on behalf of infant ward so as to bind him personally—Effect of Act VI of 1862 (Bombay), Sec. 12, in regard to a charge upon a talukdari estate in the Ahmedabad District during the period of management.*

A guardian cannot contract in the name of a ward, so as to impose on him a personal liability.

Act VI of 1862 (Bombay), "for the amelioration of the condition of talukdars in the Ahmedabad Collectorate and for their relief from debt," was intended to deal with all debts and liabilities which could possibly impose a charge upon the *talukdari* estate at the end of the period of management; when the estate was to be restored to the *talukdar* free of incumbrance, excepting the Government revenue. If debts amounted to more than the surplus of rents during the management, of which the maximum period was twenty years, they were not to be paid.

A widow, as guardian of her infant son, the heir of a *talukdari* estate in the above district, validly transferred villages, part thereof; and in the deed of transfer, to which her ward was by her as his guardian nominally a party, contracted to indemnify the purchaser in case the Government should claim and enforce a right to revenue upon the villages which she transferred as being

rent-free. The deed purported to make both guardian and ward personally liable in this respect, and also charged the liability upon other parts of the *talukdari* estate. The infant attained majority, and the estate was then placed under management, within Act VI of 1862. During the period of management the Government claimed and enforced payment of revenue upon the villages.

Held that there was no personal liability on the part of the *talukdar* created by the above; also, that if the charge on the estate had been validly made, it fell, at all events within the terms of section 12 of Act VI of 1862, absolving estates from liability to debts incurred, not only before, but during the period of management. [*Waghela Rajsanji* v. *Sheik Masludin*] ... ... 16.

2. *Guardian and Minor—Enhancement of rent, Effect of—Acts of mother and guardian, how far binding on minor son—Kabuliyat given by widow in possession to bind her son and successor to pay enhanced rent decreed against her—Admission not amounting to estoppel.*

A putnidar obtained decrees for the enhancement of the rent of holdings in the possession of the widow of a deceased tenant, one decree being in respect of land formerly held by the latter, and the other in respect of a holding purchased by the widow, on behalf of her minor son by the deceased, whilst the enhancement suits were pending. The widow also signed kabuliyats relating to both tenancies, agreeing, as mother of the minor, to pay the enhanced rent.

Held, that as the putnidar was entitled to sue for enhancement, and it was not to be presumed that the mother held adversely to her son, also as she had come to what she believed to be, and was, a proper arrangement, the son on his attaining full age entered into possession of the tenancies, and was bound by the kabuliyats.

The putnidar was not precluded by the fact that he had, after the son had attained full age sued the mother as tenant, stating that she, and not the son, was tenant [*Watson & Co.*, v. *Sham Lall Mitter*] ... 66.

3. *Minor—Guardian, Powers of, to deal with minor's estate—Application of the Land Acquisition Act, 1870, to the land of of a minor—Insufficiency of compliance with the other requirements of the Act, without actual compesation to the minor's estate—Recovery of land by minor on coming of age.*

The guardian of a minor's estate has no power to waive a right to compensation for part of the estate taken under the Land Acquisition Act, 1870; although the owner, had he been of full age, might have waived it.

Although the Court of Wards had no power to alienate the land of a minor of whose estate it had charge, yet possession might have been lawfully taken of the land for a public purpose, under and in conformity with the Land Acquisition Act, 1870, if there had been due compliance with the provisions of the Act, as regards compensation to the minor's estate.

Where, however, compensation had not been given, and a merely nominal consideration had passed, the Collector not having acted, as the representative of the Court of Wards, so as to protect the interests of the minor, *held*, that no valid title to the land was established as against the ward, and that on his attaining full age he could recover it with mesne profits. [*Luchmeswur Singh* v. *Chairman of the Darbhanga Municipality*] ... ... 564.

See "GUARDIAN" M. L.
— "MESNE PROFITS."

GUARDIAN, POWER OF.

See "GUARDIAN" M. L.

GUARDIAN, SALE BY.

See "GUARDIAN" M. L.

GUARDIAN'S AGREEMENT TO PAY ENHANCED RENT HOW FAR BINDING ON MINOR.

See "GUARDIAN AND WARD" 2.

GUARDIAN'S POWER TO BIND THE WARD PERSONALLY.

See "GUARDIAN AND WARD" 1.

GUARDIAN'S POWER TO WAIVE THE RIGHT TO COMPENSATION.

See "GUARDIAN AND WARD" 3.

HINDU LAW—ADOPTED SON LIABILITY OF.

See "MESNE PROFITS."

HINDU LAW—ADOPTION.

1. *Adoption—Widow adopting to her deceased husband, with consent of sapindas—Effect of estate having already vested in the widow of a son.*

A son's widow having obtained her widow's estate in the property inherited by her deceased husband from his father, the widow of that father cannot adopt a son to the latter, whether she acts under authority from her husband or as widow with the assent of sapindas.

That the power of the father's widow to adopt a son to him is brought to an end upon the vesting of the estate in the son's widow was decided in *Mussumat Bhoobun Moyee Debia* v. *Ram Kishore Acharj* and *Padmakumari Debi* v. *The Court of Wards* [*Thayammal* v. *Venkatarama Aiyan*] ... 10.

2. *Failure to prove alleged authority to widow who had purported to adopt to her deceased husband. Query; as to effect upon an adoption of an adopted child being the only son of his father.*

Whether an elder widow who had purported to adopt a son to her deceased husband under his authority had received such authority orally or by will, was disputed by a junior widow, the Courts below differing as to the question of fact. Upon the evidence, the finding of the Subordinate Judge that no such authority had been given, was maintained.

The Courts below also differed as to whether the adoption, if authorized was validly, effected, the boy adopted having been the only son of his natural father Whether this is a disqualification invalidating an adoption, is a question that has not come before Her Majesty in Council for decision. [*Sri Amini Debi* v. *Sri . Vekrama Debi*] ... ... 190.

HINDU LAW—ADOPTION OF SISTER'S SON BY A BRAHMAN INVALID.

See "POSSESSORY TITLE."

HINDU LAW—ADOPTION, POWER OF, ENDED ON THE ESTATE VESTING IN THE SON'S WIDOW.

See "WILL" 3. H. L.

HINDU LAW-ALIENATION BY HINDU WIDOW.

See "WIDOW" H. L.

HINDU LAW—ANCESTRAL ESTATE.

See "JOINT FAMILY" H. L.

HINDU LAW—BROTHER, DISQUALIFICATION OF, TO SHARE.

"*See* INHERITANCE" 2. H. L.

HINDU LAW—ENDOWMENT.

Hindu Law—Endowment—Hereditary right to be shebait and to have possession of property dedicated to religious purposes.

According to Hindu law, when the worship of a Thakur has been founded, the office of a shebait is held to be vested in the heir or heirs of the founder, in default of evidence that he has disposed of it otherwise, provided that there has not been some usage, course of dealing, or circumstance, shewing a different mode of devolution. *Peet Koonwur* v. *Chutter Dharee Singh* referred to. It having been established that a particular worship had been founded by the plaintiff's grand father, it followed that the plaintiff was by inheritance the shebait of that worship, there being no proof of any usage at variance with this presumption, but the custom appearing to be in accordance with it.

Held, that the plaintiff, as such representative of the founder, was entitled, in preference to a collaterally-descended member of the founder's family, to claim the shebaitship. Also, that the plaintiff was entitled, in that character, to the possession of a portrait which had been by the same founder dedicated to this worship. But that he had no right to a temple in which the portrait was kept, this temple having been given by one of the worshippers ("for the location of the Sri Sri Ishwar Jios,") with the condition annexed that the defendant should be shebait. The plaintiff, accordingly, could not claim possession of this temple, as it could only have been accepted as a gift upon the donor's terms; and this condition prevailed notwithstanding that the temple had been in part paid for by subscription among the worshippers; there being no evidence that the latter did not know of it, or had paid their money with any reference to the question who was to be shebait. [*Gossami Sri Gridhariji* v *Ramanhalji Gossami*... 350.

HINDU LAW—FATHER'S DEBT, SALE FOR.

See "SALE IN EXECUTION OF DECREE." 5, 7.

HINDU LAW—GIFT.

Hindu law—Gift—Inheritance in a village community in Oudh—Wajab-ul-arz modifying the Mitakshara law—Hindu widow's power of alienation—Operation of gift on her two donees, one of whom could not take.

A clause in the wajib-ul-arz of a village in Oudh authorized any co-parcener not having male issue, or his widow, to make a gift of his share in the village to a daughter, or a daughter's son; the intention apparent from this, and from a further provision as to the descendants of a sharer's daughter, being to modify the law otherwise prevailing *viz.*, the Mitakshara, and authorize the introduction of a daughter, or her son, and their descendants, male or female, in priority to brothers or nephews of the sharer.

Held, that such introduction was authorized, and that the inheritance, where the widow had made a gift of it in favour of a daughter was transmitted to the daughter's daughter, the gift being of more than the donor would have taken as a widow.

The gift was to the daughter, and to her husband jointly. *Held*, that the gift being invalid as to the husband, the daughter took the whole estate given on the general principle of gifts to two persons jointly, where they failed as to one of them, operating entirely for the benefit of the other who could take, declared in *Humphrey* v. *Tayleur* which, not depending on any peculiarity of English law, was applicable here. [*Nandi Singh* v. *Sita Ram* ... 307.

HINDU LAW—GIFT OF BENEFICIAL INTEREST.

See "WILL" 3. H. L.

HINDU LAW—GIFT-OVER AFTER LIFE INTEREST.

See "WILL" 2. L. H.

HINDU LAW—GIFT TO PERSONS AND HEIRS MALE OF THEIR BODIES, CONSTRUCTION OF.

See "WILL" 2. H. L.

HINDU LAW—GIFT BY HUSBAND.

See "STRIDHAN" H. L.

HINDU LAW—GRANT.

Grant, Construction of—Invalidity of grant, or covenant by grantor, in favor of persons unborn, upon a condition which may never arise—Restraint upon grantor's own power of alienating—Hindu law.

A Hindu owner cannot make a conditional grant of a future interest in property in favor of persons unborn, who may happen at a future time to be the living descendants of the grantees named, to take effect upon the occurrence of an event which may never occur. That they would thereby impose a restraint contrary to the principles of Hindu law, upon his own power of alienating his estate, discharged of such future interest, is a reason for the invalidity of such a grant.

The purpose was to oblige the grantor and his successors in a Raj estate to give in some way or other maintenance to all the descendants of four persons living at the date of the grant, by declaring that on the failure of the Raja of the day, at any future time to maintain such descendants, the latter were to have an immediate right to four of the Raj villages. This might be regaded as importing a present assignment to persons not yet in existence, subject to a suspensive condition, which might prevent its ever taking effect; or it might be regarded as a covenant intended to run with the Raj estate, in favor of non-existing covenantees, to give the villages to them in the event specified *Held*, that in either view, it was equally ineffectual.

Held, also, that the High Court had correctly construed the instrument in holding that the words, "if ever in the time of my descendant you are not provided with means of maintenance," formed a condition; which also was unfulfilled—the descendants being in possession of villages granted to them by the Raja, other than those claimed, more than sufficient for their maintenance [*Chandi Churn Barua* v. *Sedheswari Debi*] ... 231

HINDU LAW—ILLEGETIMATE SON, RIGHT OF, AMONG SUDRAS.

See "INHERITANCE" 2, H. L.

HINDU LAW—IMPARTIBLE ESTATE.

Custom—Impartible estate—Right of possessor of impartible estate to alienate.

There is no such co-parcenary in an estate impartible by custom, as, under the law of

the Mitakshara governing the descent of ordinary property, attaches to a son on his birth.

The son's right at birth, under the Mitakshara, is not connected with the right to share in, and to obtain partition of, the estate, that it, does not exist independently of the latter right.

Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom.

In regard to a *raj* estate in Gorakhpur, by custom impartible and descending by primogeniture, the family being in other respects governed by the Mitakshara law, the present Raja's alienation of part of that estate was alleged by his son to be invalid as against him.

Held that if there had been no custom of impartibility, the Raja's power over the estate would have been restricted by the law declared in Mitakshara, ch. I, s. 1, v. 27; and the gift would have been void. But, there being the above custom, the question was how far the general law was superseded, and whether the right of the son to control the father's act in this respect was beyond the custom.

Held that in regard to impartible estate, the son's right at birth did not exist where there was no right on his part to partition; also that inalienability depended on custom or on the nature of the tenure. In this case the evidence did not establish that by custom the estate was inalienable. [*Rani Saytaj Kuari* v. *Rani Desraj Kuari*]... 139.

See "ZEMINDARI, IMPARTIBILITY OF."

HINDU LAW—INHERITANCE.

1. *Inheritance to property purchased by Hindu widow out of the income of her estate.*

When a widow, not spending the income of her widow's estate in the property which belonged to her husband when living, has invested such savings in property held by her without making any distiction between the original estate and the after-purchases, the *primâ facie* presumption is that it has been her intention to keep the estate one and entire, and that the after purchases are an increment to the original estate.

The authority upon this matter is found in *Isridut Koer* v. *Hansbutti Koerain* where a widow having made no distinction between the original estate and the after-purchases, the latter were held inalienable by her for any purpose not justfying alienation of the former. [*Sheolochun Singh* v. *Saheb Singh*] ... ... 1.

2. *Hindu Law—Inheritance—Impartible Estate—Mitakshara Law—Right of illegitimate son among Sudras—Survivorship.*

For determining who is to be heir to an impartibe estate, the same rules apply which also govern the succesion to partible estates though the estate can be held by only one member of the family at a time.

Under the Mitakshara, among Sudras, where a father left a son by a wedded wife, and an illegitimate son, the ordinary rule of survivorship incidental to a family co-parcenary was held to apply; and the illegitimate, was held entitled by survivorship to succeed to the family estate, which was impartible and appertained to a raj, on the death of his brother without male issue.

Sadu v. *Baiza* referred to and approved. [*Jogendra Bhupati Hurro Chundra Maha patra* v. *Nityanand Man Singh* ... 596

3. *Hindu law—Inheritance—Mitakshara—Disqualification of a brother to share—Intention as evidenced by conduct—Waiver of rights—Estoppel—Limitation.*

Between the two surviving brothers of a Mitakshara family, the action of the elder to the younger, who had been born deaf and dumb, was such as to recognise for some years that the latter had a joint interest in the family property. The proper inference to be drawn from this was that the elder treated his brother as a member of the family, and entitled to equal rights until it had become clear that his disqualification would never be removed by his being cured. Their Lordships would not infer that there was an intention shown by the acts of the elder to waive the rights accruing to him in consequence of this disqualification, nor would they hold that his act operated to create a new title in the younger.

This branch of the family became extinct, the brothers having died, and also the elder brother's daughter, she having been the only descendant. This daughter had an only son, who died before her, after taking, however, the whole family estate under a gift made to him with his mother's assent by his maternal grandfather in 1876. In 1882 the plaintiff, a collateral relation, sued the widow of the donee to obtain the estate of the younger of the brothers. The widow made

title under the gift to her deceased husband, followed by his possession, and heirs afterwards, since the date of the gift. Upon the facts found, the suit was held to be barred by limitation. [*Lala Muddon Gopal* v. *Khikhinda Koer*] ... ... 676.

See 'GIFT" H. L.
— "OUDH ESTATES ACT" 4, 5.
— "PARTITION" 1 H. L.

HINDU LAW—JOINT FAMILY.

Hindu Law—Joint family—Ancestral estate held jointly by family under the Mitakshara —Sale attempted by one member of his share—Effect of partition—On death of vendor, right by survivorship of other members—Equity of purschaser to have a lien against survivor.

As to ancestral estate under the Mitakshara, so long as the estate is undivided and the share of a member of the family is indefinite, he cannot dispose of it without the consent of his coparceners. *Held*, that in a joint family, a nephew, having taken by survivorship the undivided share of an uncle deceased, was entitled to recover that share from a purchaser, to whom the uncle in his lifetime had sold it without the consent of his coparceners, and without necessity ; *held*, also that the purchaser could have no lien on the share for return of the purchase-money.

As soon as partition is made ;—actual partitition not being in all cases essential, as for instance where the family has agreed to hold their estate in definite shares, or a member's undivided share, in execution of his creditor's decree, has been attached ,—that will be regarded as sufficient to support the alienation of a member's interest, as if it had been his acquired property.

As regards members of a family living at the time when their alienation was set aside at the instance of another member, the Court, in *Mahabeer Persad* v. *Ramyad Singh* justly ordered that the property should be thenceforth possessed in defined shares, and that the shares of the members who had joined in the sale should be subject to a lien for the purchase-money. But that case must be distinguished from the present. Here, the accrued right of survivorship precluded any such course. The nephew not being responsible for the personal debts and obligations of his uncle, what might have been an enforcible equity against the interest of the latter, while it existed, could not affect the interest which had passed to a surviving co-parcener [*Madho Pershad* v. *Mehrban Singh*] ... ... 586.

See "EVIDENCE" 6.
— "SALE IN EXECUTION OF DECREE" 1, 2, 3 5, 7, 8.
— "PARTITION" 1, 2, 3. H. L.

HINDU LAW—MANAGING MEMBER OF A JOINT MITAKSHARA FAMILY, MORTGAGE BY

See "SALE IN EXECUTION OF DECREE" 3.

HINDU LAW—MITAKSHARA.

See "GIFT." H L.
— "INHERITANCE" 1, 3. H. L.

HINDU LAW—MITAKSHARA, MODIFIED BY WAZIB-UL-URZ.

See "GIFT" H. L.

HINDU LAW-MITAKSHARA—SALE IN EXECUTION—RIGHTS OF CO-SHARERS NOT BEING PARTIES TO THE DECREE OR EXECUTION PROCEEDINGS.

See "SALE IN EXECUTION OF EECREE" 1, 2, 3
— "STRIDHAN." H. L.

HINDU—LAW PARTITION.

1. *Hindu law—Partition—Inheritance of talukdari estate in Oudh—Sanad recognizing primogeniture, Effect of as to existing rights of inheritance—Shares held by members of family—Mesne profits on specific and definite shares.*

The ordinary rule is that if persons are entitled beneficially to shares in an estate they may have partition Although in a suit for the partition of joint family estate, where the head of the joint family does not account for the profits, under the ordinary Hindu law, mesne profits are not recoverable, it is not so where the family has been living under a clear agreement that the members are entitled, not as an ordinary Hindu family but in specific and definite shares If the enjoyment of those shares is in any way disturbed, the right to sue for profits will arise, as well as the right to partition.

A talukdari estate which, before and after annexation, was subject to the common Hindu law of Oudh, *viz.*, the Mitakshara, was

restored, after the general confiscation of 1858, to the family, which received a sanad recognizing the shares of its members. At the same time, a grant was made to the head of the family as talukdar of two other villages, and to him afterwards in 1868, was issued a primogeniture sanad of the above talukdari estate. This sanad could not prevail against the family rights of inheritance; and effect was given to family arrangements, with the same results as regards the two villages.

On the contention that the family by the effect of the sanads, was to have one head and sole manager in the talukdar, who, being accountable to the junior members for their shares of the profits, was alone to hold the entire estate by primogeniture: *Held*, that this kind of managership was entirely unknown to the common Hindu law of Oudh; and that, apparently, the Oudh Estates Act, 1869, did not contemplate any such thing. At all events there must be clear arrangements, such as were not found here, to establish and prove its existence. Partition was, accordingly, decreed to the members of the family suing for it.

Pirthi Pal Singh v. *Jawahir Singh* as to the right to partition of a talukdari estate, referred to and followed: also, the same case in regard to profits, where the members of a family are entitled to specific and definite shares not as members of an ordinary joint faimily. [*Sankar Baksh* v. *Hardeo Baksh*] ... ... 299.

2. *Hindu Law—partition—Widow—Maintenance of Hindu widow where there are sons by different mothers, how chargeable.*

When the Hindu law provides that a share shall be allotted to a woman on a partition, she takes it in lieu of, or by way of provision for, the maintenance for which the partitioned estate is already bound. According to Jimutavahana, referred to by Jaganatha (Colebrooke), commenting on v. 89 of Chap. 2 Book V, it is a settled rule that a widow shall receive from sons, who were born of her, an equal share with them; and she cannot receive a share from the children of another wife. So long as the estate remains joint and undivided, the maintenance of widow is a charge on the whole; but where a partition takes place, among sons of different mothers, each widow is entitled to maintenance only out of the share or shares, allotted to the son or sons, of whom she is the mother.

Jeemony Dossee v. *Attaram Ghose* referred to and approved. [*Hemangini Dasi* v. *Kedarnath Kundu Chaudhri*] ... 374.

3. *Hindu law—Partition—Evidence of Partition—Distribution of family estate followed by separate possession, equivalent to informal partition—Appeal to Chief Court, Punjab—Civil Procedure Code, 1882, s. 584—Questions of fact.*

The Courts below found that a distribution of ancestral estate among the members of a family had taken place in former years, and had been followed by continuous possession whithout their having any intention to re-adjust or to hold on behalf of the family. The right of an individual member to claim another partition was therefore negatived.

The parties, who had long discontinued joint residence, were members of a family consisting at the time of the distribution of four sons left by a Sikh Dewan deceased. The son of one brother now claimed from the son of another, joining a third who still survived, partition of the property which had descended from the grandfather with the increment since his time.

That an actual partition had been effected although probably no formal document of partition had been executed, appeared to their Lordships to be a just inference from the evidence.

An appeal from an Appellate Court to the Chief Court is not limited as such appeals are under the Civil Procedure Code, 1882, section 584; but evidence may be dealt with and questions of fact are open for decision. [*Budha Mal* v. *Bhagwan Das*]... 632.

See "EVIDENCE" 6.
— "JOINT FAMILY". H. L.
— "PARTITION". H. L.

HINDU LAW—PARTITION BETWEEN COWIDOWS.

See "POSSESSORY TITLE."

HINDU LAW—PROPERTY PURCHASED BY WIDOW OUT OF THE INCOME OF HER HUSBAND'S ESTATE, INHERITANCE TO.

See "INHERITANCE." H. L.

HINDU LAW—SISTER'S SON, ADOPTION OF.

See "POSSESSORY TITLE."

HINDU LAW—STRIDHAN.

Shares in village held by wife of former proprietor—Stridhan—Mitakshara—Mutation of names in the settlement record.

A share in a pattidari village given by a Hindu proprietor to his wife may become her stridhan, within the contemplation of the Mitakshara, section 11, cl. 1, enabling her to make a valid gift of it.

A transfer from a husband of a share in a village was not formally carried out, otherwise than by its being evidenced by mutation of names in the settlement record; and a son, claiming as his father's heir, alleged that his mother's name was only used *benami* by the father.

Held, that a finding that such mutation was not for the purpose of putting the property into the name of the wife, *benami* for the husband, but for her own benefit, was substantially correct. [*Thakro* v. *Ganga Prasad*] ... ... 133.

HINDU LAW—SUDRAS, RIGHT OF ILLEGITIMATE SON AMONG.

See "INHERITANCE" 2. H. L.

HINDU LAW—SURVIVORSHIP.

See "INHERITANCE" 2. H. L.
— "JOINT FAMILY" H. L.

HINDU LAW—WIDOW.

Hindu law—Widow—Power of Hindu widow to alienate—Qualified title to alienate in contracting debt by manager of estate charging it in the hands of heir—Responsibility of lender—Rate of interest, as regards necessity, distinguishable.

A suit was brought by a creditor who had advanced money for the payment of Government revenue upon an estate under the management of a Hindu widow. The plaintiff's agent had received rents to a certain amount from part of estate. *Held*, that the plaintiff ought to have taken care that this sum was applied in part reduction of the debt to him, and that it must be deducted from the amount chargeable to the estate in the hands of the reversionary heir. *Hunoomun Persad Panday* v. *Munrug Kooneeree* followed.

The widow was borrowing in a case where it was for the plaintiff to see whether there was actually a ground of necessity for the loan. Though the loan was necessary, for her to borrow at the high rate of interest charged, considering the security which she gave, was not necessary. The rate of interest had therefore been rightly reduced to twelve per cent. [*Hurronath Rai Chowdhri* v. *Randhir Singh*] ... ... 642.

See "ADOPTION" 1, 2. H. L.
— "CONSTRUCTION" 1.
— "GIFT." H. L.
— "INHERITANCE" 1. H. L.
— "PARTITION" 2. H. L.

HINDU LAW—WIDOW, MAINTENANCE OF.

See "PARTITION" 2. H. L.

HINDU LAW—WILL.

1. *Hindu law, Will, Construction of—Restrictions upon estate bequeathed, Effect of, if contrary to Hindu law—Restrictions separable from valid dispositions.*

In the will of a Hindu restrictions contrary to law made by the will upon valid dispositions, if they are separable from the latter, need not be held to invalidate them.

Three documents, of which the second and third were executed by a testator after intervals of some years, together formed his will, containing a bequest of estate to his sons.

This was held valid by the High Court, although the testator in the later documents had endeavoured to impose restrictions upon the estate contrary to law, and therefore inoperative; the principal of them being, (*a*) prohibition of actual possession, or alienation, by any son, of his share in the estatee and (*b*), direction that the whole estate should be managed in a common cutcherry, with religious trusts, the sons to get only the remaining amount of profit according to their respective shares in perpetuity.

At the same time the Court held a good provision for defraying the marriage expenses of sons from joint funds, with the direction in the will that until the youngest son should attain majority none of the sons should have a right to partition; any son who should separate from the others getting, up to the time of his attaining majority, merely

maintenance, and not the profits accruing upon his share.

A gift over was that on the death of a son surviving sons should take his share proportionately to their own, and that if any of the sons so taking should die leaving sons, such sons should receive their proportionate parts of the deceased son's share: the first part of this provision was held good, not being invalidated by the second, which, as constituting a gift to an indefinite class, would not take effect.

The judgment of the High Court to the above effect was upheld by the Judicial Committee. [*Raj Kishori Dasi* v. *Debendra Nath Sarkar*] ... ... 100.

2. *Hindu law, Will—Construction of Will—Successive interests bequeathed—Gift over after life interest—Construction of gift persons, and the heirs male of their bodies.*

A will cannot institute a course of succession unknown to the Hindu law: and in conferring successive estates, the rule is that an estate of inheritance must be such a one as is known to the Hindu law, which an English estate tail is not. It is competent to a Hindu testator to provide for the defeasance of a prior absolute estate contingently upon the happening of a future event; but an important part of the rules relating thereto is: first, the event must be one that will happen, if at all, at latest immediately upon the close of a life in being at the time of the gift (as decided in the *Mallick case*): secondly, that a defeasance, by way of gift over, must be in favour of some person in existence at the time of the gift (as laid down in the *Tagore case*) the latter case deciding not only that a gift to a person unborn is invalid, but that an attempt to establish a new rule of inheritance is invalid.

A testator bequeathed the residue of his estate to his executors upon trust to pay the income to his daughter during her lifetime; and after her death in trust to convey the residue to his two half-brothers, in equal moieties, and to the heir or heirs male of their or either of their bodies, in failure of whom upon trust to give the same to the sons or son of his daughter. Both the half-brothers survived the testator. On the death of one of them, the daughter (to whom children, as well as to the half-brothers had been born), making all persons interested parties, claimed that the trusts and limitations had become void as to one moiety of the residue bequeathed, and that she had become entitled thereto for the estate of a Hindu daughter. Of the children, all were born after the testator's death, save three sons of the surviving half-brother who were born in the testator's lifetime.

Held, that the gift of the residue, so far as it purported to confer an estate of inheritance on the half-brothers, and the heirs male of their bodies, was contrary to law and void; that the gift to the plaintiff's sons, unborn at the death of the testator, was incapable of taking effect: that each of the half-brothers took an estate for life in one moiety of the residue bequeathed, in remainder expectant on the death of the plaintiff: and that accordingly, on the death of the half-brother, who had died before this suit was brought, the inheritance of his moiety had devolved on the Plaintiff, as daughter and heir of her father, and as she claimed. [*Kristoramani Dasi* v. *Narendra Krishna Bahadur*] ... ... 285.

3. *Hindu law, Will—Construction of Will of Hindu testator—Power to adopt conferred on testator's widow ended on estate vesting in his son's widow—Gift of beneficial interest.*

On a claim by the children of the testator's daughter, as against his brother's son, held that the testator's direction to his executor (who was his elder brother), to make over whatever remained of his estate, after payment of debts, to his, the testator's son ("when he comes of age") had the effect of a gift to that son operating at that time; and that the words in the will, "if my minor son dies," meant, in order to be consistent with the above, "dies before attaining full age."

On the death of the testator's son, after attaining full age and leaving a widow, the testator's widow, although empowered by the will to adopt if the testator's son should die without son or daughter (which he did) could not exercise this power after the estate had, consequently upon the son's death, vested in his widow for her widow's estate.

Thayammal v. *Venkatarama Aiyan* referred to and followed.

The testator's son, having succeeded to the estate under the above provisions, himself made his will, whereby he directed that "his cousin brother" (the defendant above-mentioned), on attaining full age, "becoming *dakilkar* of my share as well as the shares of my elder uncle, should maintain his, the testator's, mother and widow.

Held, that this was not an absolute gift of the beneficial interest, and that the claim of the children of the daughter of the present testator was valid. [*Tarachurn Chatterjee* v. *Suresh Chander Mukerjee*] ... 379.

See "WILL."

ILLEGITIMATE SON, RIGHT OF, AMONG SUDRAS.

See "INHERITANCE" 2. H. L.

IMPARTIBLE ESTATE.

See "IMPARTIBLE ESTATE" H. L.
— "INHERITANCE" 2. H. L.

INHERITANCE.

See "INHERITANCE" 1, 2, 3. H. L.
— "LEASE" 2.

INHERITANCE TO PROPERTY PURCHASED BY HINDU WIDOW OUT OF THE INCOME OF HER HUSBAND'S ESTATE.

See "INHERITANCE" 1. H. L.

INJUNCTION.

See "CO-SHARER."

INSANE DISQUALIFIED TO INHERIT.

See "OUDH ESTATES ACT" 5.

INSOLVENT.

See "COMPROMISE."
— "LIMITATION."

INSURANCE.

See "MARINE INSURANCE."

INTEREST.

See "MORTGAGE" 2.
— "WIDOW." H. L.

INTESTATE.

See "OUDH ESTATE'S ACT" 3.

ISSUE.

Question in issue—Parties—Admission.

The plaintiff claimed to have inherited estate in the possession of the defendant, who was also related to the last owner, but who set up, independently of other title, a deed of gift from the latter in his favour. It was decided in the appellate Court that even if this deed had been executed it was inoperative, and on this point the decision of the first Court was maintained. An issue having been fixed as to the execution, and the plaint also showing that the execution was disputed, their Lordships declined to treat the execution as not having been in contest. [*Anand Kuar* v. *Tansukh*] ... 372.

See "EVIDENCE" 2.
— "GIFT" M. L.

ISSUES INCONSISTENT.

See "GIFT." M. L.

JETTISON.

See "MARITIME LAW."

JURISDICTION.

Act XX of 1893 (Religious Endowment), s 10—Appellate jurisdiction—Order of District Judge filling vacancy on committee not appealable.

It is not to be assumed that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by the enacted law, or equivalent authority.

The High Court has no jurisdiction to hear an appeal from the order of a District Judge made by him on petition pursuant to s. 10 of Act XX of 1893 (Religious Endowments), appointing a member to fill a vacancy in a Committee. Neither that Act, nor the general law, gives any right of appeal, which therefore does not exist, from such an order.

In a cause which a Judge is competent to try, if the parties without objection join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground of irregularities, which, if objected to at the proper time, might have led to the dismissal of the suit. But when the Judge has no jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process.

Ledgard v. *Bull* referred to and followed. [*Minakshi Naidu* v. *Subramanya Sastri*]...54.

See "ASSESSMENT OF REVENUE."
— "LIMITATION" 9.
— "TRANSFER OF DECREE."

JURISDICTION OF CIVIL COURT IN REGARD TO ORDERS OF REVENUE AUTHORITIES.

See "ASSESSMENT OF REVENUE."

JURISDICTION OF HIGH COURT ORDINARY AND EXTRAORDINARY.

See "LIMITATION" 9.

LANDLORD AND TENANT.

Landlord and Tenant—Long continuance of a tenancy at a low and unvaried rent—Zemindar's right against tenant—Origin and special purpose of the tenancy—Cessation to use the land for such purpose—Burden of proving permanent tenure—Inference of tenancy-at-will, or from year to year.

The evidence having shown the origin and particular purpose of a tenancy, long continued at a low and unvaried rent, *viz.*, from 1798 until 1873, where the tenant ceased to use the land for the purpose; *held*, that it was not to be inferred from that evidence that an agreement had been made between the parties that the tenant should hold a permanent tenure; and *held*, that, on such cessation, the tenant could only resist a suit to eject him by proving, or giving grounds for the inference of, an agreement with the owner of the land that he should have something more of a lease than the ordinary tenancy-at-will, or from year to year; also, that the facts here presented did not lead to that inference. [*Secretary of State* v *Luchmeswar Singh*] ... ... 275.

LAND REGISTRATION.

Land Registration Act (Bengal Act VII of 1876), s. 7—Delimitation of land of adjoining proprietors—Correction of entry in register.

On a claim for the correction of the entry of the names of proprietors in the general register of revenue-paying lands in a district kept in accordance with Bengal Act VII of 1876, the limits of the area of the estate had not been defined, further than by boundaries mentioned in the plaint, which were disputed by the defendants, who were the owners of land adjoining, and who had obtained from the revenue authorities an order for the entry now alleged to be incorrect. The properties were both parts of an ascertained number of bighas, forming a chuckla.

The High Court, while affirming the decision of the Court below in the plaintiffs' favour, ordered a local enquiry with a view to the accurate delimitation of their estate. This, with the subsequent decree, resulted in the area being defined therein by reference to a map made and marked by an Amin. This was not a just division; for, while it divided the chuckla so as to give the defendants their full share, it went beyond it, to make up the full area of the plaintiffs' share. Their Lordships therefore made a new order, calculated to secure the division of the whole chuckla in due proportions for the purposes of the entry in the register. [*Hemmuni Singh* v. *Cauty*] ... 429.

LEASE.

1. *Lease, Construction of—Construction of pottah as to duration—Use of the word "mokurari."*

A ghatwali estate having been sold for arrears of revenue, the purchaser brought suits to set aside under-tenures, and in so doing sued a tenant who alleged himself to be a ghatwal. The latter compromised the suit, receiving a mokurari pottah not cottaining any words importing an hereditary interest.

Held, that the above circumstances were no ground for declining to give effect to the pottah as it stood, the word "mokurari" not importing inheritance. *Purameswar Pertab Singh* v. *Padmanand Singh* ... 128.

2. *Lease—Construction of lease, as to the inheritance of it by the heir on the lessee's death.*

An ijara for the hundred and twenty-five years granted to a wife stated that it was for the performance of pious acts by her, and that on her death her sons were to take. Her only son died before her, leaving a son.

Held that the construction that the grandson inherited the term on the death of the lessee was correct.

Tej Chand Bahadoor v. *Srikanth Ghose* referred to. [*Gobind Lal Roy* v. *Hemendra Narayan Roy Chowdhry* ... ... 497.

See "OCCUPANCY RIGHT"

LEAVE TO APPEAL.

Privy Council, leave to appeal to—Prerogative right of Crown to admit appeal where leave to appeal refused by High Court—Final decree—Meaning of "final" in Section 595 of Civil Procedure Code (XIV of 1882)—Section 501 of Code—Practice—Procedure.

Where a decree directing the taking of accounts which the defendant contends ought not to be taken at all, decides in effect, that, if the result should be found to be against the defendant, he is liable to pay the amount, the decree is final within the meaning of section 595 of the Civil Procedure Code (XIV of 1882) for the purpose of appeal.

On the ground that a decree for an account was not final within that section, the High Court refused, under section 601, to grant the defendant a certificate.

On his application for special leave to appeal to Her Majesty in Council, not by way of an appeal from the local Court's refusal, but asking for the exercise of the prerogative right to admit an appeal :

Held, that, as leave could be granted on any other ground, should any appear, besides the ground that the Court had refused the certificate without good cause, while leave could also be granted on the latter ground, if established, to make this application was, perhaps, more, convenient than to appeal from the order of refusal.

Held, also, that the real question in this suit having been the liability of the defendant to account to the plaintiff upon several claims, the decree had decided this against the defendant in such a way that, although the account had not been taken, the decree was final within section 595. [*Rahimbhoy Habibhoy* v. *C. A. Turner*] ... 639.

LEGACY.

CLAIM TO SHARE IN IMMOVABLE PROPERTY IS BARRED TWELVE YEARS AFTER THE TESTATOR'S DEATH.

See "LIMITATION" 1.

LEGAL PRACTITIONERS.

1. *Legal Practitioners Act (XVIII of 1879) ss. 14 and 40—Irregularity in procedure in dismissing a mukhtar.*

A charge of unprofessional conduct brought against practitioner, holding a certificate under Act XVIII of 1879, having been found to be established by a Subordinate Court, which also considered that he, in consequence, should be dismissed, and the same having been reported, in conformity with s. 14 of that Act, to the principal Court in the province, such dismissal was ordered. *Held*, that the practitioner could not be dismissed or suspended under that section, without his having been allowed, under s. 40, an opportunity of defending himself before that Court.

It is within the duties of a Court, informed of the misconduct of one of the practitioners before it, to take steps to have the matter adjudicated upon. [*In the matter of Sonthekal Krishna Rao*]... ... 96.

2. *Act XVIII of 1879, Legal Practitioners, Act, s. 13.*

A pleader's professional misconduct having amounted to "reasonable cause," within the meaning of s. 13 of the Legal Practitioners Act, XVIII of 1879, for suspending him from practice, their Lordships declined to interfere with the decision of the High Court as to the punishment, it not being clearly shown that the quantum awarded was unreasonable and excessive. [*In the matter of F. W. Quarry*] ... ... 638.

LENDER, RESPONSIBILITY OF.

See "WIDOW" H. L.

LIEN.

See "SALE AND CONSIGNMENT OF GOODS." — "JOINT FAMILY" H. L.

LIEN ON CARGO SAVED BY JETTISON.

See "MARITIME LAW."

LIEN ON SURVIVOR.

See "JOINT FAMILY" H. L.

LIMITATION.

1. *Limitation Act (XV of 1877), s. 19 and Art. 140—Claim to share in immovable property under will—Acknowledgement of liability—Basis of decision of Case.*

The right of property left by will (assuming that the testator had power to dispose of it) falls into possession, by Hindu law immediately upon the death of the testator; and, therefore, a claim, making title to shares in immovable property under a will, is barred by time, unless brought within twelve years from the date of the testator's death under Art. 140 of Act XV of 1877, Sch. II.

Ackowledement of liability in order to be within the meaning of s. 19 of the same Act, must be an acknowledgment of liability to the person who is seeking to recover possession, or some person through he claims.

The determination in a cause must be founded upon a case, either to be found in the pleadings, or involved in, or consistent with, the case thereby made. *Eshen Chunder* v. *Shama Churn Bhutto* referred to. [*Mylapore Tuyaswamy Vyapoory Moodhliar* v. *Yeo Kay.*] ... ... 50.

See "RATIFICATION OF TRANSFER."

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2. *Limitation Act (XV of 1877), Art. 132. —Construction of will—Charge on immovable property.*

A will devising immovables stated that the father of the devisee had lent a sum of money to the testator, and directed the devisee to repay the debt with interest. This was construed to be a charge on immovables, and it was held that a suit, brought by the auction purchaser of the creditor's claim to recover the above mentioned debt, was within Art. 132 of the second schedule of Act XV of 1877; and having been brought within twelve years from the date when the debt was so charged was not barred by time. [*Girish Chunder Maiti* v. *Anandamoyi Debi* ... 78.

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3. *Limitation Act (XV of 1877), Sch. II, Art. 91—Suit to set aside deed—Fraud.*

In a suit instituted in 1884 by a husband and wife to have a deed, granting land, which was executed by the husband in 1872, set aside on the ground that it had been obtained from the latter by fraud and undue influence, the facts relied upon were known to the co-plaintiff husband from the date of the deed. Although in another suit a sale by the husband, effected in 1879, was set aside in 1882, on the ground of his having been unduly influnced, he was not at the time of the previous transaction, nor for some years after it, mentally incompetent or unable to allow that knowledge to operate on his mind. *Held* that, therefore, the suit, falling within s. 91 of Schedule II of Act XV of 1877, was not maintainable by either of the plaintiffs. [*Janki Kunwar* v. *Ajit Singh*] ... ... 92.

4. *Limitation Act (XV of 1877), Sch II, Art. 11—Code of Civil Procedure, ss. 278, 280, 283—Investigation of claim to attached property.*

A decree holder, against whom the release of propetry, attached in execution of his decree, has been ordered, after investigation under s. 280 of the Code of Civil Procedure, is limited by Art. 11 of Sch. II of Act XV of 1877, the Indian Limitation Act, to one year within which to institute a suit to establish that the property is that of his judgment debtor.

The extent to which the "investigation" required by s. 280 should be carried depends upon the circumstances of the case. [*Sardhari Lal* v. *Ambika Pershad*] ...172.

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5. *Limitation Act, (XIV of 1859) s. 1, cl. 13—Partition suit for share of joint family estate—Failure to prove participation in the family coparcenary within the period.*

In a suit brought in 1881 for a share of joint family estate, the question whether the plaintiffs' right to sue was barred by limitation under Act XIV of 1859, s. 1, cl. 13, depended on whether there had been any participation of profits between the plaintiff's father and the defendants, who with him were co-descendants from a common ancester, after 1837 down to which year the family was certainly joint. If in 1871 the period of limitation had expired, the Act IX of that year and the later Acts need not be referred to; for, if they altered the law, they would not revive the right of suit.

Upon the evidence it was found that whatever might have been the father's intention when he settled in another village in 1837, the effect of what had been since done, or omitted, on both sides, was that in due time the right of suit had become barred under the first limitation Act. [*Appasami Odayar* v. *Subramanya Odayar*]... ... 255.

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6. *Limitatiion Act (XV of 1877) sch. ii, Nos. 64 and 97—Act IX of 1872, (Contract Act) s. 65.*

Money due on an account stated which would, as such, have been barred in three years from the statement, under Act XV of 1877, sch ii, art. 64, becomes, for purposes of limitation, a debt of another character, when, it having been the subject of an arrangement whereby it was to be retained by the debtor as part of the consideration upon a proposed sale of land, that arrangement

failed, the sale not being specifically enforceable, and so declared by decree.

In contemplation of a sale of land by the debtor to the creditor, it was agreed that the book-debt should be retained by the former in satisfaction of part of the price, but the parties failing to agree as to certain other terms, a suit, brought by the intending vendor for specific performance, was dismissed, on the ground that no effectual agreement had been made.

Held, that this decree brought about a new state of things, and imposed a new obligation on the debtor, who could no longer allege that he was absolved by the creditors being entitled to the land instead of the money. He became bound to pay that which he had retained in payment of his land, the date of the decree giving the date of the failure of an existing consideration, within the meaning of art. 97.

The matter might also be regarded as falling under s. 65 of the Contract Act, IX of 1872, under which, when the agreement was decreed ineffectual, the debtor, having previously received an advantage under it, was made liable "to restore" that advantage, or "to make compensation for it." [*Bassu Kuar* v. *Dhum Singh*] ... 260.

7. *Limitation Act (XV of 1877) Art. 135—Suit by mortgagee against martgagor and purchasers from him—Regulation XVII of 1806—Transfer of Property Act (IV of 1882).*

A mortgage by conditional sale, before the operation of the Transfer of Property Act 1882, on default made in payment, proceedings having been taken by the mortgagee under Regulation XVII of 1806, entitled the mortgagee to possession after the year of grace. On the mortgagor's right of possession being thus brought to an end without a suit for foreclosure, a right of entry accrued to the mortgagee whose suit for possession, unless brought within twelve years from the date "when the mortgagor's right to possession determined," was barred by Art. 135 of Sched. II of Act XV of 1877.

This Regulation foreclosure was applied to a mortgage, dated 17th November 1865, between Hindus, with power of entry and sale, in the English form, of land in the 24-Pergunnahs District (which mortgage, therefore, received the same effect as a mortgage by conditional sale), and the proceedings were perfect on or before 31st March 1873, as against the mortgagor, whose right of possession determined on the 17th February 1866. Parcels of the mortgaged land had been sold by the mortgagor, down to August 1866, and the purchasers, not having been served with notice of the above proceedings under the Regulation, were not parties thereto, so that the relation of mortgagee and mortgagor continued to subsist, as between them and the mortgagee, notwithstanding the determination of the mortgagor's right of possession.

In a suit brought in 1882 against the purchasers, as also against the mortgagor, for foreclosure and possession, by a transferee who had acquired the mortgagee's interest in 1879. *Held* that the mortgagor's right of possession determined on the above date, and that the mortgagee's right of suing for possession having been extinguished on the expiration of twelve years from that time, *viz.*, on the 17th February 1878, such right was not revived by the subsequent creation of suits for foreclosure, on the coming into operation of the Transfer of property Act. 1882; and that the title of the plaintiff, made through the mortgagee, to sue the purchasers for possession of the mortgaged land, was barred by time under Art. 135, as against them.

The suit therefore was dismissed as against the purchasers; but as against the mortgagor, who made no defence, the right of possession in the mortgagee consequent on the proceedings under the Regulation in force till its repeal in 1882 supported the decree made against him by the Courts below, from which he had not appealed. [*Srinath Das* v. *Khetra Mohun Singh*]... 315.

8. *Limitation Act (XV of 1877), sched. ii, Art. 142—Burden of proof—Date of dispossession or discontinuance of possession.*

The claimants had shown that they formerly were proprietors of the land to which they alleged title, and from which they claimed to oust the defendants; but they had been dispossessed, or their possession had been discontinued, some years before this suit was brought by them, and the land was occupied by the defendants who denied their title. That being so, the burden of proof was on the claimants to prove their possession at some time within the twelve years (prescribed by Art. 142 of sched. ii of Act XV of 1877) next preceding the suit.

That the claimants certainly showed an anterior title was not enough, without proof of their possession within twelve years, to

shift the burden of proof on to the defence to show that the defendants were entitled to retain possession. [*Mohima Chundra Mozumdar* v. *Mohesh Chandra Neogi*] ... 321

9. *Limitation to execution of judgment of Court for the relief of insolvent debtors entered up in the High Court under Section 86 of 11 and 12 Vic, cap. 21—Indian Limitation Act, XV of 1877, Sch 11, Art. 180—Starting point of limitation—Jurisdiction, "ordinary" and "extraordinary."*

The Indian Limitation Act XV of 1877, Schedule II, article 180, applies to a judgment of a Court for the relief of insolvent debtors entered up in the High Court, in accordance with section 86 of the Statute 11 and 12 Vic., cap. 21. Although a Court held under the latter statute determines the substance of the questions relating to the insolvent's estate, the proceedings in executions and the judgments are the High Court's. The judgment is entered up in the ordinary course of the duty cast upon the High Court by the law, not by way of special or extraordinary action, but in the exercise of its ordinary original civil jurisdiction. The latter expression in the charter of 28th December, 1865, being opposed to the "extraordinary" jurisdiction, which the High Court may assume, at its discretion, upon special occasions and by special orders, includes all such jurisdiction as is exercised by the High Court in the ordinary course of law without any step taken to assume it.

When an order has been made, under section 86 of the Statute 11 and 12 Vic., cap. 21, that execution be taken out, a present right accrues to the Official Assignee to apply for it; and, therefore, article 180 of Schedule II assigning, in reference to judgments of High Courts exercising ordinary original jurisdiction, a starting point of time depending on the accrual of the right to enforce them, is the article applicable. [*In the matter of Cándás Narrondas Navivahu* v, *C. A. Turner*] ... ... 400.

10. *Limitation Act (XV of 1877), Sched. ii, Arts. 142, 144—Proprietors having refused at the first regular settlement to engage and others having been admitted as malguzars of the land, effect of lapse of time—Discontinuance of possession.*

Article 144 of sched. ii of Act XV of 1877, as to adverse possession, only gives the rule of limitation where there is no other article in the schedule specially providing for the case. The proprietary right would continue to exist until, by the operation of law of the limitation, it has become extinguished; but if a claim comes within the terms of Art. 142 (enacting that when the plaintiff, while in possession of the property, has been dispossessed, or has discontinued possession, limitation shall run from the date of the dispossession or discontinuance), in such a case, by the law of Act XV of 1877, and previously of Act IX of 1871, adverse possession is not required to be proved in order to maintain a defence.

At the regular settlement in the Delhi District (1843) the plaintiffs' ancestors, *ex-maafidar* of a plot on which the rent-free tenure had been resumed in 1838, declined to engage for the revenue; and the plot was assessed along with the village in which it was; the village proprietors through the *lambardars* engaging for and obtaining the land.

At the revision of settlement, more than thirty years after, the plaintiffs claimed possession, alleging their title, and that the village co-parceners held only in farm from the Collector for the period of settlement.

Held, that there had been a dispossession or discontinuance of possession within the meaning of Art. 142; and that whether any proprietary right had existed or not in the plaintiff's ancestors, the twelve years' limitation ran from the date of the dispossession or discontinuance [*Mahammud Amanulla Khan* v. *Badan Singh*] ... 412.

11. *Limitation—Parties—Joinder of parties—Civil Procedure ss. 30 and 34—Signature of plaint by one of several co-plaintiffs.*

There is no rule that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint.

Three suits for money were filed by one of three joint-creditors, the others being named as co-plaintiffs with him in the plaints, which he alone signed and verified. An order was made by the Court after the filing of the plaints that one of these joint-creditors should be added as a co-plaintiff, as if he had not been on the record already. If the date of that order had been the date of suit brought, limitation under Act XV of 1877, sched. II, art. 67, would have applied; but it was *held* that all the joint-creditors became plaintiffs when the plaints were filed, the order adding parties being inoperative, and that the suits when instituted

were not defective for want of parties. [*Mohiny Mohun Das* v. *Bangsi Buddon Saha*] ... ... 498.

See "INHERITANCE" 3. H L.
— "RATIFICATION OF TRANSFER."

LIS PENDENS.

See "RESJUDICATA" 6.

LOCAL INVESTIGATION, CONFLICTING.

See "EVIDENCE" 10.

MAAFIDAR, EX—.

See "LIMITATION" 10.

MAHOMEDAN LAW—APPROPRIATION, EFFECT OF, WHEN THE CHARGE WAS NOT SUBSTANTIAL ONE.

See "ENDOWMENT." M. L.

MAHOMEDAN LAW—ENDOWMENT.

Mahomedan Law—Endowment—An appropriation not within the principle of wakf—Property settled on members of grantor's family with a charge upon it for religious and charitable purposes—Effect of appropriation where the charge was not a substantial one.

Although the making provision for the grantor's family out of property dedicated to religious or charitable purposes may be consistent with the property being constituted *wakf*, yet in order to render it *wakf* the property must have been substantially, and not merely colourably, dedicated to such purposes.

Although an instrument purporting to dedicate property as "*fisabilillah wakf*," and vesting it in members of the grantor's family in succession, "to carry on the affairs in connection with the *wakf*," might include provisions for the benefit of the grantor's family without its operation as a *wakf* being annulled, yet, on the other hand, it would not operate to establish *wakf*, as it did not devote a substantial part of the property to religious or charitable purposes.

Without determining how far provisions for the grantor's family might form part of a settlement for religious or charitable purposes, and yet not deprive it of its character establishing *wakf*, the Committee approved the decision in *Muzhurool Huq* v. *Puhraj Ditarey Mohapattur* to the effect that the mere charge upon the profits of the estates of certain items which must in the course of time have ceased, being for the benefit of one family, did not render an endowment invalid as a *wakf*.

In the present case, however, there being no authority for holding a gift to be good as a *wakf* without there being a substantial dedication of the property to charitable or religious uses at some time or other; and the uses prescribed involving only an outlay suitable for such a family to make in charity, the gift was held not to be a substantial, or *bonâ fide*, dedication of the property as *wakf*. The use of this expression, and others, being only to cover arrangements for the benefit of the family and to make their property inalienable, the property was not constituted *wakf*, nor was it freed from liability to attachment in execution of a decree against one of the grantees. [*Mahomed Ashanulla Chowdhry* v. *Amarchand Kundu* ... 476.

MAHOMEDAN LAW—GIFT.

Issues—Inconsistent issues—Undue influence—Mahomedan law of gift—Possession not delivered at the time, but afterwards obtained—Mushâa, mixed, or common property, with shares undistinguished.

The execution of a hibanama having been denied by the plaintiff, a Mahomedan widow and purdanashin, in a suit brought by her to have it set aside as fabricated, she also alleged that undue influence had been exercised upon her. It was decided upon the evidence that the instrument was genuine, having been executed by her of her own free will.

The above questions being inconsistent with one another, the latter should not have been admitted to form part of an issue together with the former.

On an issue of undue influence, rightly raised, a Court should consider whether the gift in question (*a*) is one which a right-minded person might be expected to make; (*b*) is or is not an improvident act on the donor's part; (*c*) is such as to have required advice, if not obtained by the donor; and (*d*) whether the intention to make the gift originated with the donor, the principles being always the same, although the circumstances may differ.

The hibanama gave an undivided share in mokurari and zemindari holdings, besides other property not reduced into possession, the whole of which had, as a matter of title, devolved upon the donor as a member of a family of which the donees were also members.

Held, that the hibanama did not infringe the Mahomedan doctrine of mushâa, as an attempt to make a gift of an undivided share in property capable of division; it having been settled that one of two sharers may give his share to the other before division, whence it followed that one of three sharers might give his share to the other two. *Ameena Bibi* v. *Zeifa Bibi* referred to and approved.

Held, also, that as the donor had done all that she could do to perfect the contemplated gift, which was attended with complete publicity, and as the donees had afterwards obtained possession, the fact of the donor's having been out of possession, and therefore not having delivered it, did not, of itself, invalidate the gift. In regard to the principle and the analogy in other systems of law to be found in the cases relating to voluntary transfers (where if the donor should not have done all that he could have done to perfect his intended gift, he cannot be compelled to do more) the Hindu case of *Kali Das Mullick* v. *Kanhaya Lal Pundit* was referred to. [*Mahomed Buksh Khan* v. *Hosseini Bibi*]...175.

MAHOMEDAN LAW—GUARDIAN.

Mahomedan Law—Guardian—Power of Guardians—Sale by guardian of property to which ward's title was in dispute, and for the benefit of the latter.

By the Mahomedan Law, guardians are not at liberty to sell the immoveable property of their wards, the title to which property is not disputed, except under certain circumstances specified in Macnaghten's Principles of Mahomedan Law, Chapter VIII, cl. 14. But, where disputes existing as to the title to revenue-paying land, of which part formed the wards' shares, sold by their guardian, were thereby ended, and it was rendered practicable for the Collector to effect a settlement of a large part of the land, a fair price moreover having been obtained, the validity of the sale was maintained in favour of the purchaser as against the wards for whose benefit the transaction was.

Although the sale deed incorrectly stated the purpose of the sale to have been to liquidate debts, a statement repeated in a petition to the Collector, asking that settlement of the shares sold should be made with the purchaser, yet, on the transaction being afterwards impeached by the wards, *held*, that it was open to the guardian to prove the real nature of the sale, and to show that it is one beneficial to them. [*Kali Dutt Jha* v. *Abdul Ali*] ... ... 326.

MAHOMEDAN LAW—GUARDIAN, POWER OF.

See "GUARDIAN." M. L.

MAHOMEDAN LAW—GUARDIAN, SALE BY, OF WARD'S PROPERTY OF DISPUTED TITLE FOR WARD'S BENEFIT.

See "GUARDIAN." M. L.

MAHOMEDAN LAW—INHERITANCE.

Inheritance by Mahomedan Law—Sunni and Shia rules of descent—Evidence as to deceased having been a Sunni.

A Mahomedan widow, who by birth was a Sunni, but whose deceased husband had been a Shia, had during her married life conformed outwardly to his religion. The Sunni and Shia rules of inheritance differing, her true heirs could only be ascertained by determining to which of these sects the deceased belonged at the time of her death.

The evidence relating to the period after her husband's death led to the conclusion that throughout her widowhood she was a Sunni, having returned to the religion of her youth when freed from the necessities of her position as the wife of a Shia. [*Hayat-un-Nissa* v. *Mahomad Ali Khan*] ... 521.

MAHOMEDAN LAW—LEGITIMACY OF CHILDREN.

See "PRACTICE" 7.

MAHOMEDAN LAW—MUSHAA.

Claim to possession of property under deed of sale—Consideration—Mahomedan law—"Mushâa"—Effect of possession following upon gift to render it valid.

The law relating to the invalidity of gifts

of "mushâa" *i. e.*, the prohibition of the gift of an undivided part in property capable of partition ought to be confined within the strictest rules ; and the authorities on the Mahomedan law show that possession taken under a gift, even although that gift might with reference to "mushâa" be invalid without it, transfers effectively the property given, according to the doctrines of both the Shia and the Sunni schools. Possession once taken under a gift is not invalidated, as regards its effect in supporting the gift, by any subsequent change of possession.

The subject of the gift was shares in revenue-paying villages, with land, homes and movables Of the greater portion of this property, the donor, a mother giving them to her daughter, had only so far possession that she was in receipt of the rents and profits In the deed of gift she declared (thereby making an admission whereby her heir and all claiming through him were bound) that she had made the donee, her daughter, possessor of all the properties ; and she directed that the gift should be carried into effect by the daughter's husband, who was manager of estates on behalf of both mother and daughter before them.

Held, in a suit for the possession of the property on a sale by the heir of the donor, brought by the vendees against him, and joining as defendants the heirs of the daughter, then deceased, that sufficient possession had been taken on behalf of the daughter to render the gift effectual, and to defeat the claim as against her heirs. [*Muhammad Mumtaz Ahmad* v. *Zubaida Jan*] 433.

See "GIFT."

MAHOMEDAN LAW—SETTLEMENT ON MEMBERS OF GRANTOR'S FAMILY WITH A CHARGE UPON IT FOR RELIGIOUS AND CHARITABLE PURPOSES.

See "ENDOWMENT." M. L.

MAHOMEDAN LAW—SHIA RULES OF DESCENT.

See "INHERITANCE." M. L.

MAHOMEDAN LAW—SUNNI RULES OF DESCENT.

See "INHERITANCE." M. L.

MAHOMEDAN LAW—WAKF, APPROPRIATION NOT WITHIN THE PRINCIPLE OF.

See "ENDOWMENT." M. L.

MAINTENANCE.

See "OUDH ESTATE ACT" 1.
— PARTITION" 2. H. L.

MAINTENANCE OF HINDU WIDOW ON PARTITION, THESE BEING SONS BY DIFFERENT MOTHERS.

See "PARTITION" 2. H. L.

MAJORITY ACT.

Act XL of 1858, s. 3—Order granting certificate to act as guardian of minor—Obtaining a certificate—Majority Act (IX of 1875).

When a Court, to which application has been made under s. 3 of Act XL of 1858 for a certificate, has adjudged the applicant entitled to have one, he then substantially obtains it ; although it may not be drawn up or issued at the time. Having obtained such an order, he has in substance complied with terms of the Act ; in the same way as, when a plaintiff has judgment that he shall have a decree in his suit, it may be said that he has then obtained his decree. Therefore, where a minor had been represented in a suit by a person who had obtained an order for a certificate under s. 3, but had not had it issued to them, the absence of a certificate was held to be not such an irregularity as entitled the minor, on coming of age, to have the proceedings set aside on the ground that he had not been properly represented. [*Mungniram Marwari* v. *Gurshahai Nand and Liakut Hossein* v. *Gurshahai Nand*] 463.

MALABAR CUSTOM.

See "CONCURRENT FINDING."

MALGUZAR.

See "LIMITATION" 10.

MAHARANI SAHEBA CONSTRUED TO MEAN ELDER WIFE OF THE RAJAH.

See "OUDH ESTATE'S ACT" 1.

MANAGER.

See "WIDOW" II. L.

MANAGER OF A JOINT FAMILY, MORTGAGE BY.

See "SALE IN EXECUTION OF DECREE" 3.

MARINE INSURANCE.

Insurance—Marine Insurance—Open cover—Proposal to issue policy—Acceptance—Refusal to issue policy in terms of open cover.

An open cover to an amount stated for insurance on cargo to be shipped for a voyage in a ship (afterwards lost on that voyage) was given by the agent of the defendant company to the owner of the ship in order that he might give it to the charterer, and it was a proposal to insure. The owner transferred the open cover to the plaintiff, who, under charter with him, shipped rice and applied for policies to the amount stated in the open cover. The defendants' agent then refused to issue any policy on the rice so shipped.

Held, that the open cover, as given to the owner, constituted a subsisting proposal to insure, and as soon as application for the policy under it was made to the defendant's agent by the shipper, to whom the open cover had been transferred, there was a binding contract that a policy should be issued in its terms. That the shipper asked for two policies did not, under the circumstances, prevent there being an acceptance, there having been a refusal to issue any policy. [*Bhogwan Das* v. *The Netherlands India Sea and Fire Insurance Company of Batavia*] 293

MARITIME LAW.

Maritime Law—Jettison—Right to general average contribution—Right of shippers of jettisoned cargo—Default of master—Right of ship-owner-Remedies of shippers—Lien on cargo saved in consequence of jettison.

In jettison of part of a general cargo the right of those entitled to contribution, and the corresponding obligations of the contributors, originating in the actual presence of a common danger, not in the causes of it, are mutually perfected whenever the goods of some of the shippers (not being wrongdoers, or those responsible for the latter) have been advisedly sacrificed and the property of others has been thereby preserved. Such exceptions as that recognized where the average loss has been occasioned by the ship's being unseaworthy [*Schloss* v. *Heriot*], and as that made in the refusal of contribution to shippers of deck-cargo when jettisoned are in truth but limitations on the above rule, which have been introduced from equitable considerations. Where a ship was stranded owing to the negligence of her master, and thereby ship and cargo were placed in a position of such danger as to make it necessary to jettison part of the cargo in order to save the remainder and the ship: *Held*, that innocent owners of the jettisoned cargo were entitled to general average contribution; but that the owners of the ship were not entitled (their legal relation to the shippers not having been varied by contract). The rules of Maritime law as to the rights and remedies in a case of jettison are: (1st) each owner of jettisoned goods becomes a creditor of the ship and cargo saved; and (2nd) he has a direct claim against each of the owners of the ship and cargo, for a *pro rata* contribution towards his indemnity. Contribution can be recovered by the owner of jettisoned goods either by direct suit, or by enforcing, through the ship-master, who is his agent for this purpose, a lien on each parcel of goods saved belonging to each separate consignee, for a due proportion of his claim. [*Stang Steel & Co.* v. *A Scott & Co.*] ... 338.

MASTER OF SHIP.

See "MARITIME LAW."

MESNE PROFITS.

Execution of decree—Mesne profits—Decree made against a widow representing estate enforced against a minor adopted son, through the widow as his guardian—Devolution of liability, along with estate, upon the minor, without his having been made formally a party to the decree—His similar liability in a suit for mesne profits.

A minor, who had been adopted by a widow as a son to her deceased husband, was not made a party to an appeal, which she preferred after the adoption, from a decree made against her when she represented the estate. *Held*, that, as liability under the decree, made when the widow fully represented the estate, devolved upon the minor on his adoption, the widow's estate

being also thereupon divested, it would be right for her to continue to defend, but only as guardian of the minor. Also, that it having been for the minor's benefit that the widow, as guardian, appealed from a decree, which had already diminished his estate, the minor was bound by the adverse decree of the Appellate Court, although he had not been made formally a party thereto. The principle of the decision in *Dhurm Doss Pandey* v. *Samasoondery Debia* referred to, and applied in this case.

Held, also, that the minor, by his adoptive mother as his guardian, was liable in a suit for mesne profits, brought after the decree upon title; it being made clear that the suit for mesne profits was substantially brought against the minor.

Sureschunder Wum Chowdhry v. *Jugut chunder Deb* approved. [*Hari Saran Moitra* v. *Bhubaneswari Debi*] ... ... 198.

See "RESJUDICATA" 5.
— "PARTITION" 1. H. L.

MINOR.

See "GUARDIAN AND WARD" 1, 2, 3. H. L.

MINOR, LIABILITY OF, TO MESNE PROFITS DECREED AGAINST THE ADOPTIVE MOTHER AS GUARDIAN.

See "MESNE PROFITS."

MINOR, RECOVERY OF LAND BY, ON COMING OF AGE.

See "GUARDIAN AND WARD" 3. H. L.

MISREPRESENTATION BY A PARTY AS TO PART OF THE SUBJECT MATTER OF A CONTRACT.

See "CONTRACT" 1.

MITAKSHARA.

See "JOINT FAMILY." H. L.
—"PARTITION." H. L.
—"SALE IN EXECUTION OF DECREE." 1, 2, 3.

MOKARARI.

See "LEASE." 1.

MOKARARI, CONSTRUCTION OF.

See "LEASE" 1.

MORTGAGE.

1. *Mortgage—Sale of mortgage property—Purchase by a mortgagor at a judicial sale of interest under a second mortgage—Rights against the mortgagor of purchaser at a sale in execution of a consent decree upon the first mortgage.*

The same property, with other, was mortgaged, first to one mortgagee, and secondly to another. Decrees were obtained upon both mortgages: the terms of the first decree having given effect to a compromise between the mortgagor and the first mortgagee. Sales in execution followed; but before the sale under the decree upon the first mortgage was effected, the sale under the decree upon the second took place, the possession remaining with the purchaser at the first sale, who was acting *benami* for the mortgagor. At the subsequent sale under the decree upon the first mortgage, the plaintiff purchased and now sued for possession.

The High Court decided that the plaintiff was entitled to the first mortgage lien, in consequence of his purchase at the second sale; and, all persons interested in the matter being before the Court, that the proper course was to direct an inquiry as to how much of the mortgage debt was chargeable upon that portion of the property which formed the subject of the appeal; and to direct that so much of the mortgage debt should be realized by the sale of that property.

Held, that this judgment incorrectly treated the plaintiff as mortgagee, refusing him a charge for the full amount of his purchase money. The case depending upon its own circumstances, it would be contrary to equity to allow the mortgagor to set up any right to possession as acquired by his purchase; and that the plaintiff, as against him was entitled to a decree for possession as purchaser. [*Lutf Ali Khan* v. *Futteh Bahadur*] ... ... 364.

2. *Mortgage—Redemption of prior mortgage by puisne mortgagee—Sale, at his suit, of mortgaged property on what terms and with payment of what incumbrance—Purchases before and during mortgagee's suit, and after decree therein how effected by it—Interest on mortgage debt when reducible by the decree from its date; and when continuing payable at the contract rate—Exe-*

cution of decree—Civil Procedure Code, s. 266—Attachment of future Estate—construction, according to Mahomedan law of grant of such Estate.

Upon a claim by a puisne mortgagee to redeem prior incumbrances, and in the alternative, for a decree ordering a sale of the property mortgaged, the sale was decreed, with application of the purchase-money to pay incumbrances in their due order; and with redemption by the plaintiff of a prior mortgagee, who was to have an option to redeem.

Previously to the mortgage, a fractional interest in the property (which interest was purchased by the plaintiff at a judicial sale) had been the subject of a settlement by a Mahomedan on his wife, under the condition that if he should have no child by her, his two sons by another wife should each have an estate therein. He died without other children. *Held*, that the two sons had taken definite interests capable of being attached, within section 266 of the Civil Procedure Code, not being mere expectancies. *Held*, also, that a judicial sale of property, purporting to be of all the interests of a judgment debtor, carries with it any enlargement thereof that may have occurred after the attachment and before the sale; and that, accordingly, the above-mentioned settler having died without a child by that wife, between the date of the attachment and the sale, the sons augmented interests passed thereby.

The plaintiff in this suit had succeeded to four, out of five, mortgages, subsequent to his own, which had been executed before a decree obtained by a mortgagee. This decree had been purchased by the first defendant, who also bought the property at the execution sale. The plaintiff had also succeeded to several mortgages executed pending the suit in which the decree was made. *Held*, that a distinction must be made in respect of whether the mortgages so transferred to the plaintiff had been excuted before or after the bringing of the above suit. As regards the mortgages executed before it, the plaintiff, not having been a party to that suit was entitled to redeem the first defendant who was purchaser of the decree. As regards the mortgages executed after the suit was brought, the plaintiff was bound by the decree, and his interest in the mortgages, transferred *pendente lite*, passed to the purchaser. On the other hand, persons who have taken transfer of property subject to a mortgage cannot be bound by proceedings in a subsequent suit, between the prior mortgagee and the mortgagor, to which they have not been made parties.

As regards the Court's power to regulate the interest, *held*, that although, in the decree for sale, the rate of interest on the debt, payable to the mortgage decree-holder was reducible from the date of the decree from the rate stipulated, to the Court rate, an order to that effect could only be made for the benefit of the judgment-debtor as a party to the suit. The plaintiff, seeking to redeem a mortgage prior to the suit, must pay the interest at the rate agreed upon in the mortgage; there being no authority, either under sec. 10 of Act XXIII of 1861, or under the Civil Procedure Code, sec. 209, to reduce it to the court rate. [*Umesh Chunder Sircar* v. *Jahur Fatima*] ... 507.

See "RESJUDICATA" 4.
—"SALE AS DISTINGUISHED FROM MORTGAGE."

MORTGAGE BY TWO MANAGING MEMBERS OF A JOINT-FAMILY UNDER MITAKSHARA.

See "SALE IN EXECUTION OF DECREE." 3.

MOSTAJIRI LEASE.

See "OCCUPANCY RIGHT."

MOTHER'S SHARE.

See "PARTITION" 2. H. L.

MUKHTIARS.

See "LEGAL PRACTITIONERS."

MUTATION OF NAME.

Assent to and validity of mutation of names in the collectorate record of rights—Act XIX of 1873 (N. W. P. Land Revenue Act) ss. 94, 97.

The question was according to the judgment of the High Court, whether a change of names in the collectorate record-of-rights represented a *bonâ fide* transfer, by the plaintiff, or whether there was a mere assent by her to a paper transaction, relating to the ownership of a share in a village, in giving which assent she had not acted freely, but under undue influence. Reversing the decision of the High Court, which was that the

plaintiff had assented to the proceedings under intimidation, their Lordships held that on the evidence, no intimidation had been proved, and that a suit to cancel this "dakhil kharij" and for a declaration of the proprietary right of the plaintiff, in whose name the village stood before the mutation, had been rightly dismissed in the first Court. [*Har Lal* v. *Sardar*] ... ... 384.

See "STRIDHAN." II. L.

NEW POINT IN APPEAL.

See "PRACTICE" 6, 7.

NOVATION.

See "CONTRACT" 2.

OCCUPANCY RIGHT.

Right of occupancy Act X of 1859 (Bengal Rent Law), sections 6 and 7—Bengal Rent Act VIII of 1869) sections 6 and 7—Mostajiri lease—Cultivating possession.

Under Bengal Act VIII of 1869, sections 6 and 7, as well as previously under the similar sections 6 and 7 of the Rent Act, X of 1859, a raiyat paying rent for and cultivating land continuously for a period of twelve years had a right of occupancy, whether he held under a potta or not.

In reference to this, it was *held* that a lessee of land continuously in cultivating possession for a period of twelve years, under several written leases or pottahs, which were for specified terms of years, but in which there was no express stipulation for the landlord's re-entry on their expiration, had a right of occupancy. The mere existence of a term in a lease was not an "express stipulalation" to the contrary, within the meaning of section 7, so as to exclude the right of occupancy.

The decision of the Full Bench in *Sheo Prakash Misser* v. *Ram Sahai Singh* approved, and held applicable.

In a suit for the recovery of possession, with mesne profits, of land, brought by a lessor against a tenant holding over, the defence was, as to part of the land, that the tenant had a right of occupancy, his cultivating possession having lasted for more than twelve years. The right was established, but the burden of proving to which part of the land it attached was upon the tenant, and for proof as to this the suit was remanded. [*Chandrabati Koeri* v. *E. T. Harrington*] ... ... 681.

ONUS PROBANDI.

Onus of proof in a suit to set aside a deed —Presumption—Evidence.

Plaintiff who sues to set aside a Mokrori is bound in the first instance to give some evidence to impeach its validity, and that some *onus* is therefore on him. If that *onus* is satisfied, and *prime facie* case to impeach the validity is made out, the *onus* is shifted on the Defendant to show by satisfactory evidence that the deed was really executed *bona fide* for a real consideration, and intended to be operative as between the executants thereof.

In this case strong suspicion against the deed arises from the circumstance that the person found fault with is still in the service of the executant, that the deed was not registered nor stamped at that time, the value of the property was considerable, the rent very small, and there was no evidence that any consideration was paid and the Defendant not having given satisfactory evidence of the execution and the *bona fides*, the instrument could not be *held* valid. [*Shamnarayan* v. *The Administrator General of Bengal*] ... ... 734.

See "CHURLAND."
— "EVIDENCE" 4.
— "LIMITATION" 8.

OPEN COVER, REFUSAL TO ISSUE POLICY IN TERMS OF.

See "MARINE INSURANCE."

ORDER GRANTING CERTIFICATE TO ACT AS GUARDIAN, EFFECT OF.

See "MAJORITY ACT."

OUDH ESTATES ACT.

1. *Will, Construction of—Oudh Estates Act (I of 1869), ss. 8, 13 and 22—Unregistered will of Talukdar—Meaning of "Maharani Sahiba" as applied to wife or wives—Decree for maintenance to widow under the will on which her suit was based, though her claim was for a different relief—Costs.*

A talukdar, who died childless, but leaving two widows, bequeathed, by an unregistered will, to the "Maharan Sahiba" his entire estate, and gave a power to the same to adopt a son to him; also providing maintenance for both his widows after such adoption

Held, that, to determine whether the will referred, in such bequest and power, only to the elder or to both of the testator's wives, extrinsic evidence of his intention was not admissible; but that the true construction was that which would indicate a reasonable and probable intention consistent with his views, as evidenced by his conduct, and his will generally. *Abbott* v. *Middleton* referred to and followed.

As his views appeared to favour single heirship, and the whole state of things, as well as the language of the will, pointed to the owner of the estate being one, and the donee of the power to adopt being one: *Held*, that accordingly the words "Maharani Sahiba" were not here used as a collective term for both widows, but signified only the elder, although, when qualified, as they were in another part of the will, they might include both.

Held, also, that as, if there had been no will, the junior widow would have succeeded to an estate expectant on the determination of the life-estate of the senior, but subject to be defeated by an adoption by the latter, this was an interest bringing her within the meaning of s. 13, para. 1 of Act I of 1869; so that maintenance bequeathed to her by the will was payable, notwithstanding its not having been registered (as that section required in other cases) as well out of the talukdari as out of the non-talukdari estate of the testator.

Held, also, that this had been rightly decreed to her, as she had sued upon the will, although her direct claim in her plaint was not for this, but to share the estate equally with the senior widow, a claim which was dismissed. *Held*, also, that the difficulty of construction having been caused by the testator himself, and in regard to the circumstances and position of the parties, costs should come out of the estate. [*Maharani Indar Kunwar* v. *Maharani Jaipal Kunwar*] ... ... 150.

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2. *Oudh Estates Act (1 of 1869), s. 3—Effect of sanad to confer proprietary right on a talukdar, not being a trustee—claim to under-proprietary right against talukdar distinguished, and not concluded by a decree for the former right in his favour.*

Unless a talukdar, who holds such a sanad as is referred to in the Oudh Estates Act I of 1869, has agreed in some way, or has otherwise become legally bound, to hold the estate comprised in the sanad, or some part of it, in trust for another person, the principle on which *Sookraj Koomar* v. *Government and Hardeo Baksh* v. *Jowhir Singh* were decided is not applicable to make the talukdar hold subject to a charge for the benefit of such other person.

The talukdar in whom no such trust is vested is entitled to the proprietary right in the lands forming the talukdari estate comprised in the sanad.

A claim against the talukdar for the proprietary right included lands in which the claimant alleged himself to have purchased under-proprietary rights which were not claimed. A decree, maintaining the talukdar's proprietary right, was made without prejudice to a claim for the under-proprietary rights. [*Haidar Ali Khan* v. *Nawab Ali Khan*] 458

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3. *Oudh Estates Act 1 of 1869, s. 13, sub-s. 1—"Intestate"—Written Authority to adopt need not be registered—Law of Adoption—Effect of Agreement between Adoptive Mother and Natural Father.*

Act I of 1869 requires an authority to adopt to be in writing, but does not require such writing to be registered, and Act III of 1877, sec 17, excepts from registration authorities to adopt which are conferred by will.

"Intestate" in sub-sec. I, sec. 13, means intestate as to estate. An adopted son is a person who would have succeeded to an intestate within the meaning of that section, although the authority to adopt him was conferred by the will of such intestate.

An adoption otherwise valid is not prejudiced by an agreement between the adoptive mother and natural father that the former should retain her husband's estate during her life. Such an agreement does not affect the rights of the son or render his adoption conditional. [*Bhaiya Rabidat Singh* v. *Maharani Indar Kunwar*] ... 505.

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4. *Oudh Estates Act, I of 1869, ss. 2, 13, 20, 22 (6)—Will of Talukdar—Registration of will—Succession to talukdari—Son of deceased elder brother preferred to younger brother.*

A written statement by a talukdar made in 1860 in reply to inquiries by the Government, issued in the districts under circular orders regarding the succession of talukdars, may come within the definition of a talukdar's will in section 2 of the Oudh Estates' Act, I of 1869. The statement was described by the talukdar in a letter to the

authorities in 1877, as "the will which has been submitted to the Lucknow district, through the tahsil of Kursi, on 6th April 1860." *Held*, that this showed that he intended the statement of 1862 to be his will, and that the statement, as was held with regard to a similar one in *Hurparsad* v. *Seo Dyal* was a will within the definition in the above section.

The talukdar declared in a subsequent will, of 19th August 1879, that no document purporting to be a will, the context whereof was repugnant to the will of the latter year, should be admitted as a will. But the instrument of 1860 was not repugnant to the will of 1879. Also the latter document was not registered in accordance with section 20 of the Oudh Estates' Act, 1869, and, being inoperative as to the talukdari estate, it could not revoke the will of 1860, which, also, was not rendered inoperative by any of the provisions of the Act.

Held, that by the true construction of section 22, sub-section 6, brothers take in the same manner as sons are directed to take by the preceding sub-sections; and that the descendants of a deceased elder brother are preferred as heirs to the younger surviving brother. [*Haidar Ali* v. *Tasadduk Rasul Khan*] ... ... 529.

5. *Oudh Estates Act, I of 1869, ss. 8 and 22, and sub section 11 of s. 22—Descent of taluk—Disqualification of insane person to inherit by Hindu law—Insanity not proved.*

A talukh, entered in the lists 1 and 2, prepared in conformity with section 8 of the Oudh Estates Act, 1869, descends, according to the rules pointed out in section 22, as an impartible estate to the single heir determined by the Hindu law of inheritance. *Brij Indar Bahadur Singh* v. *Jankee Koer* followed. Exclusion, under the Hindu law, of a claimant from the inheritance on the ground of insanity could not be inferred merely from his being described in the plaint as insane, or from his suing by a guardian certified under Act XXXV of 1858. Although he might be incompetent to commence the suit, or to proceed with it except by a guardian, this did not establish that he was excluded when the succession opened. [*Ran Bijai Bahadur Singh* v. *Jagatpal Singh*] ... ... 590.

See "REGISTRATION OF DOCUMENT" 2.

OUDH RENT AND REVENUE ACT.

Oudh Rent Act (XIX of 1868), ss. 41 and 83 cl 4—Liability of lessees in the position of under-proprietors not entitled to sub-settlement—The Oudh Sub-Settlement Act (XXVI of 1866)—The Oudh Land Revenue Act (XVII of 1876), s. 158.

A decree, in 1869, of a Settlement Court, upon the compromise of a claim, made by village co-parcenary occupiers, to an order for sub-settlement as against the talukdar, declared the claimants to be entitled to a heritable, but not transferable, lease of the village, at a rent leaving twelve per cent. profit to the lessees. For default in payment of rent the lease was decreed to be in future liable to cancellation "by the decree of any competent Court, according to any law which may be in force in Oudh with respect to persons holding an under-proprietary right in land." Afterwards, in 1879, the parties agreed that the lessees might be dispossessed for non-payment of rent. Default occurred, decrees for arrears were made in 1882 and 1883, and remained unsatisfied. In a rent suit brought by the talukdar *held*, that he could not sue in a Revenue Court to have the lease cancelled, under the terms of the Oudh Rent Act (XIX of 1868), either by virtue of the decree, or of the subsequent agreement. [*Raja Madho Singh* v. *Ajudhia Singh*] ... ... 165.

OUDH TALUKHDARS.

Oudh Talukhdars—Title obtained by Talukhdar under his sanad—Effect of confiscation of 1858 upon previous gift—Attempt to establish trust for claimants as to part of talukhdari estate—Claim to sub-proprietary right distinguished.

The sanad granting a talukhdar's estate confers *primâ facie* an absolute title upon the grantee

A gift of villages by a talukhdar to collateral relations, if effectively made in 1850, and whether absolute or only for the maintenance of the donees out of the rents and profits, was rendered, by the effect of the confiscation of 1858, inoperative after that event to establish an interest as against the talukhdar holding under a sanad comprising the villages.

Where a claim was based upon the principle that the conduct of a sanad-holding talukhdar and of his predecessor had been sufficient to establish against him a liability to make good, out of his taluk, interests, as

to which ground was supposed to have been given for his relations to claim : *Held*, that such a claim was not established merely by the claimants having been left in possession of villages, and having paid to the talukhdar only the proportion of the revenue assessed upon them, during the whole time of the troubles in Oudh, and afterwards. *Held*, also, that the question of the claimants having an under-proprietary right in such villages was entirely irrelevant to a claim for a declaration that they had proprietary right therein, on which latter title they sought to found a right to have their names entered in the settlement record; and *held*, that, although there are cases in whichthe claimant of a proprietary right may be allowed to maintain, on the same facts, that he is an under-proprietor, this claim was not one of them. [*Ram Singh* v. *Deputy Commissioner of Bara Banki*] ... ... 486.

See "PARTITION" 1. H. L.

PARTICIPATION IN FAMILY COPARCENARY PROPERTY WITHIN THE PERIOD OF LIMITATION.

See "LIMITATION" 5.

PARTIES.

See "LIMITATION" 11.
— "MESNE PROFITS."
— "RESJUDICATA" 5.
— "SALE IN EXECUTION OF DECREE" 1.

PARTIES IN PARIDELECTO.

Parties in Paridelicto—Damages—Costs.

Two adult brothers sold their shares as well as those of their minor brothers to A and executed an ekrar to him, stating that the said brothers could not come to execute the deed of sale as they were not at leisure. The three minor brothers got their shares back by suit on attaining majority. The suit by A against his vendors for damages was dismissed, as both were dealing with the property of infants, and were found to be in *pari delicto*. No costs allowed to either party. [*Bhoop Narain Chowdhry* v. *Rughoo Nath Gobind Roy*] 691

PARTIES, JOINDER OF.

See "LIMITATION" 10.
— "MESNE PROFITS."

PARTITION OF JOINT FAMILY ESTATE.

See "EVIDENCE" 5.
— "JOINT FAMILY" H. L.
— "LIMITATION" 5.

PARTITION, INFORMAL, BY DISTRIBUTION OF ASSETS AND SEPARATE POSSESSION.

See "PARTITION" 3. H. L.

PLAINT.

Plaint, Form of—Civil Procedure Code, 1882, ss. 50 and 53, sub-section (d)—Charges of fraud—Pleading—Amendment of plaint—Rejection of plaint.

A plaint charging fraud must set forth particulars; general allegations, however strong the words, not even amounting to an averment of fraud of which a Court can take notice.

After an examination of the plaintiff's pleader by the Court to discover whether there were grounds, which did not appear, for an amendment, a suit was dismissed on the defects of the plaint, which, charging fraud, did not set forth a good cause of action in regard to the above.

Held, that dismissal was not the proper mode of disposal of the suit; but the plaint should have been rejected, a course which would have enabled the plaintiff, if he found himself at a future time in a position to make averments giving relevancy to an action, to present a fresh plaint. [*Gunga Narain Gupta* v. *Tiluckram Chowdhry*]...168

See "LIMITATION" 11.

PLAINT, SIGNATURE OF, BY ONE OF SEVERAL CO-PLAINTIFFS.

See "LIMITATION" 11.

PLEADING, AMENDMENT OF.

See "COMPROMISE."
— "PLAINT."

POLICY.

See "MARINE INSURANCE."

POLITICAL PENSION, NON-LIABILITY OF.

See "ATTACHMENT," 2.

POSSESSION.

See "Co—sharer."
— Churland.
— "Evidence." 10.
— "Gift" M. L.
— "Limitation." 10.
— "Musha." M. L.
— "Partition." 3. H. L.

POSSESSION, DECREE FOR.

See "Co-sharer."

POSSESSION, PRESUMPTION ARISING FROM.

See "Evidence." 2.

POSSESSORY TITLE.

Possessory title—Possession of and partition between co-widows of estate left by their deceased husband—Attempted adoption of sister's son by a Brahman.

Possession of the estate left by their deceased husband was taken by two widows of a deceased Hindu, who, being childless, had, before his death adopted a son, to whom, also, by will, he bequeathed his estate. The adopted son died soon after the testator.

Held, that the widows had possessory title or interest in the estate, notwithstanding that a preferable title might exist in others through the deceased legatee : also, the estate, being jointly held by them, was partible, and that either widow might maintain a suit for partition.

The child whom the testator had purported to adopt was his sister's son. If it had been necessary to determine the point, their Lordships would, probably, have had little difficulty in accepting the opinion of the High Court that a Brahman cannot lawfully adopt his sister's son. [*Sundar* v. *Parboti*] ... ... 448.

See "Churland."

POWER OF AGENT.

See "Practice." 6.

PRACTICE.

1. *Privy Council, Practice of—Practice relating to substitution of parties on revivor—Representative character to be ascertained by Lower Court.*

On the death of a party on the record of an appeal pending before Her Majesty in Council, proof must be given in the Court from which the appeal has been preferred, of the representative character of the person or persons by or against whom revivor is sought. There ought to be some finding of of the Court below ; which, also, should give its own opinion as to who are the parties proper to be substituted upon the record. A certificate or statement on which their Lordships can act should be made by the Court below. [*Haidar Ali* v. *Tassadduk Rasul*] ... ... 270.

2. *Privy Council, practice of—Admission to practice in the Privy Council—Rules of 31st March 1871—Vakil of High Court.*

The words of ss. 2 and 3 of the Rules of 31st March 1871 are such that the classes of persons to be admitted to practice in the Privy Council must be either Solicitors or others practising in London, or Solicitors admitted by the High Courts in India or in the Colonies respectively, and have not left an undefined class admissible at the discretion of the Judicial Committee.[*In re R. E. Twidale*] ... ... 336.

3. *Privy Council, Practice of—Procedure—Circumstances and terms of substitution of an appellant.*

An appellant, after the transmission of his appeal to England, obtained leave in the High Court to withdraw it. The appeal involved the rights of a minor, party to the suit, whose mother and guardian obtained an order for her to be substituted for the withdrawing appellant, on the terms that she should give security to the satisfaction of the High Court for costs already ordered, and should undertake to abide by any order as to general costs. [*Gour Mohun Chuckerburty* v. *Tara Sundari Debi*] ... 504.

4. *Privy Council, Practice of—Suits for exclusive possession of a sota—Decree for a moiety in favor of each party in a consolidated appeal—Costs.*

Disputes arising between the zemindars of of Mechpara and Charpan as to a *Sota*, lying at the confines of their estates and claimed by either party as part of their zemindari, in two separate suits, the Subordinate Judge decreed in favour of Mechpara zemindars, setting aside an order of attachment made

under sec. 530 and 531, Cr. Procedure Code and declaring their title to the *Sota* :—

Held, in a consolidated appeal, reversing the decrees of both the lower Courts, that the evidence being insufficient to establish an exclusive possession by either of the parties and equally cogent to show that there was possession between the two, each of the parties should be declared entitled to an equal moiety of the *Sota*, opposite to and adjoining their respective zemindaries and possession decreed accordingly ;

Held, further, that both of the parties having failed to establish exclusive possession, each party should bear their own costs of all the courts. [*Khagendra Narain Chowdhry* v. *Matangini Debi*] ... ... 528.

5. *Privy Council, practice of—Findings of fact—Concurrent findings by two Courts.*

The usual course of not disturbing concurrent findings of fact may be followed, notwithstanding that a part of the evidence in the suit has not been considered by the Lower Court, when both Courts, have arrived at the same result.

In this case, however, the whole of the evidence having been brought to their notice, the Judicial Committee expressed their opinion that the appellate Court below could not have decided otherwise than as it had decided. [*Ram Lal* v. *Mehdi Husain*]... 572.

6. *Privy Council, practice of—Power of agent—New point—Not allowed to be raised.*

The question raised in the Courts below being whether Mahomed Khan the overseer of the Defendant had signed the Plaintiff's account or not, the question as to whether the said Mahomed Khan had authority or not from the Defendant to sign it was not allowed to be raised by the Privy Council. [*Baboo Lall* v. *Luttoo Ram*] ... 694.

7. *Privy Council, practice of—New case in appeal—New Principle of Mahomedan Law as to legitimacy of children—Credibility of witnesses.*

When a new case is attempted to be made in appeal at the last stage, it must be looked at with disfavour.

The presumption of Mahomedan Law as to legitimacy of children followed.

Witnesses who come deliberately to prove a case which is shown to be false, cannot be much relied upon with regard to any particular question in the case. [*Khajah Habeeb Oollah* v. *Khajah Gouhar Ally Khan*]... 699.

PRACTICE—CHARGE OF FRAUD SHOULD BE PROVED AS LAID IN THE PLAINT AND NO AMENDMENT SHOULD BE ALLOWED AFTER EVIDENCE.

See "COMPROMISE."

PRACTICE—IN SECOND APPEAL THE APPELLANT SHOULD NOT BE ALLOWED TO QUESTION THE FINDING OF THE FIRST APPELLATE COURT ON A QUESTION OF FACT.

See "CONTRACT" 1.

PRESUMPTION FROM LOW AND UNVARIED RENT.

See "LANDLORD AND TENANT."

PRESUMPTION ARISING FROM POSSESSION.

See "CHURLAND."
— "EVIDENCE." 2, 6.

PRIMOGENETURE.

See "PARTITION" 1. H. L.

PROPOSAL TO ISSUE POLICY.

See "MARINE INSURANCE."

PROPRIETOR.

See "OUDH ESTATES ACT." 2.

PROPRIETOR DECLINING TO ENGAGE AT THE SETTLEMENT, LIMITATION RUNS FROM THE DATE OF DISPOSSESSION.

See "LIMITATION" 10.

PURCHASER.

See "JOINT FAMILY" H. L.

PURCHASER, BONAFIDE, IN EXECUTION, NOT AFFECTED BY REVERSAL OF THE DECREE.

See "SALE IN EXECUTION OF DECREE." 4.

PURCHASER AT A SALE IN EXECUTION OF A CONSENT DECREE UPON THE FIRST MORTGAGE.

See "MORTGAGE." 1.

PURCHASER DECREEHOLDER BOUND BY THE REVERSAL OF THE DECREE.

See "SALE IN EXECUTION OF DECREE."

PURCHASER, MORTGAGOR, IN EXECUTION SALE UNDER A PUISNE MORTGAGE, RIGHTS OF.

See "MORTGAGE." 1.

RATIFICATION OF TRANSFER.

Acquiescence—Ratification of transfer of Property—Limitation Act (XV of 1877), s. 10—Trust.

A solehnama in 1847, to which were parties the sons, daughters, and widow of a deceased Mahomedan proprietor, transferred the shares of two minor daughters, in their father's estate, having been executed by their mother, the widow, on their behalf. On the question, whether the solehnama should be set aside, at the instance of the two daughters, on the ground of its having been beyond their mother's power to bind them, and of the instruments having been prejudicial to their interests, the evidence showed that it had been acted on and followed by possession, and that the daughters had, after attaining full age, allowed a lengthened period of twenty years to elapse without taking proceedings to dispute it ; *Held* that, if the mother had exceeded her powers in executing the solehnama on their behalf, and if they might, at one time, have had it set aside, their long acquiescence was sufficient to show ratification of the transaction and the solehnama was upheld.

As to limitation, it was not to be inferred from the evidence that the sons, by reason of their having managed their late father's estate, should be regarded as trustees, at the time of the execution of the solehnama, for the daughters ; and therefore, s. 10 of Act XV of 1877 was inapplicable. So that, as regarded the property included in the solehnama, suits instituted in 1882 by the daughters would have been barred by time. [*Mahomed Abdul Kadir* v. *Amtul Karim Banu*] ... ... 224.

RECEIVER.

Discretionary refusal to remove a Receiver and Manager of the Estate of Hindu widows.

Rights and proceedings rendering a Court's order, refusing to remove an appointed Receiver and Manager of the estate, of which the widowed Ranis of the late Maharaja of Tanjore had become possessed by grant from Government, entirely a matter for the discretion of the Court, which had exercised its discretion soundly. [*Exparte Rani Mathusri Jigai Amba*] ... ... 584.

REDEMPTION.

See "MORTGAGE." 2.

REGISTRATION OF AUTHORITY TO ADOPT NOT NECESSARY.

See "OUDH ESTATES ACT." 3.

REGISTRATION OF DOCUMENTS.

1. *Act VIII of 1871, Registration Act ss. 28, 64, 65, 66—Place of registration of documents.*

The requirements of s. 28 of Act VIII of 1871 are fulfilled by the registration of a document relating to immoveable property in the office of the sub-registrar within whose sub-district any portion of the property is situate The words "some portion of the property" are not to be read as meaning some substantial portion of the property. All matters of publicity which it is the object of a register to afford are provided for in this respect, by the carrying out of the provisions of ss. 64, 65 and 66. [*Hari Ram* v. *Sheodayal Mal*] ... ... 281.

2. *Registration—Registration in accordance with the rules of 1862, regulating the place and mode of it, in Oudh—Oudh Estates Act I of 1869, s. 13.*

An Oudh talukdarri made a grant of a village, part of her talukdari, to her adopted daughter ; the instrument requiring, in order to be valid under Act I of 1869, s. 13, to be

registered within one month after execution. With a view to its registration, she being a purdanashin, sent for the neighbouring Pargana Registrar, who attended at her house for her convenience, took her acknowledgment of the document, recorded the registration, and filed a copy of the document in his office.

Held, that this proceeding was a registration of the document, complete and effective; having been substantially, a registration at the Pargana office. [*Majid Hossein* v. *Fazl-um-Nissa*] ... ... 312.

See "OUDH ESTATES ACT." 3, 4.

REGULATION (BENGAL)
——— VIII OF 1793, ss. 54, 55 AND 61.

See "ABWAB."

——— XVII OF 1806.

See "LIMITATION" 7.

REGULATION (MADRAS)
——— XXV OF 1806.

See "ZEMINDARY, IMPARTIBILITY OF".

REMAND.

Remand—Court incompetent to go beyond the remand order—Evidence.

On a prior appeal to England, the case which was one of boundary dispute, was finally decided on some points, and remanded as to the rest. The broad, if not the sole, issue left to be determined after remand was —What portion of the land in dispute was comprised in Mr. Piron's settlement of Havelee with the defendant? The propriety or otherwise of that settlement was not left open for adjudication, the settlement being held to be a proper one. On the adjudication of the case after remand and after a further enquiry, the case was again appealed to England. *Held* that the High Court was not competent to go behind the remand order and to adjudicate on question as regards the propriety or otherwise of Mr. Piron's settlement, and should have confined itself solely to the question which it was directed to try. The finding of fact of the High Court as regards the land not included in that settlement and its decree to the Plaintiff for the same confirmed, but its finding as regards the impropriety of that settlement with regard to some land on fresh evidence and the consequent decree regarding the same are set aside. [*Court of Wards* v. *Rajah Leelanund Sing*] ... 722.

RENT, ENHANCEMENT OF, AGREED TO BY GUARDIAN, HOW FAR BINDING ON THE MINOR.

See "GUARDIAN AND WARD" 2.

RESJUDICATA.

1. *Resjudicata—Civil Procedure Code (Act XIV of 1882), s. 13,—Act IX of 1847—Alluvion.*

To apply the law of estoppel by judgment, stated in s. 6 of Act XII of 1879 and in s. 13 of Act XIV of 1882, it must be seen what has been directly and substantially in issue in the suit, and whether that has been heard and finally decided; for which purpose the judgment must be looked at. The decree is usually insufficient for showing this: as, according to the Code, it only states the relief granted, if any, or other disposal of the suit, without the ground of decision, and without affording information as to what may have been in issue and decided.

This suit was to establish a right to land, and for possession, against two defendants, who alleged their rights respectively. The claimant had previously obtained a decree against one of the defendants, and in that decree the land now claimed had been excepted.

Held, that the matter now in issue, not having been directly and substantially in issue in the prior suit, the present suit was not barred under s. 13, Act XIV of 1882 Civil Procedure Code. [*Kali Krisna Tagore* v. *The Secretary of State for India in Council*] ... ... 237.

2. *Resjudicata—Dismissal of suit for default—Difference in causes of action—Civil Procedure Code, ss. 13, 102, 103.*

The dismissal of a suit in terms of s. 102, Civil Procedure Code, is not intended to operate in favor of the defendant as *res-judicata*. When read with s. 103, it precludes a fresh suit in respect of the same cause of action, referring, irrespectively of the defence or the relief prayed; entirely to the grounds, or alleged *media*, on which the plaintiff asks the Court to decide in his favor.

Brother's sons, as nearest agnates of a deceased proprietor, sued for a decree, declaring that a gift, before then made by the widow in favor of her daughter's son, of the estate of her late husband, would not operate against their right of succession on her death. A prior suit, before the date of the gift, brought by two of the plaintiffs for a declaratory decree, and an injunction restraining the widow from alienating the same estate, had been dismissed under the provisions of ss. 102 and 103 (Act X of 1887), Civil Procedure Code.

Held, that the causes of action in the two suits were not identical, and the fresh suit was not precluded by s. 103, the gift having afforded the new ground of claim, which also had subsequently arisen. [*Chand Kour* v. *Partab Singh*] ... ... 243.

3. *Res judicata—Civil Procedure Code, s. 13—Substantial matters in issue decided in a former suit—Right of shebait-ship of a family deb-sheba under a will.*

A testator, who died leaving widows and a daughter, also three surviving brothers, bequeathed all the residue, after certain legacies in his acquired estate to maintain the worship of a family deity, appointing his three brothers and his eldest widow to be shebaits, and providing that "the family of us five brothers shall be supported from the *prosad*, "offering to the deity"

One or other of the brothers then for some years managed the estate as shebaits, and the surviver of them was succeeded by his son, one of the defendants in the present suit, which was brought by the testator's only daughter as heiress to his estate, claiming that the Court should determine "those provisions, which were valid and lawful, and those which were invalid and illegal." She claimed possession and an account, and also to be the shebait.

In a previous suit the present shebait had obtained a decree, to which the daughter, now plaintiff, was a party defendant, affirming the validity of the will and the rights of the members of the family to be maintained under it.

Held, that the question of the validity of all the provisions of the will having been substantially decided in the decree in the former suit which pronounced that the will was wholly valid, passing the entire estate of the testator to the *deb-sheba*, and maintaining the rights of the members of the family under the will, this suit was barred under s. 13 of Act X of 1877 as to all but the claim to the shebait. The plaintiff's claim to a preferential title to this office depended on a sentence in the will, constituting, as construed by the Courts below, to be shebait the senior in age of the heirs of the original shebaits, the defendant now holding the office coming within this provision according to the judgments of both Courts. As to this no reason had been shown in appeal for a different conclusion. [*Asutosh Mukerjee* v. *Kamini Debi*] ... ...246.

4. *Res judicata—Code of Civil Procedure, s. 13—Omission to bring forward in a prior suit what then would have been a defence—Accounts between mortgagor and mortgagee—Purchase of mortgaged property by the latter at judicial sale, on leave obtaining to bid.*

A mortgage between parties who had accounts together, comprised lands which also were leased by the mortgagors to the mortgagees, who in 1878 obtained a decree upon the mortgage, although at the time they owed to the mortgagors a considerable sum for rents. The mortgagors did not then set up the defence that they were entitled to have a general account taken, and to have the mortgagees decree limited to such balance as might be found to exist in favour of the latter. But the mortgagors alleged a specific agreement, which they failed to prove, that the rents were to be set off against the mortgage debt; and they also stated their intention to sue separately for the rents due. No deduction was made in the decree upon the mortgage on account of these rents, for which moreover afterwards the mortgagors did obtain a decree. But the mortgagees executed their decree upon the mortgage, notwithstanding objections (which were disallowed in 1882), and having obtained leave to bid at the judicial sale purchased the property. In the present suit, brought by the mortgagors to have the judicial sale set aside, and to have the mortgage debt extinguished, by having set off against it the rents which had already accrued, or might afterwards accrue and for possession of the lands on the expiry of the lease :

Held, that, although an equity had been raised in favour of the mortgagors, that an account should have been taken and that the rents payable should have been credited against the sums due by them, yet this equity could not be enforced in this suit. The proper occasion for enforcing it would

have been in defence of the suit upon the mortgage; the present claim was within the meaning of s. 13 of the Code of Civil Procedure; and the plaintiffs were now barred from insisting on it, *exception rei judicatæ*.

Nor could the mortgagees be held to have purchased as trustees for the mortgagors, as suggested for the appellant, the leave granted to bid having put an end to the disability of the mortgagees to purchase for themselves, putting them in the same position as any independent purchaser. [*Mahabir Pershad Singh* v. *Macnaghten*] ... 345.

5. *Resjudicata—Civil Procedure Code, ss. 13, 43—ascertainment of a defendant's liability by an operative decree after the declaration of his general liability in a prior decree—His death in the interval between such decrees, and effect, in execution, of his representatives not being parties to the operative one—Mesne profits—Parties—Non-joinder.*

The dismissal of a suit to have set aside an order made in one district, for the sale of the plaintiff's interest in property therein, is not a bar under ss. 13 and 43, Civil Procedure Code to another suit to obtain relief against an order in another district for the sale of property therein belonging to the same plaintiff, or of other property not included in the order of sale against which the dimissed suit was directed.

An operative decree, obtained after the death of a defendant, ascertaining for the first time, the extent, and quality of his liability, the latter having been already declared in general terms in a prior decree, cannot bind the representatives of the deceased, unless they were made parties to the suit in which such ascertainment was pronounced.

The question of the amount of mesne profits due, they having been decreed together with the possession of land in 1856, against a body of village proprietors, was not decided till 1877. In that year an operative decree was made against the village proprietors whose names appeared as defendants in the suit of 1856, and in 1881 execution proceedings were taken against the present plaintiffs, attributing to them the character of heirs the original judgment-debtors.

Held, that the right to execute for mesne profits was not wholly dependent upon whether or not the ancestor of the present plaintiffs had been a party to the decree of 1856, which did not ascertain the amount of the profits, or determine whether the then defendants were liable jointly or severally, in respect of the wrongful possession.

Before the issue of a money decree which was capable of being put into execution, the alleged ancestor of the present plaintiffs was dead, and the latter, not having been parties to that decree, were not liable under it. [*Radha Prosad Singh* v. *Lal Saheb Rai*] 600.

6. *Res judicata—Civil Procedure Code 1882, s. 13—Matter adjudged in a former suit—Purchase pendente lite.*

A Zemindar, having granted a putni lease, mortgaged the zemindari to the putnidar, who, having afterwards obtained a decree against the zemindar upon the mortgage, attached and purchased, at the sale in execution, the zemindari interest, subject to the mortgage.

Before that purchase, though after the attachment, another holdor of a decree against the zemindar brought the right, title, and interest in the zemindari to sale in execution of his decree, and himself became the purchaser. He then, claiming to have obtained the zemindari estate, sued the putnidar for rent due under the lease. This suit was dismissed, save as to rent due for the time intervening between the two sales in execution, on the ground that the relation of zemindar to lessee had ceased on the purchase by the latter.

The present suit was brought by the purchaser from the zemindar, stating his title, acquired at the prior of the two sales, and claiming to redeem the mortgage. *Held*, that the dismissal of the rent suit, which involved the title, barred the present one; and the opinion was expressed that the plaintiff had been rightly adjudged in the rent suit to be bound by the proceedings taken by the mortgagee, pending which the purchase relied upon had been made. [*Radhamadhab Haldar* v. *Monohur Mukerjee*] ... ... 211.

7. *Res judicata—Civil Procedure Code, 1877, ss. 13 and 43—Act XII of 1879, s. 6—Act VIII of 1859, s. 7—Inclusion of whole claim in suit.*

The present suit was preceded by others in which the plaintiff sought to establish a right in the same part of the talukdari estate that he now claimed to redeem from mortgagee.

The first suit, in which he with another claimed as under-proprietors, was dismissed,

in 1866 on the ground that they had not shown themselves to have held such right under the talukdars within the period since 1841. Proceedings not to be regarded as judicial, subsequently taken under Circular 4 of 1867, resulted in a finding that the dismissal was right upon the merits, the property having been transferred to the talukdar by a conditional sale which had become absolute.

Another suit was then brought to recover the talukdari right, under the terms of Circular 106 of 1869, it being alleged that arrears of revenue paid by the talukdar had been paid on the plaintiff's account. That suit was also dismissed. *Held*, that the present suit to redeem the same property under a mortgage was not barred under s. 13 of Act X of 1877, as amended by s. 6 of Act XII of 1879. The claim to redeem did not arise out of the former cause of action within the meaning of the sections of Act VIII of 1859 relating to the inclusion of the whole claim in a suit. The plaintiff not then being aware of his right when he sued before, it could not be regarded as a "portion of his claim," and he was not precluded, by having omitted it, from bringing it forward. [*Amanat Bibi* v. *Imdad Husain*] ... ... 214.

8. *Resjudicata—Person made party on application pending appeal.*

Pending a Privy Council appeal Tiery against Nundo Lall Ghose the point in dispute in which was as to whether the land in dispute appertained to lot 100 or lot 104, Ashootosh Dhur, auction purchaser at a rent sale of the Ganteedaree interest in lot 100, belonging to Bharut Chunder (who had obtained a decree for possession against the said Nundo Lall Ghose who also claimed the said lot under a Ganteedaree interest) applied for being made, and was made, a respondent in the Privy Council appeal case, and in his presence the said case was decided against him in favor of the owner of lot No. 104. In a suit by Ashootosh Dhur for the said land, *held* that the decision in the Privy Council Appeal case affected only the parties to it, that is the parties to the judgment, of which undoubtedly Dhur was one. Dhur now claims exactly on the same right on which he had claimed before. If the decision had been in his favor, undoubtedly he would have availed himself of it, and the decision being against him he must be bound by it. The suit is therefore barred by *resjudicata*. [*Belchambers* v. *Ashootosh Dhur*] ... ... 736.

RESTRICTIONS UPON ESTATE BEQUEATHED.

See "WILL" H. L.

RESTRICTIONS SEPARABLE FROM DISPOSITIONS.

See "WILL" H. L.

REVISION BY HIGH COURT.

Superintendence of High Court—Code of Civil Procedure (Act XIV of 1882). s. 622.

A decision by the judgment of a competent Court, whether right or wrong, which by law is final and without appeal, where the Court has not acted in the exercise of its jurisdiction illegally, or with material irregularity, cannot be set aside under s. 622 of the Civil Procedure Code. [*Mahammad Yusuf-Khan* v. *Abdul Rahaman Khan*] ... 362

SALE.

See "JOINT FAMILY" H. L.
— "MORTGAGE 1, 2.
— "GUARDIAN" M. L.

SALE AND CONSIGNMENT OF GOODS.

Sale and consignment of goods—Banian of firm, right of—Right of the consignor, as against the Banian, to merchandise consigned to a Calcutta firm—Denial of banian's claim to a lien on general account with the firm—Banian's non-liability to account for past sales already brought into account with consignee—Contract Act, 1872, ss. 103 and 178—Lien.

There is no rule of law giving a lien to the banian as against his employer, nor is there any custom to that effect. If the banian claims a lien he must prove its existence, either by showing some express agreement giving to him the lien, or by showing some course of dealing from which it is to be implied.

On the other hand, where merchandise consigned has been sold in good faith, and in accordance with the purpose for which the consignment was made and the proceeds have been brought into account between the consignee and the banian, he is not liable to account to the consignor. The principal of the agent cannot disturb the account with the sub-agent except on the ground of bad faith.

A banian, not setting up a written agreement, nor asserting that he had advanced to the firm on the security of specific quantities, claimed a lien as against the consignor on merchandise consigned to the firm whether arrived or in transit. The lien alleged was for the general balance of account, in virtue of an agreement extending to the whole of the merchandise consigned, whatever might have been the terms of the consignment between the consignor and consignee.

The banian had made advances, but for them the consideration was the profit to be made by sales. There was no pledge, nor any agreement, express or implied, giving the banian a lien on the goods consigned. It was, therefore, unnecessary to determine whether the banian had notice of the terms of the consignments. Nor was it necessary to consider the effect of section 178 of the Contract Act IX of 1872, there having been no pawn. The banian, having no lien against the consignee, had none against the consignor and could not question the right of the latter to stop *in transitu*. [*Peacock* v. *Baijnath*.] ... ... 651.

SALE AS DISTINGUISHED FROM MORTGAGE.

Sale, with right reserved of repurchase within a period, distinguished from mortgage—Construction of documents of sale and of agreement for re-sale.

A document purporting to be one of sale, though it is accompanied by a contract reserving to the vendor a right to purchase the property sold, on repaying the purchase-money within a certain time, is not on that account to be construed as if it were a mortgage. *Alderson* v. *White* referred to and followed, the law of India and of England being the same on this point. [*Bhagwan Sahai* v. *Bhagwan Din*]... ... 557.

SALE BY GUARDIAN OF WARD'S PROPERTY OF DISPUTED TITLE FOR THE WARD'S BENEFIT.

See "GUARDIAN" M. L.

SALE CERTIFICATE.

See "SALE IN EXECUTION OF DECREE" 1.

SALE FOR ARREARS OF REVENUE.

Sale for arrears of revenue—Act XI of 1859, sections 18 and 33—Collector's order of exemption.

A Collector's order under section 18 of Act XI of 1859 for exempting an estate from sale for arrears of revenue must be an absolute exemption, and not an order having effect as an exemption or not according to what may happen, or be done, afterwards. It must not depend on an act which may, or may not, be performed.

The High Court having set aside a sale, as contrary to the provisions of the Act XI of 1859, upon a ground other than that declared and specified in an appeal made to the Commissioner of Revenue against the order for the sale, the Judicial Committee, referring to section 33 as prohibiting such a course, reversed the decision of the High Court. [*Lala Gouri Sanker Lal* v. *Janki Pershad*] ... ... 518.

SALE IN EXECUTION OF DECREE.

1. *Sale in execution of decree—Judgment-debtor's share in joint ancestral estate—Mitakshara law—Execution of decree by sale of such share—Rights of co-sharers not being parties to the decree or execution proceedings—Sale certificate.*

The question was whether the whole estate belonging to a joint family, living under the Mitakshara, including the shares of sons or the share of their father alone, passed to the purchaser at a sale in execution of a decree against the father alone upon a mortgage by him of his right.

Held that, as the mortgagee and decree, as well as the sale certificate, expressed only the father's right, the *primâ facie* conclusion was that the purchaser took only the father's shares, a conclusion which other circumstances—the omission on the part of the creditor to make the sons parties and the price paid—not only did not counteract but supported.

The enquiry in recent cases regarding the liability of the estate of co-shares in respect of transfers made by, or execution against, the head of the family has been this, *viz.*, what, if there was a conveyance, the parties contracted about, or what, if there was only a sale in execution, the purchaser had reason to think he was buying. Each case must depend on its own circumstances—*Upooroop Tewary* v. *Lalla Bandhjee Suhay* distinguished. [*Simbhunath Pande* v. *Golab Singh*] ... ... *b.*

2. *Sale in execution—Civil Procedure Code, Act VIII of 1859, s. 264—Execution of decree against a member of an undivided family by sale of his personal interest in the family estate, which was an impartible zemindari; such interest, by reason of his death before the sale, consisting only of the rents and profits then uncollected.*

On a sale of the right, title, and interest in an impartible zemindari in execution of decrees against the zemindar, the head of an undivided family, the question was whether (*a*) only his own personal interest, or (*b*) the whole title to the zemindari, including the interest of a son and successor, passed to the purchaser. The proclamation of sale purported to relate to (*a*) only; and between the dates of proclamation and the auction sale the zemindar died.

On the argument that, this having given rise to an ambiguity, the Court must be understood to have sold all that it could sell, and that under the circumstances it could sell, and was bound to sell (*b*); because, the debts, the subject of the decrees under execution, not having been incurred by the late zemindar for any immoral purpose, the entire zemindari formed assets for their payment in the hands of his son:

Held, that the question of what the Court could, or should, have sold had not arisen. All that required decision was what the Court had sold. If (*a*) only was put up for sale, then that interest only could have been purchased. Two Courts having concurred in finding that (*a*) only was sold, in which also their Lordships agreed, only that interest passed to the purchaser. [*Pettachi Chettiar* v. *Sangili Vira Pandia Chinnatambiar*] ... ... 38.

3. *Sale in execution—Hindu law, Joint family—Mitakshara Law—Sale of joint family property in execution of decree, as the result of a mortgage by Managing Member—Liability of shares of members of family not parties to the decree.*

Although some of the members of a joint family had not been made parties to a suit upon a mortgage effected by the managing members, the entire family estate was bound by the act of the latter, and passed at the sale in execution of a decree upon the mortgage.

Whether the shares of all were bound depended on the authority of those who executed the mortgage. This authority they had to raise money to pay a debt owed by the family as joint members of an ancestral trading firm.

The managing members of a joint trading family, having purported to mortgage the family estate, to pay a debt due by the firm, were sued upon it by the mortgagee, who afterwards purchased the property at the execution sale. In a suit brought by the latter against the other members of the family to obtain a declaration that he had purchased the entire family estate, the defendants, without showing that the mortgage did not validly bind the family estate, contended that, not having been made parties to the suit, they were not affected by the decree, and their shares had not passed at the sale in execution.

Held, that, as the defence was substantially on the latter ground only, though there was every opportunity given to the defendants to raise the former ground also, the suit need not be remanded; and that the whole estate had passed to the purchaser. *Nunomi Babuasin* v. *Modhun Mohun* referred to and followed; *Pursid Narain Sing* v. *Honooman Sahay* referred to and approved. [*Daulat Ram* v. *Mehr Chand*] ... ...84.

4. *Sale in execution of decree—Effect of reversal of decree upon sale in execution—Sale to bona fide purchaser, not a party to the decree, distinguished from sale to decree-holder.*

A sale, having duly taken place in execution of a decree in force at the time, cannot afterwards be set aside as against a *bona fide* purchaser, not a party to the decree, on the ground that, on further proceedings, the decree has been, subsequently to the sale, reversed by an appellate Court.

A suit was brought by a judgment-debtor to set aside sales of his property in execution of the decree against him in force at the time of the sales, but afterwards so modified, as the result of an appeal to Her Majesty in Council, that, as it finally stood, it would have been satisfied without the sales in question having taken place. He sued both those who were purchasers at some of the sales, being also holders of the decree to satisfy which the sales took place, and those who were *bona fide* purchasers at other sales, under the same decree, who were no parties to it.

Held that, as against the latter purchasers, whose position was different from that of the decree-holding purchasers, the suit must be

dismissed. [*Nawab Asin-ul-Abdin Khan* v. *Mahammad Asgar Ali Khan*] ... 129.

5. *Sale in execution—Hindu law, Alienation —Sale of joint family estate in execution of decree upon the father's debt—Exoneration of son's share only where debt has been incurred for an immoral or illegal purpose—Burden of proving the nature of the debt.*

The sons in a joint family, under the Mitakshara, cannot set up their rights of inheritance in the family estate against their father's alienation for an antecedent debt, or against a sale in execution of a decree upon such debt, although the sons may not have been parties to the decree, unless the sons can establish that the debt has been contracted for an immoral or illegal purpose.

A decree against indebted fathers, in a family consisting of fathers and sons, charged the family estate, and the sale in execution was not merely of the right, title and interest of the debtors, but of the property being such interest. On the other hand, before the sale, notice was given on behalf of the sons that the property was ancestral and joint.

Held, in a suit on behalf of the sons against the purchaser at the sale to recover their shares, that it was for the plaintiffs to show affirmatively that the debts were contracted for an illegal or immoral purpose, and that to establish general extravagance against the fathers was insufficient. It was not necessary for the purchaser to show that there had been a proper inquiry as to the purpose of the loan, or to prove that the money was borrowed for family necessities. [*Bhagbat Perskad Singh* v. *Girja Koer*] 186.

6. *Sale in execution—Civil Procedure, Code, 1882, s. 311.—Alleged irregularity attending sale in execution—Failure to prove substantial injury resulting.*

A judgment-debtor having allowed the execution-sale of immovables to be completed without objecting on the ground afterwards alleged by him, viz, insufficiency of description within the requirements of s. 287, he having been throughout aware of what the description was, the sale is not invalid on this ground alone without more.

No evidence having been given in the Court executing the decree of substantial injury having resulted by reason of such irregularity, *i. e.*, the alleged misdescription: *Held*, that, although the Appellate Court below had assumed that the property had been sold for less than it ought to have fetched, such substantial injury as inadequacy of price should have been proved to have occurred in order to bring the case within s. 311. *Olpherts and Macnaghten* v. *Mahabir Pershad Singh* referred to and followed. [*Arunachellam* v. *Arunachellam*] ... ... 265.

7. *Sale in execution—Hindu Law—Ancestral zamindari sold in execution of decree for money against the father, including the son's right of succession—Debt not immoral.*

A sale in execution of a decree against a zamindar, for his debt, purported to comprise the whole estate in his zamindari. In a suit brought by his son against the purchaser, making the father also a party defendant, to obtain a declaration that the sale did not operate as against the son as heir, not affecting his interest in the estate, the evidence did not establish that the father's debt had been incurred by him for any immoral or illegal purpose:

Held, that the impeachment of the debt failing, the suit failed; and that no partial interest, but the whole estate, had passed by the sale, the debt having been one which the son was bound to pay:

Hardi Narain Sahu v. *Ruder Perkash Misser* (where the sale was only of whatever right, title, and interest the father had in property), distinguished. [*Minakshi Nayudu* v. *Immudi Kanaka Ramaya Goundan*]...271.

8. *Sale in execution of decree—Sale of joint family estate in execution of a decree against the father upon debts contracted by him—Liability of son's share—Hindu Law—Alienation.*

It is only on condition of the son's showing that the father's debt has been contracted for an illegal or immoral purpose that the son, upon a decree against the father alone being executed by the attachment and sale of the family estate, can claim to have the liability limited to the father's own share under the Mitakshara.

In the absence of such proof, whether the entirety of the family estate has been transferred at the sale in execution, or not, is a question of fact, in each case dependent on what was understood to be brought, and has been brought to sale.

Nanomi Babuasin v. *Modhun Mohun* and *Bhagbut Pershad Singh* v. *Girja Koer* referred to and followed.

The description of the property, in the certificate of sale, as the right, title and interest of the judgment-debtor was consistent with every interest, which he might have caused to be sold passing at the sale. [*Mahabir Pershad* v. *Maheswar Nath Sahai*]... 489.

SANAD.

See "OUDH ESTATES ACT" 2.
— "PARTITION" 1. H. L.

SANAD-I-MILKIYAT-I-ISTIMRARI.

See "ZEMINDARI, PRESENT PARTIBILITY OF.

SECONDARY EVIDENCE.

See "EVIDENCE" 5.

SECURITY FOR COSTS.

See "COST" 1, 2, & 3.

SECURITY FOR COSTS, DISCRETION OF COURT TO REFUSE.

See "COST" 1.

SECURITY FOR COSTS, POWER OF APPELLATE COURT TO EXTEND THE TIME FOR,

See "COST" 2.

SETTLEMENT ON MEMBER OF GRANTOR'S FAMILY WITH A CHARGE UPON IT FOR RELIGIOUS AND CHARITABLE PURPOSES.

See "ENDOWMENT" M. L.

SETTLEMENT OFFICER.

See "EVIDENCE" 3.

SHEA RULES OF DESCENTS.

See "INHERITANCE" M. L.

SHEBAYET.

See "RESJUDICATA" 3.
— "ENDOWMENT" H. L.

SHIP, MASTER OF, DEFAULT BY.

See "MARITIME LAW."

SHIPPER'S RIGHT & REMEDY OF.

See "MARITIME LAW."

SHIP-OWNER, RIGHT OF.

See "MARITIME LAW."

SON'S LIABILITY FOR FATHER'S DEBT NOT IMMORAL.

See "SALE IN EXECUTION OF DECREE" 7.

SON NOT LIABLE FOR FATHER'S DEBT FOR IMMORAL PURPOSES.

See "SALE IN EXECUTION OF DECREE" 5.

SOVEREIGN POWER, CONSTRUCTION OF.

See "TREATY."

SPECIAL APPEAL.

1. *Second Appeal—Code of Civil Procedure (Act XIV of* 1882), *ss.* 584, 585—*Jurisdiction to hear a second appeal, on what matters—Admission of secondary evidence —Evidence Act (I of* 1872), *ss.* 65, 66.

Under ss. 584 and 585 of the Code of Civil Procedure 1882, a second appeal is confined to matters of law, usage having the force of law, or substantial defect in procedure.

On an appeal to the Judicial Commissioner from a decree given on first appeal by an Appellate Court, and maintaining a finding of fact by the original Court, the only questions were (1) whether secondary evidence had been properly admitted on a case that had arisen for its admission; and (2) whether the evidence offered constituted secondary evidence of the matter in dispute, which was the making of a document.

Held, that (no special leave to appeal from the judgment of the Commissioner, the first Appellate Court, having been applied for) the facts were not open to decision on this appeal; this Committee could only do what the Judicial Commissioner on second appeal, under the above sections, could have done; and that, as the case stood, they were bound by the findings of fact of the first Appellate Court.

Both the above questions were decided in the affirmative by their Lordships: the *first*,

on the ground that whether the evidence offered would itself prove the making of the document or not, it formed good ground for holding that there was a document capable of being proved by secondary evidence, admissible with reference to the Indian Evidence Act (1 of 1872), ss. 65, 66 the *second* also in the affirmative, because, the evidence consisting of a copy which was made of a document, and filed (in another suit) among the records of the Court, and still there, endorsed, "copy in accordance with the original," signed by the Judge who presided in the Court, who alone was authorized to compare and accept such copy, there were grounds for considering it genuine. [*Luchman Singh* v. *Puna*] ... ... 370.

2. *Second appeal—Ground of second appeal —Civil Procedure Code. s. 584 —Substantial error in a first appellate Court's finding without any evidence to support it.*

The Court of first instance dismissed the suit upon the ground that the right, which it was brought to establish, had been taken away by a compromise, entered into by a guardian on behalf of an infant party to former proceedings. This was reversed by the first Appellate Court, which decreed the claim, holding it unaffected by the compromise, on the ground that the latter was, in fact, contrary to the interests of the infant. The High Court, on a second appeal, set aside this finding, there having been no proof that the compromise was to the infant's detriment, and affirmed the decree of the first Court.

Held, that the High Court rightly reversed the decree of the first Appellate Court; the above finding, without any evidence to support it being a substantial error in the proceedings, and good ground of second appeal within the meaning of section 584, subsection (c), of the Civil Procedure Code. [*Hemanta Kumari Debi* v. *Brojendra Kishore Roy Chowdhury*]... ... 542.

3. *Second appeal—Civil Procedure Code, s. 584—Grounds of second appeal.*

Under the Code no second appeal will lie, except on the grounds specified in section 584. There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding. *Anangamanjari Chowdhrani* v. *Tripura Sundari Chowdhrani* and *Pertab Chunder Ghose* v. *Mohendra Purkait* referred to and followed. *Futtehma Begum* v. *Mohamed Ausur and Nivath Singh* v. *Bhikki Singh* overruled. [*Durga Chowdhrani* v. *Jewahir Singh Chowdhri*] ... ... 560.

See "CONTRACT." 1.

SPECIFIC PERFORMANCE OF CONTRACT.

1. *Specific performance of contract—Act I of 1877 (Specific Relief Act.)*

Upon a contract for the sale of the proprietary right in land, the intending purchaser, insisting on a right to compel the vendor to give an absolute warranty of the title, withheld payment of the purchase money beyond the time fixed. He also sued for specific performance of the contract, requiring a guarantee from the vendor, until it appeared that the judgment of the appellate Court was about to be given against him on the ground that he was not entitled to what he claimed.

Held that certain reported cases where, apparently, the plaintiff had been willing to submit to have the agreement which was actually proved performed, were different from this; and that the decree dismissing the suit ought to stand. Here the plaintiff, insisting upon having that which he had no right to have, had delayed performing his part of the agreement on that account. [*Bindeshri Prasad* v. *Mohant Jairamgir.*] ... ...61.

2. *Specific performance—Contract—Disability to contract—Temporary disability of Zemindar to contract, his estate being subject to the provisions of Act VI of 1876 (Chutia Nagpur Encumbered Estates Act), amended by Act V of 1884—Effect of continuance of transactions after the release of his estate from management under that Act.*

It is competent to a person, who has been, but it is no longer, in a state of disability, to take up and carry on transactions commenced while he was under disability, in such a way as to bind himself as to the whole. He may be bound by a contract of which the terms are to be ascertained by what passed whilst he was disabled from contracting.

The defendant's ancestral zemindari was placed under management by an order made under s. 2 of Act VI of 1876, and he became incapable of contracting in reference to it. He, however agreed with the plaintiff that the latter should advance money on mortgage, and take a lease of part of the estate. Afterwards by an order, whether well founded or not, at all events effectively made, under s. 12 as amended by Act V of 1884, he was restored to the possession of his estate, again acquiring the right to contract about it. He carried on the transaction with the plaintiff, retained the benefit of money paid by him, but in the end not completing.

Held, that he was bound by the contract, though its terms were to be ascertained by what had passed while he was disabled from contracting, and that specific performance could be decreed against him. Whether his entering into the contract was against the policy of the Act, and whether the order under s. 12 had or had not been made on good grounds, did not affect the question. [*Gregson* v. *Udoy Aditya Deb*] ... 416.

STATUTE 12 VIC. C. 21 SS. 28 AND 29.
See "COMPROMISE."

——— 11 & 12 VIC. C. 21, s. 86.
See "LIMITATION" 9.

STRIDHAN.
See "STRIDHAN" H. L.

SUBMERGED LAND, REFORMED, EVIDENCE OF IDENTITY OF.
See "EVIDENCE" 2.

SUCCESSION.
See "INHERITANCE" H. L.
——— M. L.

SUCCESSION OF DECEASED ELDER BROTHER'S SON IN PREFERENCE TO YOUNGER BROTHER.
See "OUDH ESTATES ACT" 4.

SUCCESSION TO TALUKDARI.
See "OUDH ESTATES ACT" 4.

SUDRAS, RIGHT OF ILLEGITIMATE SON AMONG.
See "INHERITANCE" 2 H. L.

SUIT TO SET ASIDE DEED.
See "LIMITATION" 3.

SUITS CONCERNING THE JOINT PROPERTY FOR POSSESSION, DAMAGE OR INJUNCTION, WHEN NOT MAINTAINABLE.
See "CO-SHARER."

SUIT ON BEHALF OF A MINOR FILED WITHOUT SANCTION OF THE COURT OF WARDS REJECTED.
See "COURT OF WARDS."

SUITS FOR DECLARATORY DECREE.
See "DECLARATORY DECREE."

SUIT BY MORTGAGEE AGAINST MORTGAGOR AND PURCHASER FROM HIM.
See "LIMITATION" 7.

SUIT FOR EXCLUSIVE POSSESSION, DECREE IN.
See "PRACTICE." 4.

SUIT FOR MESNE PROFITS.
See "MESNE PROFITS."

SUIT FOR PARTITION OF JOINT FAMILY PROPERTY.
See "LIMITATION" 5.

SUNNI RULES OF DESCENT.
See "INHERITANCE" M. L.

SURVIVOR, LIEN AGAINST, OF PURCHASER.
See "JOINT FAMILY" H. L.

SURVIVORSHIP.
See "INHERITANCE" 2 H. L.
— "JOINT FAMILY" H. L.

TAKBUST MAP, STATEMENTS RECORDED ON.

See "EVIDENCE." 7.

TALUK, DESCENT OF.

See "OUDH ESTATES ACT." 5.

TALUKDAR.

See "OUDH ESTATES ACT." 4, 5.
—"OUDH TALUKDAR."

TENANCY-AT-WILL OR FROM YEAR TO YEAR, INFERENCE OF.

See "LANDLORD & TENANT."

TENANCY, PRESUMPTION AS TO THE NATURE OF.

See "LANDLORD & TENANT."

TITLE, EVIDENCE OF.

See "EVIDENCE." 2.

TRANSFER.

See "RATIFICATION OF TRANSFER."
— "LEASE."
— "MORTGAGE."
— "SALE"

TRANSFER OF DECREE FOR EXECUTION.

Transfer of a decree for execution—Striking off the execution case—Jurisdiction to entertain subsequent application for execution.

The contention being that, when the Principal Sudder Ameen, to whose file a decree was trasferred for execution by the Judge, struck off the execution proceeding from his file, thereupon his jurisdiction to deal with the decree altogether ceased, and that he could not deal with it again until a subsequent order had been made by the Judge of the Zillah Court, sending it back to him again and that the subsequent applications for execution were made to a Court without jurisdiction :—*Held* that in the absence of any evidence to shew what this striking off the file amounted to, *i. e*, whether for non-prosecution or for default or from inadverture or on account of a practice of the Court not keeping upon the paper causes not immediately before it, the order of the Court, referring the decree to the Principal Sudder Ameen for execution could not be got rid of ; that the order having been in force, it was for the appellants to shew that for some good reason it had ceased to be so and that in the absence of any clear proof of those propositions the applications to the Principal Sudder Ameen were to a Court of competent jurisdiction and therefore the execution was valid. [*Gourmoni Dassee* v. *Jogutindro Narayan*] ... ... 696.

TRANSFER OF PROPERTY ACT.

See "LIMITATION." 7.

TREATY.

Treaty, Construction of—Money settled upon members of Royal Family of Oudh, and their heirs—Perpetual pensions by payments arranged between sovereign powers—Construction of the word "issue," as used in a treaty between them, and in subsequent correspondence.

An arrangement between two sovereign powers, *viz.*, the King of Oudh and the East India Company, whereby members of the Royal Family of Oudh had secured to them and to their issue pensions in perpetuity, although a settlement of pensions in perpetuity could not under the Muhammadan Law be validly made by a private individual, took effect as a contract or treaty between the powers.

Held on the construction of a treaty made in 1838 between the King of Oudh and the East India Company, that it was the intention of the King thereby to provide pensions for certain members of the Royal Family in perpetuity ; that if any of the pensioners should die without issue, his or her pension should revert to the King ; that the words "heirs" and "issue" were used as convertible or equivalent terms ; and that they meant persons who would be heirs according to Muhammadan Law.

Held also, that the King intended in 1842 to provide for the ancestor of the plaintiffs an additional pension of the same kind as the pension which he had provided for her in 1838 ; and that according to the letter written by the King in that year to the Government of India, after her death, if she should have left issue, the additional pension was to be payable to such of her issue as should be also her heirs, according to the rules of the Muhammadan Law of Inheritance. [*Mariam Begum* v. *Mirza and Wazir Begum* v. *Mirza*] ... ... 422.

TRUST.

See "RATIFICATION OF TRANSFER."

TRUST PROPERTY NOT LIABLE TO ATTACHMENT, EVEN THE UNDEFINED SURPLUS.

See "CIVIL PROCEDURE CODE" 2.

UNDER-PROPRIETOR.

See "OUDH ESTATES ACT" 2.

UNDUE INFLUENCE.

See "LIMITATION" 3.
— "GIFT" M. L.

VAKIL, HIGH COURT, ADMISSION OF, TO PRACTISE IN THE PRIVY COUNCIL.

See "PRACTICE" 2.

VESTED ESTATE.

See "ADOPTION" 1 H. L.

VILLAGE PROPERTY.

Village property—As to what was the common property of a village; viz., a tank—Inability of any of the co-proprietors to exclude the rest from contributing to repair it.

A village tank, on the site of an ancient one, was the common property of and used by, all the inhabitants, of whom one family on the ground of improvements and additions made by their ancestor with the general acquiescence of the village claimed, against the rest the exclusive right of repairing the tank at their own cost. But no corresponding obligation on the plaintiffs to repair was shown; and from the evidence, including that afforded by a compromise made in 1842, it appeared that the repairs were to be effected by a common collection made through the person in management, who was to account for his receipts and expenses:

Held, that it was equally at the option of the rest of the villagers either to permit the repairs to be done by the plaintiffs, or to insist on the work being done at the common cost; the tank remaining the common possession of the village, and no class of the villagers having any right to exclude the rest from contributing to the repairs. [*Sivaraman Chati* v. *Muthaya Chati*]... 331.

WAIVER.

See "INHERITANCE" 3 H. L.

WAKF.

See "ENDOWMENT" M. L.

WARD.

See "GUARDIAN AND WARD."
— "GUARDIAN" M. L.

WAZIB-UL-URZ, WHAT SHOULD BE ENTERED IN, BY SETTLEMENT OFFICERS.

See "EVIDENCE" 3.

WAZIB-UL-URZ MODIFYING MITAKSHARA LAW.

See "GIFT" H. L.

WIDOW.

See "CONSTRUCTION" 1.
— "INHERITANCE" 1, H. L.
— "WIDOW" H. L.

WIDOW, ALIENATION BY.

See "CONSTRUCTION" 1.
— "GIFT" H. L.
— "WIDOW" H. L.

WILL.

See "LIMITATION" 1, 2.
— "OUDH ESTATES ACT" 1, 4.
— "WILL" 2, 3, H. L.

WILL, RESTRICTIONS UPON ESTATE BEQUEATHED BY, EFFECT OF, IF CONTRARY TO HINDU LAW.

See "WILL" 1, H. L.

WILL, RESTRICTIONS BY, SEPARABLE FROM VALID DISPOSITIONS.

See "WILL" 1. H. L.

WILL SUCCESSIVE INTEREST BEQUEATHED BY.

See "WILL" 1, H. L.

WITNESS.

See "PRACTICE" 7.

ZEMINDARI, IMPARTIBLE.

See "SALE IN EXECUTION OF A DECREE" 2.

ZEMINDARI IMPARTIBILITY OF.

Impartibility of zemindari shown by evidence —Grant by sanad in 1802 of zemindari without change of rule of succession by primogeniture—Madras Regulation XXV of 1802.

The question whethere an estate is impartible and descends by the law of primogeniture, or is subject to the ordinary Hindu law of inheritance, must be decided in each case according to the evidence given in it. The result of the evidence in this suit was to show that before, and in the year 1802, the zemindar was in possession of the Devarakota zemindari, by right of primogeniture, as an impartible estate; and that he was so regarded by the Government.

On the passing of Madras Regulation XXV, of 1802, and the issue to him of a sanad-i-milkiyat-i-istimrari, in accordance with it, he acquired a permanent property in the zemindari lands at a fixed assesment but they remained heritable as before; the estate remained entire; and there was no evidence of any intention on the part of the Government to alter the nature of the tenure. What was said in the judgment in the *Hansapur case* was applicable here. The estate continued to be impartible, and the rule of succession to it was not altered. It descended by the rule of primogeniture. [*Srimantu Raja Yarlagaddu* v. *Millikarjuna Srimantu Raja Yarlagaddu Durga*] ... 547.

ZEMINDARI, PRESENT PARTIBILITY OF.

Present partibility of a zemindari originally existing before 1759—Grant by Government in 1802, and again in 1835 of the same zemindari—Absence of intention to grant it as impartible—Sanad-i-milkiyat-i-istimrari.

Although it might be taken that the Merangi zemindari was formerly held on a military tenure under a raj, and that it continued to be held on the same tenure after it had been incorporated in another zemindari, and, subsequently, when, by conquest, it became part of the Vizianagram zemindari, which was dismembered in 1795. And, even if impartibility was the rule then applicable to the estate, yet the subsequent dealings with the zemindari, the nature and terms of the grants under which it was held after 1802, and the absence of proof of its having been impartible during the present century; also the character of the estate, which was in no way distinguishable from that of an ordinary zemindari assessed to the revenue, all led to the conclusion that the zemindari was now partible.

It was clear from the kabuliyat, or instrument of assent to the sanad-i-milkiyat-i-istimrari of 25th April 1804, that the latter was in the ordinary form of such grants, and there was no ground for inferring that the Government intended to create an impartible zemindari, or to restore an old one with impartibility attached.

In 1835, there was, for a second time, such a dealing with the estate by the Government, in granting it again by sanad, as showed that there was no intention to the effect above mentioned.

The case of the *Hansapur Zemindari* situate in Behar, as to which their Lordships in 1867 held that it must be taken to retain its previous old quality of impartibility, after having been granted in 1790, was distinguished. [*Sri Raja Satracharla Jaganadha Razu* v. *Sri Raja Satrucharla Ramabhadra Razu*] ... ... 645.

ZEMINDAR'S CONSENT NECESSARY FOR THE SALE OF A GHATWALI TENURE.

See "GHATWALI TENURE, SALE IN EXECUTION OF."
— "IMPARTIBLE ESTATE" H. L.

ZEMINDAR, TEMPORARY DISABILITY OF.

See "SPECIFIC PERFORMANCE OF CONTRACT" 2